THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JUNE 18, 2010 and JANUARY 20, 2011

IN THE

Supreme Court of Nebraska

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VOLUME CCLXXX

PEGGY POLACEK

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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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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
		Michael E. Piccolo	North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James M. Worden	Gering
		Randin Roland	Sidney
		Russell W. Harford	Chadron
		Kristen D. Mickey	Gering

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

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Brock Douglas Wurl
Adam Damien Young
David James Young
Jacqueline Lee Young
Joseph Matthew Zebrowski
Katherine Lorraine Zielinski

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No. S-09-581: **Maciejewski v. Maciejewski**. Affirmed. McCormack, J. Wright, J., not participating.

No. S-09-916: **McMillan v. Wanzek Constr**. Affirmed. Connolly, J.

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No. S-09-1188: **Arias v. State Patrol**. Affirmed in part, and in part dismissed. Stephan, J. Wright, J., not participating.

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No. S-09-1204: **Grayhawk West Townhome Owners Assn. v. Birth**. Affirmed. Wright, J. McCormack, J., not participating in the decision.

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No. S-10-407: **In re Interest of Merlyn R**. Reversed and remanded for further proceedings. Heavican, C.J.

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No. A-09-611: **Thunder Bay, Inc. v. Kawa**. Petition of appellee for further review denied on November 10, 2010.

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No. A-09-816: **Sullivan v. Farmers Ins. Exch**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-817: **Villas of Southwind v. Southwind Homeowners Assn**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-839: **Hall v. Hall**, 18 Neb. App. 384 (2010). Petition of appellant for further review denied on June 30, 2010.

No. A-09-851: **State v. Roberts**. Petition of appellant for further review denied on June 25, 2010, as untimely filed.

No. A-09-918: **State v. Taylor**. Petition of appellant for further review denied on June 23, 2010.

No. A-09-940: **E & E Prop. Holdings v. Universal Cos.**, 18 Neb. App. 532 (2010). Petition of appellant for further review denied on November 10, 2010.

No. S-09-944: **Maycock v. Hoody**. Petition of appellant David A. Maycock for further review denied on January 12, 2011.

No. S-09-944: **Maycock v. Hoody**. Petition of appellees for further review sustained on January 12, 2011.

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No. A-09-973: **State v. Armstrong**. Petition of appellant for further review denied on November 5, 2010, as untimely.

No. A-09-974: **State v. Hansen**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-975: **Beckman v. Federated Mut. Ins. Co.**, 18 Neb. App. 513 (2010). Petition of appellee for further review denied on September 29, 2010.

No. A-09-978: **Bailey v. Bachman**. Petition of appellants for further review denied on January 12, 2011.

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No. A-09-999: **State v. Smith**. Petition of appellant for further review denied on June 30, 2010.

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No. A-09-1137: **State v. Benish**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1142: **In re Interest of Shayla H. et al**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-1143: **State v. Killingsworth**. Petition of appellant for further review denied on January 12, 2011.

No. A-09-1155: **Harper v. Department of Corr. Servs**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-1156: **In re Interest of Shireen S**. Petition of appellant for further review denied on November 24, 2010.

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No. A-09-1164: **State v. Harden**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1182: **Guthrie v. Runge**. Petition of appellants for further review denied on November 24, 2010.

No. A-09-1198: **Thies v. Wild West**. Petition of appellant for further review denied on August 20, 2010, as filed out of time.

No. A-09-1218: **State v. Ticnor**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-1222: **State v. Fick**, 18 Neb. App. 666 (2010). Petition of appellant for further review denied on January 12, 2011.

No. A-09-1229: **In re Interest of Marquesha C. et al**. Petition of appellant for further review denied on September 15, 2010.

No. A-09-1230: **State v. Craven**, 18 Neb. App. 633 (2010). Petition of appellant for further review denied on December 8, 2010.

No. A-09-1233: **State v. Jackson**. Petition of appellant for further review denied on October 14, 2010.

No. A-09-1234: **State v. Kuta**. Petition of appellant for further review denied on October 4, 2010, for lack of jurisdiction.

No. A-09-1237: **State v. Gonzales**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1239: **Looby v. Wulf**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1240: **Looby v. Cameron**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1241: **Kandel v. Nebraska Med. Ctr**. Petition of appellant for further review denied on November 19, 2010, as untimely filed.

No. A-09-1256: **Smokey Ridge Feeders v. Magill**. Petition of appellant for further review denied on November 17, 2010.

No. A-09-1264: **State v. Zimbelman**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1266: **Gard v. City of Omaha**, 18 Neb. App. 504 (2010). Petition of appellants for further review denied on November 10, 2010.

Nos. A-09-1275, A-09-1276: **State v. Osler-White**. Petitions of appellant for further review denied on July 20, 2010, as filed out of time.

No. A-09-1278: **State v. Hagen**. Petition of appellant for further review denied on August 25, 2010.

Nos. A-09-1282, A-09-1283: **State v. Fieldgrove**. Petitions of appellant for further review denied on September 22, 2010.

No. A-09-1290: **State v. Williams**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1301: **Goodnight v. Diemer**. Petition of appellant for further review denied on June 23, 2010.

No. S-09-1313: **State v. Landis**. Petition of appellee for further review sustained on September 22, 2010.

No. A-10-021: **In re Interest of Wendi L**. Petition of appellant for further review denied on September 29, 2010.

No. A-10-022: **State v. Dyer**. Petition of appellant for further review denied on December 15, 2010.

No. A-10-037: **State v. Phalen**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-041: **State v. Andersen**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-049: **McNew v. Hunt**. Petition of appellee for further review denied on December 15, 2010.

No. A-10-053: **State v. Castonguay**. Petition of appellant for further review denied on June 17, 2010.

Nos. A-10-086, A-10-087: **State v. Weirich**. Petitions of appellant for further review denied on August 25, 2010.

No. A-10-093: **Marti v. Anderson, Creager**. Petition of appellant for further review denied on June 17, 2010.

No. A-10-099: **Scott v. Khan**, 18 Neb. App. 600 (2010). Petition of appellee for further review denied on December 22, 2010.

No. S-10-103: **Tierney v. Four H Land Co**. Petition of appellants for further review sustained on December 22, 2010.

No. A-10-124: **State v. Balvin**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-129: **State v. Lewis**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-136: **Great West Cas. Co. v. Michigan Millers Mut. Ins. Co**. Petition of appellee for further review denied on December 15, 2010.

No. A-10-147: **State v. Gray**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-152: **State v. Manchester**. Petition of appellant for further review denied on September 15, 2010.

No. A-10-174: **State v. Parks**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-175: **State v. Neville**. Petition of appellant for further review overruled on September 17, 2010, as untimely.

No. A-10-181: **State v. Yashirin**. Petition of appellant for further review denied on June 17, 2010.

No. A-10-197: **In re Interest of Vincent L**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-198: **State v. Baker**. Petition of appellant for further review denied on October 14, 2010.

No. A-10-199: **State v. Morgan**. Petition of appellant for further review denied on November 24, 2010, as untimely filed.

No. A-10-207: **State v. Shelby**. Petition of appellant for further review denied on December 15, 2010.

No. A-10-213: **State v. Eagleboy**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-242: **State v. Mendoza**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-245: **State v. Marking**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-246: **Davenport Ltd. Partnership v. 75th & Dodge II, L.P**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-254: **In re Interest of Aliee P**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-266: **State v. Smith**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-273: **In re Interest of Elizabeth L**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-275: **State v. Roberts**. Petition of appellant for further review overruled on October 5, 2010, as premature.

No. S-10-278: **State v. Sidzyik**. Petition of appellant for further review sustained on October 14, 2010.

No. A-10-294: **State v. Helmstadter**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-325: **State v. Bernhardt**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-329: **In re Interest of Enrique P. et al**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-345: **State v. Holladay**. Petition of appellant for further review denied on October 14, 2010.

No. S-10-361: **Schropp Indus. v. Washington Cty. Attorney's Office**. Petition of appellant for further review sustained on September 9, 2010.

No. A-10-368: **State v. Idles**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-373: **Cloyd v. Exmark Manufacturing**. Petition of appellant for further review denied on September 29, 2010.

No. A-10-379: **Krebs v. Sanders**. Petition of appellant for further review denied on October 29, 2010, as untimely filed.

No. A-10-404: **Carpenter v. Carpenter**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-428: **State v. Kudron**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-433: **Young v. Prentice**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-449: **Gray v. City of Lincoln**. Petition of appellant for further review denied on October 27, 2010.

No. A-10-450: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on September 9, 2010.

No. A-10-463: **State v. Ajok**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-464: **State v. Vargas**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-466: **Cain v. Cain**. Petition of appellant for further review denied on September 22, 2010.

No. A-10-479: **State v. Hodgdon**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-480: **State v. Rosberg**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-494: **State v. Stauffer**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-538: **Eden Cemetery Assn. v. Cramer**. Petition of appellant for further review denied on October 5, 2010, as untimely.

Nos. A-10-554, A-10-555: **State v. Richardson**. Petitions of appellant for further review denied on December 8, 2010.

No. A-10-561: **Halac v. Girton**. Petition of appellant for further review denied on October 14, 2010.

No. A-10-563: **State v. Lowery**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-578: **State v. Collins**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-580: **State v. Thompson**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-588: **State v. Lathrop**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-641: **State v. Drees**. Petition of appellant for further review denied on September 13, 2010.

No. A-10-642: **State v. Sines**. Petition of appellant for further review denied on September 13, 2010.

No. A-10-650: **Dunn v. Melcher**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-663: **Harris v. Department of Corr. Servs**. Petition of appellant for further review denied on September 15, 2010.

No. A-10-695: **State v. Kiick**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-716: **State v. Pestka**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-779: **Herren v. Herren**. Petition of appellant for further review denied on October 27, 2010.

No. A-10-815: **State v. Nebraska Diamond Sales Co**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-826: **In re Interest of Nevaeh M**. Petition of appellant for further review denied on December 15, 2010.

No. A-10-935: **Midstates Development v. Jones**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-1026: **Harris v. Frazier**. Petition of appellant for further review denied on January 12, 2011.

DOROTHY L. BAUERMEISTER ET AL., APPELLEES, V. WASTE MANAGEMENT CO. OF NEBRASKA, INC., APPELLANT, AND NATURE'S WORKS, LLC, ET AL., APPELLEES.

783 N.W.2d 594

Filed June 18, 2010. No. S-09-019.

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 lower court.
2. **Estates: Perpetuities.** The common-law rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, MOORE, Judge, and HANNON, Judge, Retired, on appeal thereto from the District Court for Douglas County, GARY B. RANDALL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., and Ronald R. Volkmer, of McGill, Gotsdiner, Workman & Lepp, for appellant.

David A. Domina, of Domina Law Group, P.C., L.L.O., and Matt R. Deaver, of Deaver Law Office, for appellees Dorothy L. Bauermeister et al.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

In this case on further review, Fred and Dorothy L. Bauermeister and Richard and Clara E. Deaver sought to repurchase their land from Waste Management Co. of Nebraska, Inc. (Waste Management), pursuant to the "Seller's Option to Buy" clause in the purchase agreement. The district court for Douglas County concluded that the clause was enforceable and quieted titled in favor of Fred, Dorothy, Richard, and Clara. On appeal, the Nebraska Court of Appeals concluded that because the option violated the rule against perpetuities, it was void, and reversed the order of the district court. On further review, we conclude that because the rule against perpetuities is inapplicable to this contractual option, the option is enforceable. We therefore reverse the ruling of the Court of Appeals and remand with directions to consider the remaining assignments of error.

STATEMENT OF FACTS

The following facts, which are supported by the record, come largely from the memorandum opinion of the Court of Appeals. See *Bauermeister v. Waste Mgmt. Co.*, No. A-09-019, 2009 WL 6473172 (Neb. App. Dec. 8, 2009) (selected for posting to court Web site). On March 22, 1989, Fred, Dorothy, Richard, and Clara executed a purchase agreement, pursuant to which Waste Management purchased 280 acres of separately owned but contiguous tracts of real property in Douglas County, Nebraska. Waste Management purchased the property to develop a landfill site, and the property was so used by Waste Management from 1989 until 2003.

In the agreement, the word "Seller" referred to Fred, Dorothy, Richard, and Clara and their heirs, successors, and assigns, and the word "Purchaser" referred to Waste Management. The purchase agreement between the parties contained a "Seller's Option to Buy," in paragraph 30, which stated:

> If Seller(s), their successors or heirs so choose, Seller(s) shall have the option to repurchase all or any portion of the Premises from Purchaser in consideration for the sum of One Dollar . . . at the termination, for any reason, of this Agreement, and Purchaser shall be obligated to sell

> the Premises to Seller(s), their successors or heirs, if they so choose. Seller's option may be exercised from the date of termination of the Landfill until two years after the date of termination of the required monitoring of the Landfill pursuant to Paragraph 16.

Separate option agreements were executed evidencing the parties' agreement and for recordation purposes. The agreement also provided at paragraph 20 that Fred, Dorothy, Richard, and Clara could sell the options, upon the same conditions as enjoyed by them, upon satisfactory notice to Waste Management.

Fred died in 2004, and on April 6, 2005, Dorothy, as trustee of Fred's trust, executed an "Instrument of Distribution of Personal Property" conveying the interest in the Waste Management purchase agreement and option to Fred and Dorothy's sons, subject to Dorothy's life use.

Richard died in 2002. Clara was named in Richard's will as his personal representative, and his estate was closed in 2007. Clara died during these proceedings, and the case was revived.

In 2003, Waste Management discontinued using the land at issue as a landfill, which prompted the required monitoring time period as discussed in the option set forth above. Pursuant to federal and state laws, a landfill's postclosure care and monitoring must begin after a landfill is closed and continue for 30 years after that closure date.

On August 31, 2006, Dorothy and Clara signed a document entitled "Notice of Intent to Exercise Seller's Option to Buy." The notice attempted to put Waste Management on notice that Dorothy, in her own behalf and as surviving spouse of Fred, and Clara, in her own behalf and as surviving spouse of Richard, were jointly and severally exercising the option to repurchase the land pursuant to the purchase agreement with Waste Management. Waste Management took the position that the "Seller's Option to Buy" was not properly executed, and did not deliver the deed to the land to either Dorothy or Clara.

On October 17, 2006, Dorothy and Clara filed a complaint in the district court for Douglas County seeking specific performance and an accounting. Dorothy and Clara alleged that

they had properly executed the option to repurchase and that Waste Management was obligated to execute the deed for the land back to them. Waste Management denied the allegations in the complaint and alleged that Dorothy and Clara were not the real parties in interest.

On October 18, 2007, Dorothy and Clara made a second attempt to exercise the option to repurchase by sending three letters to Waste Management. In late 2007, Dorothy, Fred and Dorothy's sons, and Clara (collectively appellees) filed an amended complaint in the district court for specific performance, accounting, quiet title, and declaratory judgment. Waste Management answered and, inter alia, asserted affirmative defenses, including that some or all of the appellees were not real parties in interest or lacked standing, the option to repurchase was void because it violated the common-law rule against perpetuities, and the amended complaint failed to state a claim upon which relief could be granted.

A trial was held. The district court entered an order filed December 10, 2008, in which it determined that Dorothy and Clara, and their heirs, clearly intended to exercise the option to repurchase in each of their respective capacities and that therefore, as real parties in interest, they had validly exercised the option. The district court ordered Waste Management to immediately convey title to the land through a warranty deed back to appellees. The district court found no merit to Waste Management's affirmative defenses. Accounting issues are the subject of another action. Waste Management appealed.

On appeal, the Court of Appeals concluded that the "Seller's Option to Buy," sought to be exercised by appellees, violated the rule against perpetuities and was void. Because resolution of this issue invalidated the option and resolved the case, the Court of Appeals did not reach the remaining assignments of error. The Court of Appeals reversed the order of the district court. Appellees petitioned for further review, which this court granted.

ASSIGNMENT OF ERROR

In their petition for further review, appellees claim, restated and summarized, that the Court of Appeals erred by concluding

that the option to repurchase was void under the common-law rule against perpetuities.

STANDARD 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 lower court. See *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

ANALYSIS

For purposes of our review, the sole issue before this court is whether the rule against perpetuities invalidates the option to repurchase in the agreement between appellees and Waste Management. The Court of Appeals concluded that because the agreement was signed a few months prior to the effective date of the Nebraska statutory rule against perpetuities, this case is governed by the common-law rule against perpetuities. The parties do not dispute this conclusion, and we agree that the common law governs.

[2] As an initial matter, we note that the common-law rule against perpetuities prohibits the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth. *In re Trust Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985). It has been observed that the rule is based on the public policy against restricting the alienability of land. See *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378 (Del. 1991).

In deciding this case, the Court of Appeals understandably relied on our opinion in *Rice v. Lincoln & N. W. R. Co.*, 88 Neb. 307, 129 N.W. 425 (1911). *Rice*, however, was decided nearly a century ago, and that portion of *Rice* to which the Court of Appeals referred was dictum. *Rice* suggested that the rule against perpetuities would be applicable to an option under certain facts.

Relying on *Rice*, the Court of Appeals determined that the lives in being at the creation of the option, which is the future interest at issue in this case, were Fred, Dorothy, Richard, and Clara and that the option also could be exercised by their

"successors or heirs." The Court of Appeals stated that the inclusion of the successors or heirs "ensures that there is a possibility that the option to purchase would reach beyond the [Seller's] death and 21 years, thus violating the rule against perpetuities and rendering the option void." *Bauermeister v. Waste Mgmt. Co.*, No. A-09-019, 2009 WL 6473172 at *4 (Neb. App. Dec. 8, 2009) (selected for posting to court Web site).

The Court of Appeals further observed that the language limiting the option to 2 years after the date of termination of the required monitoring of the landfill did not prevent the option from violating the rule against perpetuities. The Court of Appeals noted that the evidence showed federal and state regulations require a 30-year landfill postclosure monitoring period and reasoned that because the option gave the "Seller" an additional 2 years after the monitoring period to exercise the option, the total duration of the option in this case was extended to 32 years.

On further review, appellees, as sellers and holders of the option to repurchase, argue that the decision by the Court of Appeals should be reversed because the modern trend in the common law applicable to this case, with respect to the application of the rule against perpetuities to contractual options, is to avoid strict application of the rule. Appellees suggest the better reasoned cases show that the rule against perpetuities is not appropriately applied to options and that effectuation of the parties' intentions to create a commercially viable and enforceable option is sound law. Appellees also note that the option at issue can be sold, which shows that its objective was commercial in nature and not donative. Waste Management argues that the rule against perpetuities applies to options and that the option contained in the purchase agreement is void. Accordingly, Waste Management urges us to affirm the ruling of the Court of Appeals. For the reasons explained below, we reverse the decision of the Court of Appeals.

Our analysis is informed by reviewing the context and timeframe during which the option at issue in this case was negotiated by the parties. The option was created in a contract signed and agreed to by the parties in March of 1989. In the agreement, Fred, Dorothy, Richard, and Clara agreed to sell

280 acres of their land to Waste Management to develop as a landfill. Paragraph 30 of the agreement included the "Seller's Option to Buy," stating in relevant part that

> Seller(s) shall have the option to repurchase all or any portion of the Premises from Purchaser in consideration for the sum of One Dollar . . . . Seller's option may be exercised from the date of termination of the Landfill until two years after the date of termination of the required monitoring . . . .

Paragraph 20 of the agreement provides that the "Seller" had the right to sell the option if "such purchaser, transferor or lienholder takes, subject to all terms and conditions of this Agreement," and Waste Management is provided proper notice. Separate option agreements were also signed.

Subsequent to the execution of the agreement, and the separate option agreements, the Nebraska version of the Uniform Statutory Rule Against Perpetuities Act (Act) became effective. See Neb. Rev. Stat. §§ 76-2001 through 76-2008 (Reissue 2009). The effective date of the Act was about 5 months after the option at issue was agreed upon. The Act excluded from the rule's coverage options such as the one in this case. See § 76-2005(1) (stating that rule against perpetuities does not apply to "[a] nonvested property interest or a power of appointment arising out of a nondonative transfer"). The Act has been widely adopted. After the enactment of the Act elsewhere, a California appellate court succinctly stated, "The rule is now irrelevant to [commercial] transactions . . . ." *Shaver v. Clanton*, 26 Cal. App. 4th 568, 574, 31 Cal. Rptr. 2d 595, 598 (1994). The California court explained the purpose of this exclusion by citing commentators as follows:

> "It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties." [See *Recommendation Relating to Uniform Statutory Rule Against Perpetuities*, 20 Cal. Law Revision Com. Rep. (1990) 2501, 2516.] "The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule—a life in being plus

> 21 years—is not suitable for nondonative transfers. . . .” (1991 Addition to Law Revision Com. com., 54A West’s Ann.Prob.Code § 21225 (1994 pocket supp.) p. 60 . . . .

Shaver, 26 Cal. App. 4th at 574, 31 Cal. Rptr. 2d at 598.

The provision in the Act excluding the application of the rule against perpetuities to commercial options was the logical outcome of years of jurisprudence critical of applying the rule against perpetuities to commercial transactions. As early as 1952, one commentator stated that applying the rule to options completely disregards the purpose of the rule, namely, to prevent extraordinarily protracted family settlements and devolution of decedents’ estates. See W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 Harv. L. Rev. 721 (1952).

In a similar vein, the Restatement (Third) of Property: Servitudes § 3.3, comment *b.* at 428 (2000), explains as follows:

> In the late 19th century, . . . courts began to apply [the rule against perpetuities] to commercial land transactions, including options [and] rights of first refusal . . . . The virtue of the rule was that it invalidated all interests that lacked a durational limit, thus clearing titles without any need to inquire into the utility of the arrangement. Its vice was that it operated arbitrarily, applying a time period totally unsuited to commercial transactions. . . .
>
> Although commentators had long complained that the rule against perpetuities should not be applied to commercial transactions, it was not until the 1980s that courts in any number followed suit.

In *Pathmark Stores v. 3821 Associates, L.P.*, 663 A.2d 1189 (Del. Ch. 1995), the Delaware Court of Chancery determined that the rule against perpetuities was not offended by the contractual option at issue in that case. In support of its conclusion, the Delaware court referred to various commentators and stated:

> The application of the rule against perpetuities to options is subject to severe criticism. *See* VI Thomas E. Atkinson et al., *American Law of Property* § 24.56 at 141 (A. James Casner ed. 1952) (“The application of the rule against

> perpetuities to options was a step of doubtful wisdom."); Lewis M. Simes et al., *The Law of Future Interests* § 1244 at 159 (2d ed. 1956) ("As an original proposition, it might have been better for the courts to hold that all option contracts are outside the rule against perpetuities."); *see also* T. Bergin et al., *Preface to Estates in Land and Future Interest* at 207-08 (2d ed. 1984) ("[T]he rule against perpetuities is obviously not suited to the commercial transaction.").

Pathmark Stores, 663 A.2d at 1192-93.

The Delaware court further noted:

> The common law rule against perpetuities time period, lives in being plus twenty-one years, is well suited for keeping family transfers of property within a reasonable time period. This common law time period is tied to notions of when a person will attain the age of majority. Commercial transactions, however, have absolutely no tie to either lives in being or twenty-one years.

Id. at 1193.

Reflecting this evolution recounted above, the Restatement, *supra*, determined that the rule against perpetuities is inapplicable to options to repurchase such as the one at issue in this case.

As noted, the Legislature enacted the Act in 1989. The Act demonstrates the policy adopted by the Legislature, and pursuant to the Act, the option at issue would not be subject to the rule against perpetuities. The Act adopted in Nebraska reflected the scholarly opinion and jurisprudence which had evolved over the decades prior to its passage. The instant case is our first opportunity to comment on the application of the rule against perpetuities to a commercial option since passage of the Act. We conclude that the application of the common-law rule against perpetuities which governs this case is no broader than that imposed by the statutory rule enacted by the Legislature, and thus, the option at issue is not subject to the rule against perpetuities. Our decision is consistent with the courts and commentators, noted above, who have observed that the purposes supported by the rule against perpetuities do not logically apply to commercial transactions such as options.

There are sound public policy reasons which support the conclusion that contractual options to repurchase, such as the one at issue in this case, are not subject to the rule against perpetuities. The option at issue is the result of a commercial transaction. It is more appropriately analyzed "based upon the realities of commerce in land, not upon a borrowing from the law of family settlements." VI Thomas E. Atkinson et al., American Law of Property § 24.56 at 142 (A. James Casner ed. 1952). In *Pathmark Stores v. 3821 Associates, L.P.*, 663 A.2d 1189, 1193 (Del. Ch. 1995), the Delaware Court of Chancery stated:

> It would be inequitable to declare this option void *ab initio*. Two commercial entities have bargained for the option to repurchase, each presumably gaining and losing contractual advantages during the negotiation process to reach this agreement. Here Pathmark not only attempts to exercise the option within the duration of the option, but even within the time limit required by the common law rule against perpetuities. Allowing defendants to escape the terms of the contract because Pathmark *might* exercise the option in an unreasonably remote way defies the contract's terms, logic, common sense, public policy and principles of equity.

The same reasoning applies to the instant case.

It would not be prudent to now deny appellees the benefit of their bargain while allowing Waste Management to avoid the terms of the agreement. In concluding that the rule against perpetuities does not apply to this option, we merely hold the parties to the terms of their contractual arrangement. Based on the foregoing, we reverse the decision of the Court of Appeals.

CONCLUSION

Because we conclude that the common-law rule against perpetuities is inapplicable to the option at issue, we reverse the decision of the Court of Appeals and remand with directions to consider the remaining assignments of error not previously considered by the Court of Appeals.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. TERRELL T. THORPE, APPELLANT.

783 N.W.2d 749

Filed June 18, 2010. No. S-09-442.

1. **Juries: Discrimination: Prosecuting Attorneys: Proof.** The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges because of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The third step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.
2. **Juries: Discrimination: Proof: Appeal and Error.** For challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), an appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. And it reviews for clear error a trial court's factual determinations whether an attorney's race-neutral explanation is persuasive and whether his or her use of a peremptory challenge was purposefully discriminatory.
3. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Although the prosecutor must present a comprehensible reason for a peremptory challenge, the second step of the analysis under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices.
4. ____: ____: ____: ____. In determining whether a defendant has established purposeful discrimination in the use of a peremptory challenge, a trial court may consider whether the prosecutor's criterion has a disproportionate impact on a particular race. If so, the court may consider whether such evidence shows the prosecutor's proffered explanation was pretextual.
5. **Juries: Discrimination: Proof.** In determining whether there is a sufficient pattern of peremptory strikes to support an inference of discrimination, the following factors are relevant: (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant racial or ethnic group from the venire as it could; (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire; and (3) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation on the jury.
6. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.

7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
9. **Criminal Law: Juror Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
10. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the verdict to the challenger's prejudice.
11. **Jury Misconduct.** Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.
12. **Juror Misconduct.** Whether a defendant was prejudiced by juror misconduct involves legal conclusions about a defendant's right to an impartial jury and thus presents a mixed question of law and fact.
13. **Motions for Mistrial: Juror Misconduct: Appeal and Error.** When a defendant moves for a mistrial based on juror misconduct, an appellate court will review the trial court's determinations of witness credibility and historical fact for clear error and review de novo its ultimate determination whether the defendant was prejudiced by juror misconduct.
14. **Jury Instructions.** Whether a jury instruction is correct is a question of law.
15. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
16. **Criminal Law: Witnesses.** Evidence of a defendant's attempted intimidation or intimidation of a State's witness is relevant evidence of the defendant's "conscious guilt" that a crime has been committed. Also, it can serve as a basis for an inference that the defendant is guilty of the crime charged.
17. **Appeal and Error.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed in part, and in part remanded with directions.

Andrew J. Wilson, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CONNOLLY, J.

I. SUMMARY

After a jury trial, the State convicted Terrell T. Thorpe of two counts of first degree murder and two counts of use of a weapon to commit a felony. The court sentenced him to life imprisonment without parole on each of the murder counts and to 30 to 40 years' imprisonment and 40 to 50 years' imprisonment on the use of a weapon counts. He appeals his convictions and sentences. We affirm his convictions on the murder charges and the convictions and sentences on the weapons charges. But we conclude that the life without parole sentences are invalid. We vacate the life without parole sentences and remand to the district court to sentence Thorpe to life sentences.

II. ASSIGNMENTS OF ERROR

Thorpe assigns three errors: (1) The court erred in failing to find that the State's use of a peremptory challenge to exclude juror No. 31 violated his right to equal protection; (2) the court erred in overruling his motion for mistrial based on the improper contact between a witness and a juror; and (3) the court erred in giving instruction No. 14 regarding conscious guilt.

III. BACKGROUND

The underlying facts are substantially similar to those addressed by this court in *State v. Sellers*,[1] which addressed an accomplice's appeal. Summarized, the facts are that on two separate occasions, Taiana Matheny lured a young male to a remote location, and then Terry Sellers and Thorpe beat, robbed, and murdered him. Thorpe's appeal focuses on three events that occurred during his trial, and so we will set out additional facts to separately address these issues.

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[1] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

IV. ANALYSIS

1. *Batson* Challenge During Jury Selection

Thorpe argues that the State exercised a peremptory challenge to remove juror No. 31 solely because of her race. The Equal Protection Clause of the 14th Amendment forbids prosecutors from using peremptory challenges for this reason.[2]

(a) Additional Facts

During voir dire, the prosecutor asked, "[I]f the State proves beyond a reasonable doubt that . . . Thorpe is guilty of these charges, is there anyone here that would not be able to vote guilty?" Juror No. 31 answered:

> Just with the evidence that they're saying, I still would have a problem. 'Cause how do I know it's real, you know? . . . And if he's saying he didn't do it, how do I even know he's telling the truth? But I wouldn't just say, oh, yeah, he did it, you know.

The prosecutor then explained that the jurors were to decide whether, based upon what they saw and heard in the courtroom, the State had proved guilt beyond a reasonable doubt. Juror No. 31 responded:

> Because I have a problem with that, with the reasonable doubt. If you're not sure yourselves, how would you be able to say, yeah, you did it? I mean, that's my — my thinking.
>
> The reasonable doubt, um, well, it says at this time you blah, blah, blah or this time blah, blah, blah. But we didn't see at that time, but we're saying all evidence shows it, and that's what I have a problem with.

When the prosecutor explained that a "beyond a reasonable doubt" standard was the standard applied in every criminal case in America, juror No. 31 interrupted:

> Well, I have the same feelings — you know, I have the same feelings with all of it. If I didn't see you — like I'm at home with my children and I don't see it. This one is

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[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

> saying that and this one is saying — the older people are like, whoop 'em all and you get the right one.
>
> Well, now they're all bigger and so I can't do it like that. Sometimes I let it go because we're bickering and arguing and I don't know who did it. But that happens in my life a lot. So like I said, I couldn't just say, okay, what so-and-so is saying, I'll go with that.

When the prosecutor responded that "[i]t sounds to me like what you're saying is that you put that burden of proof pretty high," juror No. 31 answered, "Yes, I do."

Ultimately, the State exercised one of its peremptory strikes on juror No. 31. Thorpe objected, arguing that the strike violated the principles of *Batson v. Kentucky*.[3] In response, the prosecutor noted that of the 38 total jurors struck by the State and the defense, 4 were African-American. The prosecutor further noted that of those four, two were stricken by the defense, one by the court, and only one, juror No. 31, by the State. When asked by the court why it struck juror No. 31, the prosecutor responded:

> The same reason the State struck . . . Juror No. 23. Both [juror No. 31] and [juror No. 23], in describing their interpretation of beyond a reasonable doubt, they both said that they gave it a very high standard, higher than I believe what the law requires.
>
> [Juror No. 31], in fact, I believe said that she would have a difficult time finding someone guilty if she didn't actually see them do it herself. That would be the State's reason . . . .

The prosecutor then clarified that the specific statement made by juror No. 31 that concerned him was, "How would I know he did it if I didn't see him do it." The prosecutor also noted that he was concerned because juror No. 31 had stated that the prosecutors "don't even know whether he did it, and now we have to decide." The prosecutor explained that another reason for the strike was that juror No. 31's comments left the "impression that she didn't believe the State

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[3] *Batson, supra* note 2.

believed . . . Thorpe was guilty." The court overruled the *Batson* challenge.

(b) Standard of Review

[1] The evaluation of whether a party has used peremptory challenges in a racially discriminatory manner is a three-step process.[4] First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor has exercised peremptory challenges because of race.[5] Second, if the defendant makes the requisite showing, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question.[6] Third, the trial court then determines whether the defendant has carried his or her burden of proving purposeful discrimination.[7] The third step requires the court to evaluate the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[8]

In several cases, we have stated that the adequacy of a party's neutral explanation of its peremptory challenges is a factual determination.[9] But this standard has confused the facial validity of an attorney's proffered explanation with its persuasiveness. In *Hernandez v. New York*,[10] the U.S. Supreme Court's plurality opinion stated that "[i]n evaluating the race neutrality of an attorney's explanation, a court must determine

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[4] See, *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006); *Gutierrez, supra* note 2.

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

[6] See *id.*

[7] See *id.*

[8] *Id.*

[9] See, e.g., *Gutierrez, supra* note 2; *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); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006); *State v. Lowe*, 267 Neb. 782, 677 N.W.2d 178 (2004).

[10] *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (emphasis supplied).

whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause *as a matter of law*." And it further stated, "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."[11]

But the facial validity of an attorney's explanation is different from its persuasiveness. Persuasiveness is relevant to the final step in the analysis—whether the defendant has satisfied his or her burden of proving purposeful discrimination. It is the final step in the analysis, in which the court must decide whether an attorney's explanation is persuasive, that presents a question of fact. In other words, whether an attorney's race-neutral explanation for a peremptory challenge should be believed presents a question of fact.[12]

[2] So we now correct our standard of review to be more consistent with the U.S. Supreme Court's precedent. For *Batson* challenges, we will review de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. And we will review for clear error a trial court's factual determinations whether an attorney's race-neutral explanation is persuasive and whether his or her use of a peremptory challenge was purposefully discriminatory.

(c) Resolution

The trial court, without specifically finding that Thorpe had made a prima facie case, asked the State to tender a race-neutral explanation for the strike, and the State complied. Then under the third step, the trial court evaluated the persuasiveness of that explanation in determining whether Thorpe carried his burden of proving a racial motivation for the strike. Under this circumstance, whether Thorpe made a prima facie showing of purposeful discrimination is moot.[13] We consider only whether the prosecutor offered an adequate race-neutral explanation for the strike and whether the trial

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[11] *Id.*, 500 U.S. at 360.

[12] See *Hernandez, supra* note 10. See, also, *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005); *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999).

[13] See *Gutierrez, supra* note 2.

court's final determination regarding purposeful discrimination was clearly erroneous.[14]

[3] Although the prosecutor must present a comprehensible reason, the second step of the analysis does not demand an explanation that is persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.[15] As examples, we have determined the State's explanations for a strike to be race neutral in the following circumstances: (1) when a prospective juror's residence was close to the crime scene,[16] (2) when a prospective juror had a close family member who was a convicted felon,[17] (3) when a prospective juror was employed at a church,[18] and (4) when a prospective juror was young and single and might be attracted to the defendant.[19] In contrast, when reviewing a gender discrimination challenge, we held that the State's use of peremptory strikes on six males was not supported by a gender-neutral reason when the State explained that its purpose was to achieve gender balance on the jury.[20]

These cases illustrate that only inherently discriminatory explanations are facially invalid. We conclude that the State's articulated reasons for striking juror No. 31 were clearly race neutral because they had no relationship to her race.

But Thorpe argues that even if the articulated reasons were race neutral, the trial court nevertheless erred in its evaluation of the persuasiveness of the reasons offered by the State. Specifically, he argues that the State's reasons for striking juror No. 31 are unpersuasive because they were based on "nothing more than misinterpretation of comments" made by that juror.[21] We disagree.

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[14] See *Hernandez, supra* note 10.

[15] See *id.*

[16] *Robinson, supra* note 9.

[17] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[18] *Id.*

[19] *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[20] *Lowe, supra* note 9.

[21] Brief for appellant at 12.

A review of the record quickly shows that the State's articulated reasons for striking juror No. 31 were persuasive. Any prosecutor who could fog a mirror would have been concerned about juror No. 31's confusing beliefs about the proof necessary to satisfy the "beyond a reasonable doubt" standard. She was in effect saying that neither she nor the prosecutor could know that Thorpe committed the crimes charged because neither of them had witnessed the act.

[4] Also, nothing in the record shows that the explanation was pretextual. In determining whether a defendant has established purposeful discrimination in the use of a peremptory challenge, a trial court may consider whether the prosecutor's criterion has a disproportionate impact on a particular race. If so, the court may consider whether such evidence shows the prosecutor's proffered explanation was pretextual.[22]

[5] In determining whether there is a sufficient pattern of peremptory strikes to support an inference of discrimination, we have recognized the following factors as relevant: (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant racial or ethnic group from the venire as it could; (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire; and (3) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation on the jury.[23] Although we lack information in the record to examine all of those factors, the record does show that of the 38 jurors struck by the parties, 4 were African-American. It also shows that of those four jurors, two jurors were struck by Thorpe, one juror was struck by the court, and only one juror was struck by the State. The State's use of a peremptory strike on only one of four African-American jurors who were struck further supported an inference that the State's

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[22] See *Hernandez, supra* note 10.

[23] See *Gutierrez, supra* note 2, citing *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005).

use of its peremptory challenge on juror No. 31 was not purposeful discrimination.

We conclude that the trial court did not clearly err in determining that Thorpe failed to carry his burden of proving purposeful discrimination.

2. Juror Misconduct

Thorpe asserts that the trial court erred when it overruled his motion for mistrial based on improper communications between a witness, Omaha Police Lt. Michele Bang, and a juror.

(a) Additional Facts

In its case in chief, the State called Bang, who oversaw the general investigation. She testified about the cellular telephone calls that were made and received between Sellers, Matheny, and Thorpe at or around the time of the crimes.

Bang's direct testimony was interrupted by a break for lunch. As Bang left for the break, a juror stepped on the elevator with her. The juror asked if she was a relative of "Shelly" Bang, and Bang informed him that that was her nickname and that she was Shelly Bang. The juror then told Bang that one of his daughters went to school with her, and Bang remembered that his daughter's name was Diane and that they had gone to high school together. Bang stated that the juror "smiled because I remembered his daughter was Diane," but that the conversation ended after that and they both got off the elevator. The juror testified that the conversation occurred in substantially the same way. When the court asked whether his conversation with Bang would affect him in any way or prevent him from being a fair and impartial juror, the juror responded, "No. What difference would it make?"

After the in-chambers testimony from Bang and the juror, Thorpe moved for a mistrial. The court overruled the motion, finding that the communication was a "very innocent conversation" and that it did not affect the juror's ability to be fair and impartial.

(b) Standard of Review

[6,7] We will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its

discretion.[24] 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.[25]

(c) Resolution

[8-11] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.[26] In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.[27] Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the jury's verdict to the challenger's prejudice.[28] Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.[29]

We have not applied a consistent standard for reviewing a trial court's determination of the effect extraneous information would have on an average juror. In recent direct appeals and postconviction appeals, we have clearly reviewed this determination de novo.[30] But in at least one postconviction decision, we explicitly stated that we were reviewing the district court's determination on this issue under a "clearly

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[24] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[25] *Id.*

[26] *Floyd, supra* note 9; *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002).

[27] *Id*.

[28] See *Harrison, supra* note 26.

[29] *Id*.

[30] See, e.g., *Floyd, supra* note 9; *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997).

erroneous" standard.[31] That is the general standard for reviewing a postconviction court's factual findings. But a review of that case shows that we independently determined that under all the circumstances, there was not a reasonable possibility that communications between a nonjuror and jurors would have affected the jury's verdict. Because of that determination, we concluded that the district court was not clearly erroneous in determining that the juror misconduct did not prejudice the defendant.[32]

[12,13] These cases illustrate that we have not reviewed determinations of prejudice from juror misconduct only for clear error. So we agree with courts that have held that whether a defendant was prejudiced by juror misconduct presents a mixed question of law and fact because it involves legal conclusions about a defendant's right to an impartial jury.[33] We conclude that when a defendant moves for a mistrial based on juror misconduct, we will review the trial court's determinations of witness credibility and historical fact for clear error; we review de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.

The record before us clearly shows that an improper communication occurred between a juror and the witness Bang. Because the misconduct involved a juror and a nonjuror, it gives rise to a rebuttable presumption of prejudice to Thorpe which the State has the burden to overcome.[34]

Here, the communication was made during the State's case in chief when evidence was still being presented. But the communication was unrelated to any issue before the jury. The communication was to one juror only, and that juror did not

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[31] See *Harrison, supra* note 26, 264 Neb. at 737, 651 N.W.2d at 580.

[32] See *id.* See, also, *Williams, supra* note 30.

[33] See, *Vigil v. Zavaras*, 298 F.3d 935 (10th Cir. 2002); *Loliscio v. Goord*, 263 F.3d 178 (2d Cir. 2001); *Sassounian v. Roe*, 230 F.3d 1097 (9th Cir. 2000); *U.S. v. Cheek*, 94 F.3d 136 (4th Cir. 1996); *People v. Avila*, 46 Cal. 4th 680, 208 P.3d 634, 94 Cal. Rptr. 3d 699 (2009); *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003); *Zana v. State*, 216 P.3d 244 (Nev. 2009).

[34] See *Floyd, supra* note 9.

share that communication with the remaining members of the jury. And when asked whether the communication would affect his ability to remain impartial, the juror stated, "No. What difference would it make?"

Under our de novo review, we conclude that the dialog between Bang and the juror on the elevator amounted to mere exchanges of pleasantries. Because the dialog was not related in any way to the issues at trial, we conclude that it would not have affected the average juror's ability to remain impartial. The trial court correctly denied Thorpe's motion for mistrial.

3. Jury Instruction on Conscious Guilt

Thorpe contends that the trial court erred in giving instruction No. 14. The trial court gave this instruction in response to the State's evidence that Thorpe had attempted to intimidate a witness.

(a) Additional Facts

Following a plea agreement, Matheny testified for the State. During her direct examination, she stated that in August 2008, she was being transferred to a holding cell in the county jail when she encountered Thorpe. The two made eye contact, and Thorpe said, "Don't come to court." Another female inmate overhead the conversation and confirmed that Thorpe told Matheny "not to testify." This inmate testified that she could tell Matheny and Thorpe knew each other from how their demeanors changed when they saw each other. The inmate thought that Thorpe looked "threatening" when he saw Matheny and that Matheny looked scared when she saw Thorpe. The inmate testified that after Thorpe made the statement, Matheny got very quiet and "looked pretty upset. Maybe scared."

During the State's case in chief, Thorpe moved to strike the testimony, arguing that it was not sufficient to show that Thorpe threatened or intimidated Matheny. The court deferred ruling on the motion to strike until the jury instruction conference.

At that conference, the court proposed jury instruction No. 14 regarding conscious guilt. It provided:

> You have heard evidence regarding the Defendant's alleged attempt to prevent a State's witness from testifying in this case. A Defendant's attempted intimidation

> or intimidation of a State's witness may be evidence of the Defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the Defendant is guilty of the crimes charged. Such evidence may be considered by you in determining whether the State has proved the elements of each of the crimes charged beyond a reasonable doubt.

Thorpe objected to the instruction, arguing that it should not be included because the evidence failed to show an inference of guilt. He then renewed his motion to strike the testimony of Matheny and the female inmate. The court overruled Thorpe's request. Thorpe then noted that he did not have any additions or corrections to the instruction as it was proposed.

(b) Standard of Review

[14,15] Whether a jury instruction is correct is a question of law.[35] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[36]

(c) Resolution

[16] Evidence of a defendant's attempted intimidation or intimidation of a State's witness is relevant evidence of the defendant's "conscious guilt" that a crime has been committed. Also, it can serve as a basis for an inference that the defendant is guilty of the crime charged.[37] Thorpe does not quibble with this general proposition, but instead contends that the testimony does not sufficiently establish that he either attempted to intimidate or intimidated Matheny. So, he argues that the testimony fails to support an inference of his conscious guilt.

We addressed a similar argument in *State v. Freeman*.[38] The State convicted William Freeman of sexually assaulting a college student after a party. A male witness who danced with the victim at the party testified that about 1 year after the party, he

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

[36] See *id.*

[37] See *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989).

[38] *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

and Freeman talked at an Omaha bar. During the conversation, Freeman indicated that the police had contacted him about the assault. Freeman then asked the witness if he had kissed the victim on the night of the party. When the witness stated that he had not, Freeman then said either "'"Well, it would help me out if you did"'" or "'"It would have helped me out if you did."'"[39] We held that the State could not admit this evidence to demonstrate that Freeman attempted to intimidate the witness, because it was unclear what Freeman actually said and Freeman took no other steps to try to influence the witness' testimony.

But unlike the testimony in *Freeman*, here the record is clear as to the words used by Thorpe, and equally clear that those words were an attempt by him to discourage Matheny from testifying against him at his trial. Also, the testimony indicates both that Thorpe looked "threatening" when he spoke to Matheny and that she looked upset or scared after he spoke to her. Contrary to Thorpe's argument, this evidence sufficiently supports an inference that Thorpe was conscious of his guilt and sought to intimidate Matheny so that she would not testify against him. The district court did not err in giving instruction No. 14.

4. Life Without Parole

[17] Although Thorpe does not assign or argue the issue, there is plain error regarding his two sentences of life without parole for the murders. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[40]

The Legislature has set forth the penalties for various felony classes in Neb. Rev. Stat. § 28-105 (Reissue 2008). Before a 2002 amendment, the penalty for first degree murder, a

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[39] *Id.* at 744, 677 N.W.2d at 172.

[40] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

Class IA felony, was "[l]ife imprisonment."[41] The 2002 amendment changed that penalty to "[l]ife imprisonment without parole."[42] But we held in *State v. Conover*[43] that the 2002 amendment was unconstitutional because it exceeded the scope of the proclamation that called the Legislature into special session. We held in *Conover* that a sentence of life imprisonment without parole was not statutorily mandated, and because it was erroneous but not void, we remanded with directions to resentence the defendant to life imprisonment on his murder convictions.

In *State v. Gunther*[44] the defendant argued that under our holding in *Conover*, his sentence of life imprisonment without parole was erroneous but not void and sought remand for imposition of a sentence of life imprisonment. The State conceded this error, and we remanded for the imposition of a sentence of life imprisonment. And in *State v. Robinson*,[45] a defendant was sentenced to life imprisonment without parole even though the murder he committed occurred before the 2002 amendment to § 28-105. On plain error review, we found this sentence to be erroneous but not void, and remanded for imposition of a sentence of life imprisonment.

We conclude that allowing Thorpe's sentences of "[l]ife imprisonment without parole" to stand would result in damage to the judicial process because the 2002 amendment to § 28-105 was "stricken" by this court's decision in *Conover*. The Legislature has taken no action to amend § 28-105 or otherwise redefine the penalty for first degree murder since our decision in *Conover*. Because a sentence of "life imprisonment without parole" is not a valid sentence for first degree murder in Nebraska, we remand with directions that the district court resentence Thorpe to "life imprisonment" on his murder convictions.

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[41] See, § 28-105(1) (Reissue 1995); *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

[42] See 2002 Neb. Laws, L.B. 1, 3d Spec. Sess. (Nov. 22, 2002).

[43] *Conover, supra* note 41.

[44] *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[45] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

V. CONCLUSION

Thorpe's assignments of error lack merit. But plain error exists in the sentences imposed for his murder convictions. We affirm the convictions and sentences on the weapons charges. We affirm the murder convictions but vacate the sentences on the murder charges. We remand with directions that the district court sentence Thorpe to life imprisonment on both murder charges.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

CENTRAL CITY EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. MERRICK COUNTY SCHOOL DISTRICT NO. 61-0004, ALSO KNOWN AS CENTRAL CITY PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

783 N.W.2d 600

Filed June 18, 2010. No. S-09-521.

1. **Commission of Industrial Relations: Appeal and Error.** In a review of orders and decisions of the Commission of Industrial Relations involving an industrial dispute over wages and conditions of employment, an appellate court's standard of review is as follows: Any order or decision of the commission may be modified, reversed, or set aside by the 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: Administrative Law.** The Commission of Industrial Relations is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the commission.
3. ____: ____. Under Neb. Rev. Stat. § 48-818 (Reissue 2004), orders of the Commission of Industrial Relations may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same.
4. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.

5. **Commission of Industrial Relations.** The Commission of Industrial Relations does not have the authority to grant declaratory relief.
6. **Contracts: Words and Phrases.** The standard inherent in the word "prevalent" is one of general practice, occurrence, or acceptance. Contract terms need only be sufficiently similar and have enough like characteristics or qualities in order to be considered prevalent.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded with directions.

Kelley Baker and Steve Williams, of Harding & Shultz, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

PER CURIAM.

I. INTRODUCTION

This industrial dispute is between the Central City Education Association (CCEA) and Merrick County School District No. 61-0004, also known as Central City Public Schools (District). A complaint was filed with the Commission of Industrial Relations (CIR) after the CCEA and the District were unable to reach a negotiated agreement for the 2008-09 contract year. The CIR entered an order setting forth the disputed terms of the parties' agreement. The District appeals. We affirm in part, and in part reverse and remand.

II. STATEMENT OF FACTS

The CCEA filed a complaint with the CIR on December 2, 2008, after it and the District were unable to reach an agreement regarding the terms of their 2008-09 negotiated agreement. As relevant to this appeal, there were two disputes between the parties: the inclusion of contract continuation language and the removal of language providing that the District would pay teachers for unused sick and personal leave.

The following array was set: Adams Central, Aurora, Boone Central, Centennial, Centura, Cross County, Doniphan-Trumbull, Grand Island Northwest, Columbus Lakeview,

St. Paul, Sutton, Twin River, Wood River Rural, and York. Following a hearing, the CIR issued an order on April 21, 2009, providing that contract continuation language was prevalent in the District's array, but that pay for unused sick and personal leave was not. Therefore, the CIR ordered that contract continuation language be included in the contract, but pay for unused sick and personal leave be deleted. Pursuant to a request by the CCEA, the CIR later reconsidered its decision to delete the language relating to pay for unused sick and personal leave, and on May 3, it issued a "Final Order," finding that such language was prevalent and should remain in the parties' agreement.

III. ASSIGNMENTS OF ERROR

On appeal, the District assigns, restated and consolidated, that the CIR (1) exceeded its authority by including the contract continuation clause in the parties' agreement and (2) erred by finding payment for unused sick and personal time prevalent in the District's array.

IV. STANDARD OF REVIEW

[1] In our review of orders and decisions of the CIR involving an industrial dispute over wages and conditions of employment, our standard of review is as follows: Any order or decision of the CIR may be modified, reversed, or set aside by the 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.[1]

V. ANALYSIS

1. Whether CIR Exceeded Its Authority in Ordering Inclusion of Contract Continuation Language

In its first assignment of error, the District assigns, restated and consolidated, that the CIR exceeded its authority by

[1] See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 274 Neb. 103, 736 N.W.2d 726 (2007).

ordering the inclusion of contract continuation language in the parties' agreement. The language in question provides that "'[t]his Agreement shall continue in full force and effect until a successor agreement is adopted which is then retroactive to the beginning of that school year.'"

The District makes several arguments in support of its assignment, which we have restated and consolidated. First, the District argues that the contract continuation clause is a topic of permissive, not mandatory, bargaining and thus exceeds the CIR's authority. The District also complains that in ordering the agreement to include the contract continuation clause, the CIR issued an order affecting a future contract year and thus entered a declaratory judgment, which also exceeds its authority. In addition, the District also contends that the CIR violated Neb. Rev. Stat. §§ 48-810.01 (Reissue 2004) and 79-515 (Reissue 2008) by ordering it to enter into a contract and violated public policy by issuing an order that prevents the District from exercising its authority to implement a final order after reaching an impasse.

(a) Mandatory Topic of Bargaining

[2,3] We turn first to the question of whether the contract continuation language is a mandatory or permissive topic of bargaining. The CIR is an administrative agency empowered to perform a legislative function and, as such, has no power or authority other than that specifically conferred on it by statute or by a construction thereof necessary to accomplish the purposes of the act establishing the CIR.[2] And under Neb. Rev. Stat. § 48-818 (Reissue 2004), orders of the CIR may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In other words, the CIR may decide mandatory topics of bargaining, but has no authority to determine permissive topics of bargaining.

The issue presented in this case is whether the contract continuation clause ordered by the CIR deals with hours, wages, or terms and conditions of employment such that it is mandatorily bargainable. We conclude that it is.

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[2] See *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

This court, in *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*,[3] addressed the issue of whether deviation from a salary schedule was mandatorily bargainable. We concluded that it was, noting that "[t]eacher salary schedules have historically been the basic framework for teacher contracts and the method by which teacher wages are determined. . . . Deviation from the salary schedule pursuant to a deviation clause affects those wages."[4]

We find *Hyannis Ed. Assn.* helpful in reaching our conclusion that the contract continuation clause in this case is mandatorily bargainable. In the same way that deviation relates to wages, we conclude that contract continuation relates to hours, wages, and terms and conditions of employment, because such a clause keeps in effect previously agreed-upon (or ordered) contract terms, including those which are mandatorily bargainable, until a new agreement can be reached.

And this conclusion is supported by other case law. The court in *Mtr Vil of Lynbrook v PERB*[5] concluded that the issue of a "'continuation of benefits clause'" was mandatorily bargainable and not a violation of public policy. And private sector cases have concluded that the duration of a collective bargaining agreement is mandatorily bargainable.[6]

Lending further support to our conclusion is this court's decision in *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*,[7] where we noted:

> A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is

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[3] *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[4] *Id.* at 966, 698 N.W.2d at 54.

[5] *Mtr Vil of Lynbrook v PERB*, 48 N.Y.2d 398, 403 n.3, 399 N.E.2d 55, 57 n.3, 423 N.Y.S.2d 466, 467 n.3 (1979).

[6] *Walnut Creek Honda Associates 2, Inc. v. N.L.R.B.*, 89 F.3d 645 (9th Cir. 1996); *N. L. R. B. v. Yutana Barge Lines, Inc.*, 315 F.2d 524 (9th Cir. 1963).

[7] *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*, 203 Neb. 832, 842-43, 281 N.W.2d 201, 206 (1979).

> mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.

We conclude that a contract continuation clause, because it continues the provisions of an existing contract until a new contract can be reached, including the salary schedule of the preceding agreement, is of "fundamental, basic, or essential concern to an employee's financial and personal concern."[8]

Moreover, we conclude that the contract continuation clause at issue is not a matter "which involve[s] foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution."[9] Matters that have been found to be of this nature include an employer's decision to hire, retain, promote, transfer, or dismiss employees[10]; the establishment of a pension plan[11]; a change in a school calendar[12]; or teacher appointment determinations.[13]

We conclude that the contract continuation clause at issue was mandatorily bargainable. The District's argument to the contrary is without merit.

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[8] See *id.* at 842, 281 N.W.2d at 206.

[9] See *id.* at 842-43, 281 N.W.2d at 206.

[10] *Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n.*, 94 N.J. 9, 462 A.2d 137 (1983).

[11] *City of Pittsburgh v. Com., PLRB*, 539 Pa. 535, 653 A.2d 1210 (1995).

[12] *West Central Educ. v. West Central School*, 655 N.W.2d 916 (S.D. 2002); *Piscataway Ed. Ass'n v. Bd. of Ed.*, 307 N.J. Super. 263, 704 A.2d 981 (1998).

[13] *School Committee of Natick v. Education Association of Natick*, 423 Mass. 34, 666 N.E.2d 486 (1996).

(b) Effect Not in Present, but in Future Contract Years

We turn next to the question of whether the CIR erred in issuing a decision that affects not the current contract year but subsequent contract years. Intertwined with this issue is the District's argument that the CIR's inclusion of the contract continuation language amounted to a declaratory judgment or advisory opinion.

[4,5] We have noted that "'[t]he function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.'"[14] And we have repeatedly noted that the CIR does not have the authority to grant declaratory relief.[15] But in this case, we conclude that the contract continuation clause had an effect in the current contract year; thus, the decision was ripe for adjudication and was not a declaratory judgment.

The CCEA presented evidence in the form of testimony by Tory Tuhey, a union employee with the Nebraska State Education Association. Tuhey testified that there is contract continuation language in the collective bargaining agreement between the state education association and its bargaining unit. Tuhey indicated that the presence of that language affects her in that it provides stability in salary and budgeting; she knows what wage she will be earning until a new agreement is reached. This evidence supports the CIR's conclusion that the contract continuation clause had an effect in the current contract year. We therefore conclude that the District's argument that the CIR was issuing declaratory relief is without merit.

(c) §§ 48-810.01 and 79-515

The District next argues that the CIR erred in including the contract continuation language, because doing so violated §§ 48-810.01 and 79-515. Section 48-810.01 provides that "[n]otwithstanding any other provision of law, the State of

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[14] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 2, 265 Neb. at 28, 654 N.W.2d at 181.

[15] See *id.*

Nebraska and any political or governmental subdivision thereof cannot be compelled to enter into any contract or agreement, written or otherwise, with any labor organization concerning grievances, labor disputes, rates of pay, hours of employment or conditions of work." And § 79-515 provides:

> The school board or board of education of any school district may enter into contracts under such terms and conditions as the board deems appropriate, for periods not to exceed four years . . . for collective-bargaining agreements with employee groups. This section does not permit multiyear contracts with individual school district employees.

The District contends that § 48-810.01 was violated when the CIR ordered that the District enter into a contract with the CCEA for a future contract year and that § 79-515 was violated because the District was ordered to enter into a contract of indefinite duration by the inclusion of the contract continuation clause.

We conclude that the District misunderstands the effect of the contract continuation clause. Such a clause neither orders the District to enter into a contract nor acts as a contract for an indefinite term. Instead, the effect of the clause is to set forth the terms of the parties' agreement until a new agreement can be reached. We conclude that the CIR did not violate § 48-810.01 or § 79-515. The District's argument is without merit.

(d) Public Policy

Finally, the district argues that the CIR violated public policy when it ordered the contract continuation clause.

The CIR's order (1) requires the District to negotiate upon the CCEA's terms or continue under the previous terms indefinitely, (2) lessens the incentive to bargain in good faith toward an agreement, and (3) deprives the District of its lawful right to implement a final offer after reaching an impasse in negotiations but prior to the CCEA's filing a petition with the CIR. The order undermines the Legislature's determination to authorize the District to implement its final offer upon impasse as well as appellate court decisions approving this process.

The District cites to *Transport Workers v. Transit Auth. of Omaha*[16] and argues that it "supports a board of education's authority to implement its final offer after impasse and before the association has filed an action in the [CIR]."[17]

We find *Transport Workers* inapplicable. In that case, we concluded that the CIR could issue orders "providing terms and conditions of employment identical to those which existed prior to the dispute."[18] Thus, we agree that this case supports the proposition that the CIR has the authority to maintain the status quo pending the resolution of a dispute. However, in *Transport Workers*, we did not opine as to the *source* of those existing terms and conditions. We conclude that *Transport Workers* does not speak to the authority of management to implement its last best offer before impasse.

The District also relies on two prior CIR orders in *General Drivers & Helpers Union, Local No. 554 v. Saunders County, Nebraska*,[19] and *Lincoln County Sheriff's Employees Association Local No. 546 v. County of Lincoln*.[20] The District implies that both support the proposition that it was a "lawful, management prerogative" for the District to unilaterally implement a bargaining offer after impasse but before a proceeding is initiated in the CIR and that the CIR "may not deprive an employer of that right by ordering a 'continuation clause.'"[21] While these cases do recognize the first part of the District's argument, they do not support the second—in fact, neither of these cases discusses continuation clauses. Moreover, we note that the CIR concluded in *Clarkson Educ. Ass'n v. Colfax Co. School*

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[16] *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984).

[17] Brief for appellant at 15.

[18] *Transport Workers v. Transit Auth. of Omaha, supra* note 16, 216 Neb. at 461, 344 N.W.2d at 463.

[19] *General Drivers & Helpers Union, Local No. 554 v. Saunders County, Nebraska*, 6 C.I.R. 313 (1982).

[20] *Lincoln County Sheriff's Employees Association Local No. 546 v. County of Lincoln*, 5 C.I.R. 441 (1982).

[21] Brief for appellant at 18.

Dist.[22] that it did have the authority to order such a continuation clause.

The District directs us to no other authority which would support the conclusion that it has an unlimited management prerogative to implement its final offer before impasse and that the inclusion of a contract continuation clause would impact that right. Nor has this court been able to find any other authority to support that assertion.

We also note the District suggests that the reasoning behind the policy to implement its final offer before impasse is to level the playing field between it and the CCEA. The District suggests that the CCEA is at an unfair advantage if the starting point in negotiations is with the CCEA's terms. This overlooks the fact that the terms and conditions which are continued are those which either were agreed to by the parties during their prior negotiations or were imposed upon *both* parties by the CIR, and thus are not the CCEA's "terms" at all. Moreover, giving the District the right to unilaterally implement its offer could be seen as giving *it* the upper hand, in that during negotiations, the CCEA would always be aware that the District had the ability to declare impasse, implement its own terms and conditions, and force the CCEA to appeal to the CIR if it wishes to change those terms and conditions.

We conclude that the District's argument that the CIR's inclusion of the contract continuation clause was a violation of public policy is without merit. We further conclude that the CIR had the authority to include a contract continuation in the parties' 2008-09 agreement. Because the District does not contest the conclusion that such a clause was prevalent within the array, we affirm the decision of the CIR with regard to the inclusion of the contract continuation clause.

2. Whether Pay for Unused Sick and Personal Leave Is Prevalent

[6] In its second assignment of error, the District argues that the CIR erred in finding that paying teachers for unused sick and personal leave was prevalent. We have said that the

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[22] *Clarkson Educ. Ass'n v. Colfax Co. School Dist.*, 13 C.I.R. 31 (1997).

"standard inherent in the word 'prevalent' is one of general practice, occurrence, or acceptance" and that contract terms need only be "'sufficiently similar and have enough like characteristics or qualities'" in order to be considered prevalent.[23]

The language in question provides in part:

> Any teacher having served the [District] for 10 or more years shall receive severance pay for each day of accumulated, unused sick leave or personal leave at the rate of one-third (1/3) of his/her daily earnings are to be based on the amount of the last contract, and the number of service days on the contract.

At least 10 of the 14 schools in the District's array have some sort of provision requiring payment for unused sick and personal leave as follows:

Adams Central: "Unused personal leave days will be compensated at a rate of $80 per day."

Aurora:

> All unused Sick Leave and Personal Leave days shall accumulate. Teachers who have taught five or more years in the Aurora Public Schools shall receive severance pay upon ceasing employment with the Aurora School District. Such pay shall be for each day of accumulated sick and personal leave at a rate of one-fourth (1/4) of the teacher's daily earnings.

Boone Central: "In a given year, a staff member may trade 2 sick days in for 1 additional personal day."

Centennial: "If six (6) or less sick leave days are used during the contract year, the teacher will be reimbursed one (1) day of the substitute teacher rate of pay . . . . Unused personal leave days will be reimbursed at the substitute rate of pay . . . ."

Centura:

> If the employee does not use two (2) personal days, the district will buy back both days at the substitute pay rate. If the employee uses only one (1) personal day, the remaining day may be rolled over to the next year, and the employee begins the year with three (3) personal

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[23] *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011, supra* note 3, 269 Neb. at 967-68, 698 N.W.2d at 55.

days. (The day must be rolled over and will not be bought back.)

Cross County:

Payment for Unused Sick Leave Days at Separation

Should a teacher, at the time of separation from the district, and having a minimum of five years with the district, have accumulated unused sick leave days, the teacher will be entitled, on or before June 15th immediately following the school year, to turn back to the school district [his or her] unused sick days and shall be paid by the School District fifty dollars ($50.00) each for two-thirds (2/3) of the days the teacher is entitled to. . . .

Payment for Unused Sick Leave Days Continuing Employee

Option I: Should a teacher, as of the last duty day of any school year, accumulate more than forty (40) unused sick leave days, the teacher will be entitled, on or before the June 15th immediately following the school year, to turn back to the school district any unused sick days in excess of forty (40) days, and shall be paid by the School district twenty dollars ($20.00) for each day the teacher is entitled to. . . .

Option II: Should a teacher, as of the last duty day of any school year, accumulate forty-three (43) or more sick days, the teacher will be entitled, on or before June 15th immediately following the school year, to turn back to the school district any unused sick days in excess of forty (40) days, and shall be granted one additional Personal Day for the following school year.

Doniphan-Trumbull:

Employees with a balance in excess of 45 days at the end of the contract year will be paid at 25% of the employee's daily rate of pay for each day in excess of 45.

. . . .

. . . Teachers . . . will be reimbursed at the end of the contract period $100 for each day of the unused leave.

Grand Island Northwest:

District #82 will pay for unused sick leave in excess of fifty (50) days cumulative sick leave at the rate of $50.00

per day. The maximum number of days that can be paid is ten (10) days. . . .

. . . .

. . . District #82 will reimburse unused personal leave in excess of two (2) days cumulative personal leave at the rate of $50.00 per day. The maximum number of days for reimbursement would be (2) days unless the teacher is resigning from the district, and then the maximum number of days would be four (4).

Columbus Lakeview:

Upon leaving the system, a teacher will be compensated up to a maximum of thirty (30) accumulated sick leave days. The District's sick leave buy-back policy does not apply to the personal sick leave bank days. The rate of compensation will be based on fifty (50) percent of a substitute's rate of pay at the time of separation.

St. Paul: No language allowing payment for unused sick and personal leave in contract.

Sutton:

At the end of each school year a teacher who has accumulated more than 50 days of sick leave will be given a stipend of $10 for each day in excess of 50 days.

. . . A teacher shall choose to have unused personal leave days added to [his or her] cumulative sick leave or reimbursed at the rate of 75% of the substitute rate of pay.

Twin River:

The teacher will be entitled on or before June 15th immediately following the end of the school year to turn back to the School District a maximum of ten (10) sick leave days. The School District shall then pay fifteen dollars ($15) for each day the teacher is entitled . . . .

. . . A teacher leaving the school system will receive fifteen dollars ($15) per day to a maximum of thirty (30) sick leave days for each day of unused accumulated sick leave.

Wood River Rural: No language allowing payment for unused sick and personal leave in contract.

York: No language allowing payment for unused sick and personal leave in contract.

Plainly, pay for unused leave is permitted by 10 of the 14 schools in the District's array. We therefore agree with the CIR and the CCEA that the inclusion of a provision providing for pay for unused leave is prevalent within the array, and to that extent, we affirm the CIR's order.

But we also conclude that on this record, the *terms* of the provision ordered by the CIR are not supported by a preponderance of the evidence. For example, we note that the rate of reimbursement differs in many of the schools in the array. In addition, some schools in the array pay for both sick and personal days, while others pay for just one or the other. Still other schools offer additional personal days in return for unused sick days rather than payment for unused days. We therefore remand this action to the CIR with directions to consider the appropriate terms of the pay for unused leave provision to be included in the parties' agreement.

VI. CONCLUSION

We affirm in part, and in part reverse and remand the decision of the CIR.

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

HEAVICAN, C.J., concurring in part, and in part dissenting.

I concur with the majority insofar as it concludes that the inclusion of payment for unused sick and personal leave is prevalent and should be included in the parties' agreement. I also concur with the majority's directive that the terms of such a clause should be considered by the CIR upon remand.

However, I disagree with the majority's conclusion that the CIR has the authority to include a contract continuation clause in the parties' agreement. Because I believe that such a clause is a violation of Neb. Rev. Stat. § 48-810.01 (Reissue 2004) and therefore in excess of the CIR's authority, I respectfully dissent from the portion of the majority's opinion concluding otherwise.

Section 48-810.01 provides that "[n]otwithstanding any other provision of law, the State of Nebraska and any political or governmental subdivision thereof cannot be compelled to enter into any contract or agreement, written or otherwise, with any

labor organization concerning grievances, labor disputes, rates of pay, hours of employment or conditions of work." I believe that essential to the question of whether this section has been violated is an understanding of the importance placed upon the bargaining and negotiation process under the Industrial Relations Act (Act).[1]

Under the Act, public employees are given the right to be "represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment and the administration of grievances arising thereunder."[2] To bargain in good faith under the Act requires "the performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or any question arising thereunder."[3] Public employers are required under the Act to bargain collectively; any failure to do so is generally considered a prohibited practice and is viewed as a violation of the Act.[4] And the CIR is given the authority to order parties to an industrial dispute to bargain collectively in situations in which the CIR believes the parties have failed to bargain or have not bargained in good faith.[5]

With this backdrop, I turn to the question of whether the CIR ordered the District to enter into a contract in violation of § 48-810.01. I acknowledge that the CIR's inclusion of a contract continuation clause was not an explicit order to enter into a contract. However, I would find the inclusion of such a clause akin to such an order and thus in violation of § 48-810.01.

In this case, the CIR's authority is limited to deciding industrial disputes for the contract year in dispute.[6] Unlike a situation in which the parties agree during the bargaining process to

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[1] Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2004 & Cum. Supp. 2008).

[2] § 48-837.

[3] § 48-816(1).

[4] § 48-824.

[5] § 48-816(1).

[6] § 48-818.

a contract continuation clause where such a clause is included *by the CIR* in the parties' agreement, the parties are potentially bound by terms that govern their relationship *beyond* that contract year. These would be terms that were previously imposed upon them *by the CIR* with no attempt by the parties to reach their own agreement through the bargaining process so essential to the Act.

Moreover, the CIR has only the authority given to it by statute, specifically, the authority to determine industrial disputes between employers and employees.[7] And this court has also held that such is not a violation § 48-810.01.[8] I would not disturb that holding. But in my view, the inclusion of a contract continuation clause is not the resolution of an industrial dispute. Instead, these types of clauses almost seem designed to resolve, without the input of either party to an agreement, *future* industrial disputes. As such, I would find it to be in excess of the CIR's authority to determine industrial disputes.

I find unpersuasive *Clarkson Educ. Ass'n v. Colfax Co. School Dist.*,[9] which the CCEA cites in support of its position. In that case, the CIR concludes that it is within its authority to include a contract continuation clause. But the primary basis for the CIR's decision in that case was a National Labor Relations Board case, *United States Pipe and Foundry Company v. N. L. R. B.*[10] I believe the CIR's reliance on that case was misplaced, as the case involved contract *duration* as a topic of mandatory bargaining. In my view, contract duration and contract continuation are two different things: duration is the length of any given contract as agreed upon by the parties, while continuation is the forced implementation of a contract upon both parties.

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[7] *School Dist. of Seward Education Assn. v. School Dist. of Seward*, 188 Neb. 772, 199 N.W.2d 752 (1972).

[8] See *id.*

[9] *Clarkson Educ. Ass'n v. Colfax Co. School Dist.*, 13 C.I.R. 31 (1997).

[10] *United States Pipe and Foundry Company v. N. L. R. B.*, 298 F.2d 873 (5th Cir. 1962).

The CCEA also relies on this court's decision in *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*.[11] I also find that unpersuasive. This court concluded in *Hyannis Ed. Assn.* that a deviation clause allowing the district to deviate from the bargained-for salary schedule affected wages and that thus, it was within the CIR's authority to include such a term in the parties' agreement. But because the issue in *Hyannis Ed. Assn.* was a deviation from the salary schedule, it had a direct impact on wages. Such is distinguishable from the contract continuation language at issue in this case.

I would conclude that the inclusion of a contract continuation clause by the CIR is akin to an order to enter into a contract, is contrary to the parties' right to bargain, and was a violation of § 48-810.01. And because I believe the CIR violated § 48-810.01, I would also conclude that the CIR exceeded its authority when it ordered a contract continuation clause to be included in the parties' agreement.

CONNOLLY, J., joins in this concurrence and dissent.

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[11] *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

STATE OF NEBRASKA, APPELLEE, V.
JON D. WOLLAM, APPELLANT.
783 N.W.2d 612

Filed June 18, 2010. No. S-09-768.

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: Courts: 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. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth

Amendment protections is a question of law that the appellate court reviews independently of the trial court's determination.

4. **Constitutional Law: Search and Seizure.** The Fourth Amendment guarantees the right to be free of unreasonable search and seizure.
5. **Police Officers and Sheriffs: Investigative Stops: Search and Seizure.** An investigative stop is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
6. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances—the whole picture—must be taken into account.
7. **Criminal Law: Eyewitnesses: Presumptions.** A citizen informant who has personally observed the commission of a crime is presumptively reliable.
8. **Criminal Law: Eyewitnesses: Words and Phrases.** A citizen informant is a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement.
9. **Criminal Law: Eyewitnesses: Search and Seizure.** Information from a reliable citizen informant may be accepted as true in order to justify a brief detention to determine whether or not a crime has been committed, is being committed, or is about to be committed.
10. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** An investigative stop, like probable cause, is to be evaluated by the collective information of the police engaged in a common investigation.
11. **Police Officers and Sheriffs: Eyewitnesses: Probable Cause.** A third-party report of suspected criminal activity must possess sufficient indicia of reliability to form the basis of an officer's reasonable suspicion.
12. **Police Officers and Sheriffs: Arrests: Probable Cause.** The existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.
13. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under the collective- or imputed-knowledge doctrine, information known to all of the police officers acting in concert can be examined when determining whether the officer initiating the stop had reasonable suspicion to justify a stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Appeal from the District Court for Saline County, VICKY L. JOHNSON, Judge, on appeal thereto from the County Court for Saline County, J. PATRICK MCARDLE, Judge. Judgment of District Court affirmed.

Kirk E. Naylor, Jr., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Jon D. Wollam was charged with driving under the influence of alcohol (second offense), refusal to submit to a preliminary breath test, refusal to submit to a chemical test, child abuse, and having an open container of alcohol in a vehicle. He moved to suppress the evidence from the traffic stop, alleging that the stop was not supported by a reasonable suspicion. The Saline County Court overruled the motion. Wollam was subsequently convicted of refusal to submit to a preliminary breath test and refusal to submit to a chemical test. He appealed to the Saline County District Court, which affirmed his convictions and sentences.

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.*

[3] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

FACTS

On March 7, 2008, the Lancaster County emergency dispatch center telephoned the emergency dispatch center in Crete, Nebraska, to relay information received about a drunk driver. The call was answered by Dawn Edmonds, an officer with the Crete Police Department. The Lancaster County dispatcher

stated that she had received a report from a woman that her husband was driving drunk. The dispatcher said the driver had left Hallam, Nebraska, 30 minutes earlier and was on his way to Crete High School to pick up his children. The dispatcher described the vehicle as a white "dually" pickup with signs on the sides that said "JW Electric." It was believed that the driver would travel on Highway 33.

As a result of the call, Edmonds and Officer Brian Stork drove toward Crete High School, and on their way, they observed a vehicle matching the description received earlier. Stork made a U-turn to follow the truck and activated the patrol car's overhead emergency lights to stop the truck.

Stork approached the driver and asked him to get out of the vehicle and move to the rear of the truck. The driver was identified as Wollam, and his two sons were in the vehicle. Both Stork and Edmonds reported noticing an odor of alcohol emitting from Wollam's person. Stork administered the horizontal gaze nystagmus field sobriety test. Based on the report from the Lancaster County dispatch center, observation of the odor of alcohol, and indicators of impairment on the field sobriety test, Stork believed Wollam was under the influence of alcohol. Wollam refused to submit to a preliminary breath test. He was read the postarrest chemical test advisement and asked to provide a blood sample. He refused and was arrested.

Wollam was charged with driving under the influence of alcohol (second offense), refusal to submit to a preliminary breath test, refusal to submit to a chemical test, child abuse, and possessing an open alcoholic beverage container. He moved to suppress any evidence gathered as a result of the stop, arguing that the stop was not supported by a reasonable suspicion, based upon articulable facts, that the motor vehicle was being operated in violation of the law. Wollam claimed the stop violated his rights under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

During the suppression hearing, the State offered exhibit 1, which is a recording of the call from the Lancaster County dispatch center to the Crete dispatch center. Wollam had no objection, and the trial court received the exhibit. After testimony

from Edmonds and Stork, Wollam offered exhibit 2 into evidence, which is a recording of the call from Wollam's wife to the Lancaster County dispatch center. The parties stipulated to the authenticity of the recording. The State objected to the relevance of the recording, and the court received the exhibit "subject to relevancy."

The trial court overruled the motion to suppress. It found that the officers, relying on a report relayed to them by the Lancaster County dispatch center, located Wollam's vehicle near the location mentioned in the report. The description of the vehicle was consistent with the report. The court found that the officers received what they believed to be a valid report upon which they should act and did so. The court concluded the officers had a sufficient articulable reason to effectuate a stop.

At trial, the State offered exhibits 1 and 2, along with exhibit 3, which was Stork's police report of the incident. Wollam stipulated that the police report accurately reflected what Stork's testimony would be at trial. Wollam stated that the stipulation was subject to his objection that the traffic stop was illegal. The trial court received exhibits 1, 2, and 3 without objection. The court noted that Wollam had preserved his objection to the traffic stop.

Wollam was found guilty of refusal to submit to a preliminary breath test and refusal to submit to a chemical test. He was ordered to pay fines totaling $500 and was placed on probation for 12 months.

Wollam appealed his convictions and sentences to the district court. He alleged the county court erred in overruling his motion to suppress. The district court remanded the cause to the county court to determine whether the county court had taken exhibit 2 into consideration in its ruling on Wollam's motion to suppress. Exhibit 2 had been received at the suppression hearing subject to the State's objection based on relevancy. The record did not indicate whether the county court ruled on the relevancy objection. However, exhibit 2 was admitted at trial without objection. In response to the district court's request, the county court stated that exhibit 2 was irrelevant for purposes of the motion to suppress and that, therefore,

the county court had not considered it in ruling on the motion to suppress.

The district court found that the initial telephone call about the drunk driver was not anonymous, because it came from Wollam's wife and she was accountable for her report. She described the vehicle in detail and reported where the vehicle could be found. The description of the vehicle was verified by law enforcement.

The district court concluded that the most important indicia of reliability was the motivation the informant had to tell the truth to protect her children from harm should they get in the vehicle with a potentially drunk driver. The court found, based on the totality of the circumstances, that there was sufficient reasonable suspicion to conduct an investigatory stop of Wollam's vehicle. The district court affirmed the judgment and sentences of the county court. Wollam appeals.

ASSIGNMENT OF ERROR

Wollam asserts, summarized and restated, that the district court erred in affirming the county court's order overruling his motion to suppress.

ANALYSIS

[4] The issue framed by the district court was whether the telephone call from Wollam's wife to the Lancaster County dispatch center was sufficient to allow the officers to effectuate a stop within the requirements of the Fourth Amendment. The Fourth Amendment guarantees the right to be free of *unreasonable* search and seizure. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). This guarantee requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. *Id.*, citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Wollam argues that the evidence obtained from the stop of his vehicle should have been suppressed because the officers did not have a reasonable, articulable suspicion of criminal activity. In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment,

we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

The record before us contains recordings of the call to the Lancaster County dispatch center (exhibit 2) and the call to the Crete dispatch center (exhibit 1). These exhibits were offered and received at trial without objection. Both are relevant to our determination whether the police had a reasonable suspicion to stop Wollam's vehicle. We therefore summarize the important parts of each call.

In exhibit 2, the caller to the Lancaster County dispatch center identified herself by name and as Wollam's wife. She stated that her husband had "just left here" and was "incredibly drunk." She added, "We're in the middle of a divorce." She stated that her husband was driving a white GMC dually pickup truck and that he was going to pick up their children at the Crete High School. She did not know the license plate number but knew that the truck had "JW Electric" on its sides. She described the route Wollam would take, and she provided her telephone number. In exhibit 1, the Lancaster County dispatch center then called the Crete dispatch center to advise of the report from a woman who stated that her husband was driving drunk. The dispatcher relayed the description of the truck and the route it would be traveling.

The Crete police officers did not observe any illegal activity on Wollam's part. They were acting solely on the report from the Lancaster County dispatch center that a white dually pickup was being driven to Crete High School by a driver who was intoxicated.

The issue is whether the calls described in exhibits 1 and 2 provided sufficient foundation to give the officers reasonable suspicion to stop the vehicle. Wollam argues that an anonymous report of a drunk driver, including a description of the vehicle, is not sufficient to justify a stop of the vehicle unless the investigating officer observes independent evidence to suggest that the driver is impaired.

[5,6] An investigative stop is "'limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning.'" *State v. Van Ackeren*, 242 Neb. 479, 486, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984). While this type of encounter is considered a "seizure" and invokes Fourth Amendment safeguards, "'because of its less intrusive character [it] requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.'" *Van Ackeren*, 242 Neb. at 486, 495 N.W.2d at 636.

> "'"[A]n investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account. . . ."'"

Id. at 497, 495 N.W.2d at 642. "'"'The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. . . .'"'" *Id*. (emphasis omitted). An officer is not required to wait until a crime has occurred before making an investigative stop. *Id*.

[7] We have held that the factual basis for a stop "need not arise from the officer's personal observation, but may be supplied by information acquired from another person. When the factual basis is supplied by another, the information must contain sufficient indicia of reliability. A citizen informant who has personally observed the commission of a crime is presumptively reliable." *State v. Bowley*, 232 Neb. 771, 773, 442 N.W.2d 215, 217 (1989).

In the case at bar, the information came from a reliable citizen informant. The call came from the wife of the person driving the vehicle. The caller gave her name, identified herself as Wollam's wife, and provided her telephone number. She reported that her husband was "incredibly drunk," and she

described his truck and the route he would take to get to Crete High School.

[8] A "citizen informant" is "a citizen who purports to have been the witness to a crime who is motivated by good citizenship and acts openly in aid of law enforcement." *State v. Lammers*, 267 Neb. 679, 686, 676 N.W.2d 716, 724 (2004).

> Unlike the police tipster who acts for money, leniency, or some other selfish purpose, the citizen informant's only motive is to help law officers in the suppression of crime. . . . Unlike the informant who acts out of self-interest, the citizen informant is without motive to exaggerate, falsify, or distort the facts to serve his or her own ends.

Id. at 687, 676 N.W.2d at 724.

In *Bowley, supra*, a police officer was flagged down by two people on a motorcycle who reported that a pickup behind them had attempted to force them off the road. The motorcycle riders identified the pickup as it drove past while they were talking to the officer. The driver of the pickup was arrested for operating a motor vehicle while intoxicated. He sought to suppress the evidence obtained as a result of the stop.

We held in *Bowley, supra*, that while the informants were unidentified until after the driver was stopped, the information from the motorcycle riders was presumptively reliable. We stated that the court balances several factors in determining whether an investigatory stop is reasonable. These factors include the reliability and credibility of the informant, the description of the vehicle, the officer's observation of traffic violations, and the timelag between the report of criminal activity and the stop.

This court had previously considered similar factors in *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988). An employee of a service station approached a police officer parked next to the station. The employee pointed to a vehicle in a nearby parking lot and told the officer that the driver had driven over the curb near the front door of the station. The employee reported that the driver had come into the station to purchase chewing gum and that he smelled strongly of alcohol. The police officer observed the vehicle start and stop three or four times

in the parking lot and followed it for a short distance, but did not observe any moving violations. On stopping the vehicle, the officer noted slurred speech and a strong odor of alcohol on the driver's breath. On appeal, the driver claimed the initial stop was illegal.

We stated:

> "The reliability of the informant varies from an anonymous telephone tipster to a known citizen's face-to-face meeting with police officers. The vehicle description varies from minimal to very detailed. The reported location of the vehicle varies from pinpoint accuracy to a general direction of travel. *The observation of traffic violations ranges from none to several*. The shorter the time lag, the more likely the stop is valid."

Id. at 827, 420 N.W.2d at 308 (emphasis supplied), quoting *State v. Warren*, 404 N.W.2d 895 (Minn. App. 1987).

In *Ege, supra*, there was a face-to-face conversation between the informant and the officer and the informant identified himself by name. The informant's knowledge was based on his observation of the defendant's driving and an in-person encounter with the defendant. We stated that the informant was "of the most reliable type." *Id.* at 827, 420 N.W.2d at 308.

We stated in *State v. Bridge*, 234 Neb. 781, 452 N.W.2d 542 (1990), that an investigatory stop may be justified even if the law enforcement officer does not observe any erratic driving or other traffic violations. In that case, the defendant went to the police station to look for his dog. An officer directed the defendant to pick up the dog from the pound. The officer informed another officer that the defendant might be driving while under the influence and provided a description of the defendant, his vehicle, and the license plate number. The second officer drove to the pound, saw the defendant drive into the parking lot, and questioned him when he came out of the pound. The officer could smell alcohol on the defendant's breath and administered field sobriety tests. As a result of the tests, the officer determined that the defendant was under the influence of alcohol and arrested him. The defendant challenged the stop and sought to suppress the results of his urine test.

On appeal, we found that the evidence established the arresting officer had a reasonable basis supported by sufficient facts to justify his investigatory stop even though neither officer observed any erratic driving or other traffic violations.

> Because the purpose of an investigative stop "is to clarify ambiguous situations, 'even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.'"

Id. at 784, 452 N.W.2d at 545, quoting 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 3.8 (West 1984). "The State's interest in preserving evidence and prevention of crime in a case such as this outweighs the defendant's [F]ourth [A]mendment interests." *Bridge*, 234 Neb. at 784, 452 N.W.2d at 545, citing *Wibben v. N.D. State Highway Com'r*, 413 N.W.2d 329 (N.D. 1987).

[9] Information from a reliable citizen informant "may be accepted as true in order to justify a brief detention to determine whether or not a crime has been committed, is being committed, or is about to be committed." *Bridge*, 234 Neb. at 785, 452 N.W.2d at 546, citing *People v. Willard*, 183 Cal. App. 3d Supp. 5, 228 Cal. Rptr. 895 (1986). In *Willard*, the California court stated:

> "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'"

183 Cal. App. 3d Supp. at 10, 228 Cal. Rptr. at 898, quoting *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978).

Wollam claims that his wife had an ulterior motive in calling law enforcement because they were in the process of getting a divorce. This information was given to the Lancaster County dispatch center but was not conveyed to the Crete police

officers. The officers knew only that the report of a drunk driver came from a wife about her husband and that he was on his way to pick up their children.

Wollam argues that the recording of the call from his wife to the Lancaster County dispatch center was improperly received into evidence and that only the call from Lancaster County to Crete should have been considered. We disagree. Both calls may be considered. Although Wollam offered the recording of the call to Lancaster County into evidence at the hearing on the motion to suppress, and the State objected, it makes no difference in the result. Both calls are relevant to our analysis. At trial, the State offered both recordings into evidence. Wollam did not object but stated that the recordings were subject to his claim that "this evidence" was illegally seized as a result of an improper traffic stop. The trial court then received exhibits 1, 2, and 3.

In the case at bar, neither party objected to the recording from Wollam's wife to Lancaster County when it was offered at trial. The parties cannot now object to use of the recordings to determine whether there was reasonable suspicion for the traffic stop.

Wollam seems to argue that the information received by the Lancaster County dispatch center should not have been relied on by the Crete Police Department. We have held that "'[a] reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle *without any proof of the factual foundation* for the relayed message.'" *State v. Soukharith*, 253 Neb. 310, 321, 570 N.W.2d 344, 354 (1997), quoting *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977).

> However, "if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information."

Soukharith, 253 Neb. at 321-22, 570 N.W.2d at 354, quoting *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).

[10] "Thus, it is irrelevant whether an officer making a stop in reliance on a radio bulletin is aware of the factual foundation for the bulletin, so long as the factual foundation is sufficient to support a reasonable suspicion." *Soukharith*, 253 Neb. at 322, 570 N.W.2d at 354. We stated that if officers placing information into a national computer system had articulable facts sufficient to support a reasonable suspicion, an officer making a stop can rely upon the computer report as the basis for the stop. We held that "[a]n investigative stop, like probable cause, is to be 'evaluated by the collective information of the police engaged in a common investigation.'" *Id.*, quoting *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993). See, also, *Nauenburg v. Lewis*, 265 Neb. 89, 655 N.W.2d 19 (2003).

In *Hensley*, 469 U.S. at 232, the Court stated, "The law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal."

If a 911 emergency dispatch call has sufficient indicia of reliability, it can supply the necessary objective basis for suspecting criminal conduct. *U.S. v. Cutchin*, 956 F.2d 1216 (D.C. Cir. 1992). In such a case, a dispatcher may alert other officers by radio, and those officers may rely on the report, even though they cannot vouch for it. *Id.* See, also, *U.S. v. Kaplansky*, 42 F.3d 320 (6th Cir. 1994) (officers could rely on dispatcher's conclusion about suspicious activity without inquiring into basis of dispatcher's knowledge).

[11] A third-party report of suspected criminal activity must possess sufficient indicia of reliability to form the basis of an officer's reasonable suspicion. *U.S. v. Fernandez-Castillo*, 324 F.3d 1114 (9th Cir. 2003). A dispatcher's knowledge may be properly considered as part of the analysis of reasonable suspicion. *Id.* In *Fernandez-Castillo*, a highway patrol dispatcher who received a report of erratic driving from two transportation department employees radioed the report to a law enforcement officer. The officer stopped the vehicle even though he did not personally observe any traffic violation. The U.S. Court of Appeals for the Ninth Circuit found that the

initial report possessed indicia of reliability to be taken into consideration to determine whether the officer had reasonable suspicion to stop the vehicle: The report described the suspect car in detail, the officer met the car in exactly the place it would be expected to travel based on the description given in the report, and the officer could have reasonably concluded that the report was based on observations made contemporaneously to the dispatch.

[12] The collective knowledge of a police officer has also been applied to the determination of probable cause. "The existence of probable cause justifying a warrantless arrest, however, is tested by the collective information possessed by all the officers engaged in a common investigation." *State v. Wegener*, 239 Neb. 946, 949, 479 N.W.2d 783, 786 (1992). "Under this 'collective knowledge' doctrine, an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who does have probable cause." *Id.*

In *Wegener, supra*, an officer was dispatched to a one-car accident and suspected the driver had been drinking. The driver was transported to a hospital. The officer investigated the accident and radioed the dispatcher to request that a second officer go to the hospital to obtain a blood sample from the driver. The second officer caused a sample of the driver's blood to be drawn and then arrested him for driving under the influence. We held that "only an imprudent person could conclude other than that [the driver] probably had been driving while under the influence of alcohol," based on the information obtained by the two officers. *Id.* at 950, 479 N.W.2d at 786.

Other courts have also adopted the imputed or collective knowledge doctrine. Relying on *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), the Idaho Court of Appeals stated, "An officer receiving a radio dispatch may be expected to take the message at face value and act upon it." *Wilson v. Idaho Transp. Dept.*, 136 Idaho 270, 275, 32 P.3d 164, 169 (Idaho App. 2001). "Whether the officer had the requisite reasonable suspicion to detain a citizen is determined on the basis of the totality of the circumstances, i.e., the collective

knowledge of all those officers and dispatchers involved." *Id.* at 276, 32 P.3d at 170. See, also, *State v. Carr*, 123 Idaho 127, 844 P.2d 1377 (Idaho App. 1992) (collective knowledge of police officers involved in investigation, including dispatch personnel, may support finding of probable cause).

The North Dakota Supreme Court addressed whether a dispatcher's knowledge of the identity of an informant may be imputed to the investigating officer. *State v. Miller*, 510 N.W.2d 638 (N.D. 1994). The court held, "Where one officer relays a directive or request for action to another officer without relaying the underlying facts and circumstances, the directing officer's knowledge is imputed to the acting officer." *Id.* at 643. "Thus, an officer, who is unaware of the factual basis for probable cause, may make an arrest upon a directive." *Id.*

[13] "Under the 'collective- or imputed-knowledge' doctrine, information known to all of the police officers acting in concert can be examined when determining whether the officer initiating the stop had reasonable suspicion to justify a *Terry* stop." *People v. Ewing*, 377 Ill. App. 3d 585, 593, 880 N.E.2d 587, 595, 316 Ill. Dec. 851, 859 (2007). "[I]f the officer initiating the stop relies on a dispatch, the officer who directed the dispatch must have possessed sufficient facts to establish probable cause to make the arrest." *Id.* at 594, 880 N.E.2d at 595, 316 Ill. Dec. at 859.

In *Ewing, supra*, the dispatcher gave the officers the make, model, color, and license plate of the vehicle; told the officers that the vehicle contained two male occupants; and told the officers the direction the vehicle would be traveling. The court stated, "[C]alls made to a police emergency number are considered more reliable than other calls because the police have enough information to identify the caller even if the caller does not give his or her name." *Id.* at 595, 880 N.E.2d at 596, 316 Ill. Dec. at 860.

> Where a nonanonymous caller reports a reckless, erratic, or drunk driver, the police must be permitted to stop the reported vehicle without having to question the caller about the specific details that led him or her to call so long as the nonanonymous tip has a sufficient indicia of reliability. Reckless and erratic drivers are likely

> impaired, and such drivers present an imminent danger to other motorists. A police officer should not have to wait to observe such driver commit a traffic violation or obtain specific details supporting the caller's conclusion before stopping the reported vehicle.

Id. at 597, 880 N.E.2d at 597-98, 316 Ill. Dec. at 861-62.

The investigatory stop in this case was based on a report from an emergency dispatch center to another law enforcement agency. The dispatcher conveyed that a woman had reported her husband was driving under the influence of alcohol. The husband was on his way to pick up their children. The woman was concerned for the children's safety. She provided the Lancaster County dispatch center with her name and telephone number, a detailed description of the truck, and the direction in which it was traveling.

The Lancaster County dispatch center relayed all the information to the Crete police officers, except that the caller and the driver were in the middle of a divorce. The Crete police officers had sufficient information and were within their authority to rely on it and take action. The officers were not required to personally observe erratic driving by Wollam. The information from the Lancaster County dispatch center could be imputed to the Crete Police Department, even though every detail was not conveyed.

The information had sufficient indicia of reliability. Although the Crete police officers did not observe any traffic violation, such observation is not required when the totality of the circumstances is taken into consideration.

We find no error on the record of the county court. Its order overruling Wollam's motion to suppress was correct. The investigatory stop did not violate Wollam's constitutional rights. Our independent review confirms that the district court was correct in affirming the county court's judgment.

CONCLUSION

The judgment of the district court, which affirmed the judgment of the county court, is affirmed.

AFFIRMED.

TERRY CARMICHEAL, APPELLEE, V. TRACY ROLLINS, APPELLANT.

783 N.W.2d 763

Filed June 18, 2010. No. S-09-775.

1. **Jurisdiction: Judgments: Appeal and Error.** 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.
2. **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.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Actions: Child Custody.** A proceeding regarding custody determinations is a special proceeding.
6. **Actions: Armed Forces: Civil Rights: Federal Acts: Intent.** One of the articulated purposes of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 et seq. (2006), is to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.
7. **Armed Forces: Federal Acts: Intent.** The Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 et seq. (2006), is intended to strengthen and expedite the national defense by enabling persons in the military service to devote their entire energy to the defense needs of the nation.
8. **Actions: Armed Forces: Federal Acts: Intent.** The protections afforded by the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 et seq. (2006), are intended to be far ranging, applying to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this act.
9. **Jurisdiction.** A request for a stay, or the grant of a stay, does not affect whether a court has jurisdiction.
10. **Child Custody: Child Support: Final Orders.** The grant of temporary custody and child support must be considered separately, and it is not a final order.

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

Robert Wm. Chapin, Jr., for appellant.

Eddy M. Rodell for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Tracy Rollins appeals the temporary grant of custody to Terry Carmicheal, the father of her child. Rollins alleges that the Lancaster County District Court did not have jurisdiction to enter the temporary order under the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. § 501 et seq. (2006). Rollins further alleges that the district court erred when it granted Carmicheal's petition for child support while she is deployed on active duty. Carmicheal argues that the district court had jurisdiction, that the SCRA does not apply to these circumstances, and that the court's temporary grant of custody is not a final, appealable order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008). We affirm the order of the district court.

FACTS

An order of paternity, custody, child support, and visitation was entered by the district court for Lancaster County on January 9, 2002, regarding the minor child of Rollins and Carmicheal. Rollins was given primary custody and support of the child at that time. The original order is not part of the record, although the district court took judicial notice of the order.

On April 9, 2009, Rollins filed an application to modify the original order due to a change in circumstances and requested an increase in support. On May 6, Rollins, a member of the U.S. Army Reserves, received orders deploying her overseas for a period of 400 days commencing on July 5. Carmicheal responded to the application to modify by entering a cross-complaint requesting custody of their child and support while Rollins was deployed.

On May 29, 2009, a hearing was held on the motions, including Rollins' motion to stay the proceedings under the SCRA. After that hearing, the district court scheduled an evidentiary hearing for June 17, at which hearing Rollins was present. Following the evidentiary hearing, the district court

entered an order denying Rollins' motion to stay under the SCRA because her military duty did not materially affect her ability to appear. The district court then granted temporary custody to Carmicheal while Rollins was on active duty and granted Carmicheal's request for child support while he had custody of the minor child. The court also stated that its order was temporary and was intended only to enforce the original order. Pursuant to that original order, custody of the child would revert to Rollins when she returned from active duty, and Carmicheal would be required to pay Rollins child support as under the original order. Rollins appeals.

ASSIGNMENTS OF ERROR

Rollins assigns that the district court erred in (1) finding that it had jurisdiction to hear the case, (2) not allowing her to exercise her family plan as submitted to the Army, and (3) awarding child support based on her overseas pay and not on her average income for a 3-year period.

STANDARD OF REVIEW

[1] 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.[1]

ANALYSIS

Denial of Motion to Stay Under SCRA Is Final, Appealable Order

[2-4] Because Carmicheal has alleged that we do not have jurisdiction, we first turn to the question of whether the trial court's order was final and appealable. 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.[2] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal

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[1] See *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 772 N.W.2d 88 (2009).

[2] *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

from which the appeal is taken.[3] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[4]

[5] We have held that a proceeding regarding custody determinations is a special proceeding.[5] However, we have not previously addressed whether the denial of a stay under the SCRA is an order affecting a substantial right. We find that it is.

[6-8] One of the articulated purposes of the SCRA is "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."[6] The SCRA is also intended to "strengthen . . . and expedite the national defense" by enabling persons in the military service "to devote their entire energy to the defense needs of the Nation."[7] The protections afforded by the SCRA are intended to be far ranging, applying to "any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to [the SCRA]."[8] Refusal to grant a stay of civil proceedings may result in the precise wrong that the SCRA was intended to prevent. In effect, if a servicemember is unable to defend himself or herself, he or she could be subjected to a default judgment, or other legal penalty, while serving his or her country.[9] Therefore, we find that the denial of a stay affects a substantial right.

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[3] *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

[4] *Id.*

[5] See *id.*

[6] 50 U.S.C. app. § 502(2).

[7] § 502(1). See, also, *Lenser v. McGowan*, 358 Ark. 423, 191 S.W.3d 506 (2004).

[8] § 512. See, also, *In re Marriage of Bradley*, 282 Kan. 1, 137 P.3d 1030 (2006).

[9] *Lenser, supra* note 7; *In re Marriage of Brazas*, 278 Ill. App. 3d 1, 662 N.E.2d 559, 214 Ill. Dec. 993 (1996).

Trial Court Did Not Err When It Denied Rollins' Motion to Stay

Having determined that Rollins' appeal is properly before us, we next turn to the question of whether the trial court erred when it denied Rollins' motion to stay. Section 522(a) states that "[t]his section applies to any civil action or proceeding . . . in which the plaintiff or defendant at the time of filing an application under this section . . . (1) is in military service or is within 90 days after termination of or release from military service." A servicemember can request a stay under § 522 at any stage before final judgment in a civil proceeding to which the servicemember is a party. Upon application by the servicemember for a stay the court "shall . . . stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met."[10]

In order to qualify for a stay of the proceedings, the servicemember shall include "[a] letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear."[11] The servicemember is also required to include a "letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter."[12]

[9] With the requirements set forth in the SCRA in mind, we also consider case law from other states addressing requests for a stay under the SCRA. Although we note Rollins argues that the request for a stay under the SCRA deprives a court of jurisdiction, she has provided no case law to support that argument. And, as one court noted, granting a stay merely holds the case in abeyance until the servicemember can return to defend

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[10] § 522(b)(1).

[11] § 522(b)(2)(A).

[12] § 522(b)(2)(B).

herself.[13] A request for a stay, or the grant of a stay, does not affect whether a court has jurisdiction.[14]

On May 28, 2009, Rollins filed a motion to stay as part of her affidavit in opposition to Carmicheal's request for temporary custody and support. In her affidavit, Rollins attested that she would be on maneuvers until May 31, but would return to Nebraska and remain in the state until approximately July 5. Rollins' commanding officer also submitted a letter attesting that Rollins would be unavailable to take part in court proceedings. However, the record indicates that Rollins was able to appear at the hearing which took place on June 17. As such, the district court found that her military service did not materially affect her ability to appear.

We find that while Rollins complied with the requirements of the SCRA to request a stay, she has not demonstrated that her service materially affected her ability to appear. In fact, Rollins did appear during the period of time she indicated that she would be present in Lincoln before being deployed. Therefore the district court did not err in determining that Rollins was not entitled to a stay under the SCRA.

Rollins' Remaining Assignments of Error

[10] We need not address Rollins' other assignments of error. As previously noted, the denial of a stay under the SCRA is a final order under these circumstances. The grant of temporary custody and child support must be considered separately, and it is not a final order.[15] As in *Steven S. v. Mary S.*,[16] where the temporary custody order was contingent on an outside event, the trial court's order is contingent upon Rollins' deployment. Custody will revert to Rollins upon her release from active duty, and Carmicheal will resume paying child support. Furthermore, as the district court noted and all parties conceded, the original order provides that custody of the parties' minor child will be with Carmicheal while Rollins is on active duty. Under these

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[13] *Lenser, supra* note 7.

[14] *Id.*

[15] *Steven S., supra* note 3.

[16] See *id.*

circumstances, the trial court's order is not final, but is a temporary order that merely enforces the original order of custody and support.

CONCLUSION

We find that the denial of a stay under the SCRA is a final, appealable order, but that Rollins was not entitled to a stay because her service did not materially affect her ability to appear. We consider the temporary order of custody separately, however, and under prior case law, a temporary order of custody is not a final, appealable order. Therefore, we do not reach Rollins' other assignments of error, and we affirm the decision of the district court.

AFFIRMED.

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

I concur in the majority's holding that Rollins could appeal from the district court's order denying her motion to stay the child custody proceedings. But I disagree with the reasoning for that conclusion. And I dissent from the majority opinion's holding that Rollins could not appeal from the modification order temporarily changing custody and support obligations until Rollins' military deployment ends.

THE SCRA ORDER IS FINAL BECAUSE IT DISPOSED OF EVERY ISSUE

The majority opinion concludes that Rollins could appeal because custody proceedings are special proceedings and because the court's refusal to grant a stay "may" result in an order adversely affecting a servicemember's civil rights. I agree that the Servicemembers Civil Relief Act (SCRA)[1] is intended to prevent the imposition of orders that adversely affect a servicemember's civil rights during his or her military service. But under Neb. Rev. Stat. § 25-1902 (Reissue 2008), a special proceeding order is final only if it affects a substantial right.

Although parents have a constitutionally protected interest in the care, custody, and control of their children,[2] Rollins

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[1] 50 U.S.C. app. § 501 et seq. (2006).

[2] See *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

appeared at the child custody hearing, and her right to be heard on the custody issue was obviously not affected by the SCRA order. And orders that simply move a case forward to trial do not affect a substantial right.[3] In short, the order denying a stay did not affect a "substantial right" in the manner that we have often interpreted that term under § 25-1902. I concede navigating the appellate swamp of special proceedings and nailing down what is a substantial right can be perplexing. But in this case, I believe Rollins can appeal under § 25-1902 because the order completely disposed of the issue in the SCRA proceeding.

Initially, it appears that the majority opinion fails to separately consider whether the orders from the SCRA proceeding and custody proceeding were issued in a special proceeding. The first issue is whether Rollins could appeal from the SCRA order denying a stay of the custody proceeding. And that issue is separate from whether she could appeal from the temporary custody order.

Under § 25-1902, an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[4]

Obviously, a SCRA proceeding is not limited to custody proceedings and is not a necessary step in such proceedings. Instead, it is a stand-alone, federally authorized proceeding, which is similar in effect to a motion to stay judicial proceedings and compel arbitration. Both types of motions invoke a procedure that can result in an order to postpone (or to dismiss in arbitration cases) the main action for reasons that exist independently of the parties' dispute. The proceeding is authorized regardless of whether a pleading raises the right to a stay (or

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[3] See *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

[4] See *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

dismissal). And the order in either procedure does not resolve the parties' dispute.[5]

We have held that motions to compel arbitration are special proceedings because they are a specific statutory remedy that is not itself an action or a step or proceeding within the overall action.[6] Under that definition, I believe a motion to stay a judicial proceeding under the SCRA is similarly a special proceeding. But to be appealable, an order in a special proceeding must also affect a substantial right.[7] In an arbitration case, we have held that if the Legislature has not specifically authorized an appeal from an arbitration order,[8] whether a party can appeal from the order depends upon whether it affects a substantial right.[9]

We have often stated that a substantial right is an essential legal right, not a mere technical right.[10] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant before the order from which he or she is appealing.[11] But our statements have been criticized as failing to provide consistent guidance for determining when an order from a special proceeding is final.[12] And our recent arbitration cases show that a substantial right has more than one meaning.

In *Webb v. American Employers Group*,[13] we held that an order denying the insurer's motion to compel arbitration affected a substantial right in a special proceeding because it

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[5] Compare *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[6] See, *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[7] See § 25-1902.

[8] See Neb. Rev. Stat. § 25-2620 (Reissue 2008).

[9] See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

[10] See, e.g., *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[11] See *id.*

[12] See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

[13] *Webb, supra* note 6.

prevented the insurer from enjoying the contractual benefit of its agreement to arbitrate disputes. In *Webb*, we interpreted substantial right to mean the insurer's contractual right. In other special proceedings, we have similarly placed emphasis on the right adversely affected by the order.

For example, in juvenile cases, detention, adjudication, and disposition orders are final and appealable because each stage of the proceeding affects parental rights.[14] Appellate review of state interference in the parent-child relationship cannot wait until the court ultimately determines compliance with a rehabilitation plan or decides whether to reunite the family or terminate parental rights. Both juvenile cases and probate cases are examples of what one commentator has called multifaceted proceedings: long-term proceedings resolving interrelated issues at different stages of the proceedings.[15] In appeals from multifaceted proceedings, I believe the focus should be on whether an order's effect on the parties' rights is significant enough to require immediate appellate review even if other issues are left to be resolved.[16]

But hearings to compel arbitration or stay judicial proceedings, like other special proceedings, are not a part of a whole. They are stand-alone proceedings intended to resolve discrete issues. Unlike multifaceted proceedings, they do not involve protracted litigation of interrelated issues. And our identification of the substantial right in *Webb* as a contractual right conflicts with another recent arbitration case. These cases illustrate that we have sometimes struggled to define a substantial right in stand-alone special proceedings.

In *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*,[17] the State appealed from the trial court's order granting the

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[14] See, *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

[15] See Lenich, *supra* note 12. See, also, *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

[16] Compare *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007), with *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[17] *State ex rel. Bruning, supra* note 9.

defendants' motion to compel arbitration and dismissing the State's declaratory judgment action. We concluded this was also a final order. But instead of focusing on the State's substantial right as we had in *Webb*, we focused on the relief granted in the special proceeding:

> Because "the contractual benefit of arbitrating the dispute between the parties [under the federal Arbitration Act] as an alternative to litigation" is ordinarily a substantial right . . . and because the court dismissed the declaratory judgment action, we determine that under § 25-1902, the order was a final order of the first type, i.e., one which affected a substantial right and which determined the action and prevented a judgment. The order to dismiss the action determined the action and prevented the State from receiving the declaratory judgment that it sought. We therefore conclude that under § 25-1902, the order is a final order for purposes of appeal.[18]

Our conclusion that the order prevented a declaratory judgment was correct. But on further reflection, I believe we should not have focused on the relief granted but on whether the order disposed of all the issues. Because we decided the issue on the trial court's dismissal of the main action, the order lost its characterization as a special proceeding order and became an order issued within an action. And we normally hinge our substantial right determinations on whether the order adversely affected a substantial right of the appellant.[19] This determination follows from the rule that only a party aggrieved by an order or judgment can appeal.[20]

But in *State ex rel. Bruning*, the State's substantial right adversely affected by the order could not have been the State's contractual right to arbitrate. Instead, the case is an example of the difficulty of dealing with a final order statute that requires the order to affect an appellant's substantial

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[18] *Id.* at 317, 746 N.W.2d at 678, quoting *Webb, supra* note 6.

[19] See, e.g., *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

[20] *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

right.[21] But I believe that we should resolve this problem by incorporating the meaning of a substantial right under the first category of § 25-1902—an order affecting a substantial right in an action.

As stated, final orders under the first category comprise orders that are issued during a step in an action and that dispose of all the issues, thus preventing a final judgment. Most notably, we have held that a summary judgment proceeding is a step or proceeding within the overall action, not a special proceeding.[22] Orders overruling motions for summary judgment are not appealable, and orders granting partial summary judgment are not appealable unless they decide the action and prevent a judgment.[23]

> To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.[24]

In short, if the court retains the cause for any further purpose, we will not review the order until the court issues a final judgment in the action.[25] For final orders under the first category, we do not normally analyze the substantial right adversely affected by the order except to sometimes conclude that the order disposed of the appellant's claims.[26] But, clearly, no substantial right is affected by an order under the first category until the court disposes of every issue in the action. So, under the first category of final orders, we implicitly assume that the order affects the substantial right of a party not to be

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[21] See Lenich, *supra* note 12.

[22] See *Keef, supra* note 6.

[23] *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[24] *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 868-69, 509 N.W.2d 618, 623 (1994). Accord *O'Connor, supra* note 5.

[25] See, *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008); *O'Connor, supra* note 5; *Rohde, supra* note 24.

[26] See *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

bound by an adverse order that has the effect of a final judgment without an opportunity to appeal.

In recent decisions, we have applied a similar reasoning to determine whether an order was final under the second category of § 25-1902. We recognized that a special proceeding order was final because it disposed of all the issues or, conversely, was not final because the trial court had not yet determined the ultimate issue.[27]

It appears that our concern about the loss of appellate review also explains why we permit an appeal from some special proceeding orders without analyzing the substantial right adversely affected. For example, we have permitted the State to appeal from writs of habeas corpus, which are issued in a special proceeding, without examining whether the order adversely affected a substantial right.[28] In these cases, the State's right to appeal is best explained by the finality of an order in a stand-alone proceeding that completely disposed of the State's claim that the inmate was not entitled to the writ. Without an opportunity to appeal the order, the State's substantial right to appellate review is lost.

The same reasoning explains why the State could appeal in *State ex rel. Bruning*. The order adversely disposed of its claim that it could not be forced to arbitrate, and no other issues were pending before the court in that proceeding. So, as with final orders under the first category of § 25-1902, the State's substantial right was the right not to be bound by an order adversely affecting its claim without an opportunity for appellate review.

Recognizing a substantial right to appellate review would avoid creating another special proceeding problem. By holding that the SCRA order was appealable because it completely disposed of the issues raised in a discrete special proceeding, we would avoid opening the door to appeals from

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[27] See, *In re Estate of Potthoff, supra* note 16; *In re Estate of Rose, supra* note 16.

[28] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007). See, also, *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958).

special proceeding orders that "may" affect a substantial right. Therefore, I believe we should permit appeals from orders disposing of every issue in a stand-alone special proceeding based on the finality of the order. Orders from stand-alone special proceedings are distinguishable from orders affecting an "essential legal right" in a multifaceted proceeding that has interrelated stages and may require appellate review even if the order does not dispose of every issue. But in this appeal, a rule recognizing a substantial right to appellate review of an order disposing of all the issues in a discrete special proceeding would lead to the same conclusion regarding the SCRA order. So, I concur in the majority's judgment that Rollins could appeal from the SCRA order.

MODIFICATION ORDER IS FINAL BECAUSE IT DISPOSED OF EVERY ISSUE

Applying the same reasoning, I believe that Rollins can appeal from the modification order temporarily ordering changing child custody and child support. We have held that a hearing to modify a child custody order is a special proceeding.[29] Arguably, it more properly falls under the third category of special proceedings: an order affecting a substantial right made on summary application in an action after a judgment is rendered. But in either case, of course, the order must affect a substantial right. Relying on our decision in *Steven S. v. Mary S.*,[30] the majority opinion concludes that when a temporary custody order is contingent upon an outside event, it is not final. I disagree with this statement.

In *Steven S.*, the dissolution decree awarded the father primary custody of the parties' twin girls. Both parties filed applications to modify the decree, accusing each other of abusing the children. After an investigation, the Nebraska State Patrol determined the accusations against the father were unfounded and arrested the mother for sexual assault on

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[29] See, *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999).

[30] *Steven S., supra* note 29.

a child. After a hearing, the court ordered both parties to have psychological evaluations and the mother to have an extensive evaluation. It suspended the mother's visitation rights until further order.

In determining whether the order was final, we concluded that it was appropriate to look to juvenile cases for guidance in determining whether a denial of custody and visitation affects a substantial right. We relied on a case in which we considered whether a parent could appeal from an ex parte order removing a child from its parent's custody pending a detention hearing: "'"[T]he question . . . whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed."'"[31]

Relying on the general principle that the length of interference with parental rights is critical, we concluded that the court's order only suspended the mother's visitation pending her psychological evaluation and the psychologist's recommendation on permanent custody: "Because [the mother's] relationship with the children will be disturbed for only a brief time period and the order was not a permanent disposition, we conclude that a substantial right was not affected."[32]

If *Steven S.* is interpreted to mean that we were concerned about the length of any interference in the parent-child relationship, our reasoning in *Steven S.* would compel the conclusion here that the length of the temporary custody—400 days—affected Rollins' substantial right to maintain custody of her child. More important, I believe *Steven S.* is another example of the difficulty we encounter by avoiding the more obvious solution to the statutory requirement that an order in a stand-alone special proceeding (or summary application) affects a substantial right.

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[31] *Id.* at 130, 760 N.W.2d at 33-34, quoting *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997).

[32] *Steven S., supra* note 29, 277 Neb. at 131, 760 N.W.2d at 34.

In juvenile cases, ex parte detention orders permitting a short detention without a hearing do not substantially interfere with a parent's fundamental rights.[33] But those cases are distinguishable from a temporary custody order entered in a custody modification proceeding when the parties are present and adducing evidence. When the parents are present, the due process right to a meaningful opportunity to be heard on the issue is not a concern. And I do not believe we should extend the concern in *Steven S.* about a temporary severing of visitation rights to temporary custody orders. We do not permit parties to appeal temporary custody orders pending a final marital dissolution decree.[34] In dissolution cases, which we have defined as special proceedings, we have reasoned that temporary custody orders are interlocutory when the court has not determined all of the parties' substantial rights.[35]

Our characterization of marital dissolution proceedings as special proceedings has also been criticized.[36] But even if we had characterized dissolution proceedings as actions, temporary custody orders would still be interlocutory.[37] The interlocutory character of the order in *Steven S.* is a more consistent rationale for concluding that it was not appealable. The court had not yet decided custody and visitation rights.

In contrast, the order here is not interlocutory and there is nothing left for the court to decide. Its temporary child custody order terminates at a known time and requires that the parties follow its original decree after Rollins' deployment ends. It may appear that a temporary custody change for a defined period would often be moot by the time an appeal reaches this court. But, as this case illustrates, a temporary change in custody is often accompanied by a temporary change in child support obligations. That issue would not be moot. Because in this appeal, the modification order disposes

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[33] See *In re Interest of Anthony G., supra* note 19.

[34] See *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984).

[35] See *id.*

[36] See Lenich, *supra* note 12.

[37] See, also, Annot., 82 A.L.R.5th 389 (2000).

of all the issues raised in the proceeding, I believe it is a final, appealable order. So I dissent from that part of the majority opinion concluding that Rollins could not appeal from the modification order.

MARY FOX, APPELLEE, V. RAYMOND WHITBECK, APPELLEE, AND SHERRY L. MCEWIN, FORMERLY KNOWN AS SHERRY L. WHITBECK, INTERVENOR-APPELLANT.

783 N.W.2d 774

Filed June 18, 2010. No. S-09-923.

1. **Appeal and Error.** An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.
2. **Judicial Sales.** It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion.
3. **Child Support: Notice.** An income withholding notice issued by the Nebraska Department of Health and Human Services pursuant to the Income Withholding for Child Support Act is not an "execution" within the meaning of Neb. Rev. Stat. § 42-371(5) (Reissue 2008).
4. **Liens: Child Support.** Child support judgments do not become dormant by lapse of time, and the fact that a child support judgment ceases to be a lien by operation of Neb. Rev. Stat. § 42-371(5) (Reissue 2008) does not extinguish the judgment itself or cause it to become dormant.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John P. Weis, of Sodoro, Daly & Sodoro, P.C., for intervenor-appellant.

Ralph E. Peppard for appellee Mary Fox.

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

STEPHAN, J.

Sherry L. McEwin, formerly known as Sherry Lee Whitbeck, appeals from an order of the Douglas County District Court confirming a sheriff's sale of real property owned by her former

spouse. The district court determined that McEwin's child support lien on the property had lapsed pursuant to Neb. Rev. Stat. § 42-371(5) (Reissue 2008). We affirm the determination of the district court regarding the lien, but reverse the order confirming the sale and remand for further proceedings on McEwin's objections to confirmation which were not dependent upon the lapsed lien.

BACKGROUND

On April 20, 1995, the Douglas County District Court dissolved the marriage of McEwin and Raymond Whitbeck. Whitbeck was ordered to pay $484 per month in child support for the parties' two children.

On February 29, 1996, Mary Fox obtained a decree of paternity entered in the Douglas County district court which determined that Whitbeck was the father of a child born to Fox in October 1993 and required Whitbeck to pay $368.50 per month in child support. On November 7, 2008, Fox filed a motion in the district court seeking leave to execute on real property formerly owned by Whitbeck in order to enforce the child support lien created by the 1996 child support judgment. The district court sustained the motion on the same day and ordered the sheriff to execute on the property.

On December 23, 2008, McEwin filed a motion to intervene and sought a hearing on the disposition of the proceedings of the execution and sale. McEwin claimed that she had a continuing child support lien on the property based upon the 1995 decree. The district court granted the motion and ordered that a hearing to determine the priority of McEwin's child support lien would be held at a later date.

The sheriff's sale occurred on December 31, 2008. Fox submitted the high bid of $21,500. The court commenced a hearing on February 20, 2009, with respect to McEwin's claimed lien. The evidence received at the hearing included a copy of McEwin's 1995 decree and a payment history report showing unpaid child support due McEwin in the amount of $14,370.82. The report reflected nine instances between 2002 and 2005 when unspecified collection efforts had been undertaken. McEwin's counsel stated that McEwin believed these collection efforts were by means of wage garnishment, but the

court noted that there was no evidence to support this claim. The hearing was continued to permit McEwin's counsel additional time to gather evidence on this point.

On March 20, 2009, before the hearing resumed, McEwin filed a motion for continuance and an objection to confirmation of sale. In these filings, she alleged that there were irregularities in the sheriff's sale that resulted in a high bid which was significantly below the fair market value of the property. McEwin argued that the sale should not be confirmed in order to protect both her child support lien and that of Fox.

The continued hearing resumed on April 1, 2009. McEwin's counsel offered, and the court received, six documents, each entitled "Order/Notice to Withhold Income for Child Support," which were filed in the district court for Douglas County on various dates between August 6, 2001, and October 21, 2003. For brevity, we shall refer to these documents as income withholding notices. Fox offered, and the court received, evidence of unpaid child support due to her in the amount of $62,702.44.

In its August 12, 2009, order, the district court overruled McEwin's objections and confirmed the sale. The court noted that neither the evidence nor its records reflected any wage garnishment or execution initiated by McEwin to enforce her child support judgment, and the court further concluded that the income withholding notices did not constitute executions within the meaning of § 42-371(5). Therefore, the court determined that the lien arising from McEwin's 1995 judgment had lapsed and confirmed the judicial sale of Whitbeck's real property to Fox.

McEwin 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.[1]

ASSIGNMENTS OF ERROR

McEwin assigns, consolidated and restated, that the district court erred in (1) determining that the income withholding

[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

notices did not constitute executions within the meaning of § 42-371(5) and (2) confirming the sale without conducting a hearing on her objections unrelated to the lien.

STANDARD OF REVIEW

[1] An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.[2]

[2] It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion.[3]

ANALYSIS

Validity of Lien

Nebraska statutory law provides various means for enforcing a child support judgment. One is through imposition of a lien on real property pursuant to § 42-371, which provides:

> (1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments;
>
> . . . .
>
> (5) Support order judgments shall cease to be liens on real or registered personal property ten years from the date (a) the youngest child becomes of age or dies or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated.

In this case, McEwin's youngest child reached the age of majority in May 1998. Thus, her child support judgment would have ceased to be a lien on the real property prior to the

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[2] See, *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007); *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

[3] *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010). See *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

sheriff's sale unless the income withholding notices constituted executions within the meaning of § 42-371(5).

The term "execution" is not specifically defined in § 42-371, but it is generally defined by Neb. Rev. Stat. § 25-1501 (Reissue 2008) as a "process of the court." This statutory definition is consistent with the commonly accepted understanding of the term as a "formal document issued by the court that authorizes a sheriff to levy upon the property of a judgment debtor"[4] or a "court order directing a sheriff or other officer to enforce a judgment, usu[ally] by seizing and selling the judgment debtor's property."[5] In *St. Joseph Dev. Corp. v. Sequenzia*,[6] the Court of Appeals held that garnishment was an execution within the meaning of Neb. Rev. Stat. § 25-1515 (Reissue 1995), which provided that a judgment would become dormant if "execution shall not be sued out" within specified time periods. McEwin argues that wage withholding to collect child support is analogous to garnishment and should therefore be considered an execution within the meaning of § 42-371(5).

Garnishment is a legal remedy which involves issuance of a summons and a court order as a means of enforcing the authority of a court with respect to a judgment.[7] Nebraska has a statutory procedure whereby a party may apply for and obtain a court order directing an employer to withhold previously ordered child support from the wages of a parent,[8] but there is no indication in the record that this procedure was utilized in this case, and we express no opinion as to whether it would constitute an "execution" within the meaning of § 42-371(5). Here, the district court treated the income withholding notices

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[4] 30 Am. Jur. 2d *Executions* § 47 at 84 (2005).

[5] Black's Law Dictionary 650 (9th ed. 2009).

[6] *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).

[7] See, Neb. Rev. Stat. § 25-1056 (Reissue 2008); *J.K. v. Kolbeck*, 257 Neb. 107, 595 N.W.2d 875 (1999).

[8] See Neb. Rev. Stat. §§ 42-364.01 to 42-364.14 (Reissue 2008).

as being issued pursuant to the Income Withholding for Child Support Act (IWCSA).[9] That determination is not challenged in this appeal, and we agree that it is correct.

A stated purpose of the IWCSA is "to provide a simplified and relatively automatic procedure for implementing income withholding in order to guarantee that child, spousal, and medical support obligations are met when income is available for that purpose."[10] The Legislature has stated that while income withholding under the IWCSA is the "preferred technique" for enforcement of such obligations, "other techniques such as liens on property and contempt proceedings should be used when appropriate."[11] Under the IWCSA, "A support order shall constitute and shall operate as an assignment, to the State Disbursement Unit, of that portion of an obligor's income as will be sufficient to pay the amount ordered for child, spousal, or medical support . . . ."[12] The IWCSA provides that "[t]he Title IV-D Division of the Department of Health and Human Services or its designee shall be responsible for administering income withholding."[13] The Department of Health and Human Services is authorized by the IWCSA to send notices to an employer directing that an amount be withheld from the income of a parent in order to reduce or satisfy that parent's child support obligation.[14]

[3] Although the income withholding notices in this case were filed in the district court and identify the proceedings in which the child support judgment was entered, there is no indication that they were issued by or transmitted by the court. To the contrary, they appear to have been authorized and issued by the Department of Health and Human Services and, in one instance, the Nebraska Child Support Payment Center. We read the language of §§ 42-371 and 43-1702 as a recognition by the

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[9] Neb. Rev. Stat. §§ 43-1701 to 43-1743 (Reissue 2008).

[10] § 43-1702.

[11] *Id.*

[12] § 43-1718.

[13] *Id.*

[14] See § 43-1723.

Legislature that execution is one of several means of collecting child support, not as a statement that all methods of collecting child support are executions. Thus, while the income withholding notices in this case are part of a legally authorized administrative remedy for the collection of child support, they are not "executions" within the meaning of § 42-371(5) because they are not processes of the court. The district court correctly concluded that McEwin's child support judgment had ceased to be a lien on the real property which was the subject of the execution and sheriff's sale initiated by Fox.

Other Objections to Confirmation of Sale

McEwin argues that even if she no longer had an enforceable lien, she still had an enforceable child support judgment, and that therefore, the district court erred in confirming the sheriff's sale without conducting a hearing on her objections to confirmation based upon irregularities in the sale and the amount of the sale price. We find merit in this argument.

[4] Child support judgments do not become dormant by lapse of time, and the fact that a child support judgment ceases to be a lien by operation of § 42-371(5) does not extinguish the judgment itself or cause it to become dormant.[15] Although McEwin did not have an enforceable lien at the time of the sheriff's sale, she was a judgment creditor with an interest in any potential proceeds of the sale exceeding the amount necessary to satisfy Fox's lien. Accordingly, she had standing to object to the confirmation of the sale on the ground of irregularities which resulted in a sale price lower than fair market value. McEwin filed an objection alleging such irregularities, but there is no indication that she was permitted to present evidence in support of her objection. The hearing regarding the validity of McEwin's lien commenced on February 20, 2009, prior to the filing of the objection on March 20, and was limited to the validity of the lien. The hearing was continued and concluded on April 1, but the record does not show that the scope of the hearing was expanded to include McEwin's objection to

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[15] See, *Nowka v. Nowka*, 157 Neb. 57, 58 N.W.2d 600 (1953); *Freis v. Harvey*, 5 Neb. App. 679, 563 N.W.2d 363 (1997).

confirmation. The district court overruled McEwin's objection and confirmed the sale based solely upon its determination that McEwin's lien had lapsed, with no mention of the other issues she raised. Because McEwin was not given an opportunity to be heard regarding her objections unrelated to her claimed lien, we conclude that the district court abused its discretion in confirming the sale.

CONCLUSION

We affirm the determination of the district court that McEwin's child support lien had lapsed by operation of § 42-371(5) because there had been no execution on her child support judgment within the prescribed time period. But because she was not given an opportunity to be heard as to her other objections to confirmation of the sale, and the district court apparently did not consider her objections, we reverse the order confirming the sale and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM D. GILNER, RESPONDENT.

783 N.W.2d 790

Filed June 25, 2010. No. S-06-963.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Amy Sherman Geren for respondent.

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

PER CURIAM.

INTRODUCTION

On September 1, 2006, the chairperson of the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association filed an application to temporarily suspend William D. Gilner, respondent, until final disposition of the pending disciplinary proceedings. This court granted the application on September 27 and suspended respondent's license to practice law until further order of the court.

On March 9, 2007, the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against respondent. The matter was referred to a referee, and a hearing was held on July 11. The referee filed a report and recommendation on September 10. In the referee's report, with respect to the formal charges, the referee concluded that respondent's conduct had violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.2 (scope of representation and allocation of authority between client and lawyer), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct). The referee recommended that respondent be suspended from the practice of law for a period of 2 years and that upon reinstatement, respondent should be placed on a period of probation and strictly monitored by another licensed Nebraska attorney for not less than 2 years.

No objections to the referee's report were filed. On September 26, 2007, this court accepted the findings of fact as set forth in the report of the referee and set the matter for oral argument limited to the issue of discipline. This court heard oral argument as to the appropriate discipline on March 5, 2008.

After hearing argument on March 5, 2008, this court entered an order staying the matter and referred the matter as one possibly involving a disability to the Counsel for Discipline for consideration under what is now codified as Neb. Ct. R. § 3-311. On May 22, this court granted the application of the Committee on Inquiry of the Second Disciplinary District and ordered that respondent be placed on disability status pursuant to § 3-311(D). The court further ordered that all pending

proceedings in this case should be held in abeyance until further order of this court.

On March 10, 2010, this court removed respondent's disability status and removed the stay on the proceedings. Both parties filed briefs regarding appropriate discipline to be imposed. Respondent seeks to be reinstated. On May 5, this court determined no further oral argument was needed.

FACTS

The referee's hearing in this case was held on July 11, 2007. Respondent did not appear at the hearing, nor did any attorney appear on behalf of respondent. Instead, respondent faxed a letter to the referee the day before the hearing, which letter was included as part of the record as exhibit 12. A total of 12 exhibits were admitted into evidence at the hearing. Relator called no witnesses. At the request of respondent after the hearing, two additional letters of reference were received by the referee and marked as exhibits 13 and 14. Each was written by a trial judge familiar with respondent's work and favorable to respondent.

The substance of the referee's findings may be summarized as follows: Respondent was licensed to practice law in the State of Nebraska in early 2001. At all times relevant, respondent was engaged in the private practice of law and was associated with the Omaha law firm of Nolan, Olson, Hansen, Lautenbaugh & Buckley, LLP (Nolan, Olson).

The allegations that formed the basis for count I of the formal charges filed by the relator are as follows: On June 28, 2006, the office of the Counsel for Discipline received a letter dated June 22, 2006, from attorney Melvin C. Hansen of the Nolan, Olson law firm. In the letter, Hansen stated that respondent had represented Reliaster Life Insurance Co. (Reliaster), a defendant in a case pending in the U.S. District Court for the District of Nebraska. Through negotiations, the parties reached a settlement agreement in 2005, whereby Reliaster would pay the plaintiff the sum of $110,000. The parties notified the court of the settlement but failed to reduce the settlement agreement to a written stipulation to be filed with the court. Eventually, on February 1, 2006, the court entered

an order directing that the settlement be paid by February 6, or Reliaster would be required to pay $250 per day to the plaintiff until the settlement was paid. Respondent failed to inform his client of this order.

On March 16, 2006, the plaintiff filed a motion to enforce the settlement agreement and the court's order of February 1. Respondent again failed to inform his client of this motion. On May 11, the court entered a judgment against Reliaster and in favor of the plaintiff. Respondent did not inform his client of this judgment. Reliaster learned of the judgment for the first time on May 23. Reliaster paid the $110,000 judgment on or about June 2. The sanction that had accrued amounted to $34,130.50; Reliaster paid the sanction. Respondent's employment with the Nolan, Olson law firm was terminated on June 16.

The allegations that formed the basis for count II of the formal charges are as follows: On August 8, 2006, the office of the Counsel for Discipline received a second letter, dated July 18, 2006, from attorney Hansen which again pertained to respondent. In that letter, Hansen alleged that respondent had represented a client in a workers' compensation case that went to trial on August 25, 2005. On December 2, an award was filed by the compensation court. Respondent timely filed an appeal on December 16. However, respondent had not informed his client that an award had been entered and did not have the client's consent to file the appeal. On March 24, 2006, respondent sent a letter informing his client that the Workers' Compensation Court had entered its order on March 20, rather than the correct date of December 2, 2005. Respondent included with his letter a purported copy of the award in which the date had been altered to reflect March 20. Respondent did not file a brief and did not appear at the appeal, which was held on April 24.

The formal charges also contained a third count. However, this count was dismissed at the hearing conducted by the referee on July 11, 2007.

Based upon the evidence offered during the hearing, the referee found by clear and convincing evidence that respondent's actions constituted a violation of the following provisions

of the Nebraska Rules of Professional Conduct: §§ 3-501.1, 3-501.2, 3-501.3, 3-501.4, and 3-508.4.

In addressing what discipline should be imposed upon respondent, the referee noted that respondent did not appear at the hearing and that the referee was therefore unable to find any mitigating factors. The referee noted that he found this disconcerting as he was unable to ascertain whether these were two isolated incidents or "a character flaw or defect that is likely to occur in the future." However, because both relator and respondent agreed that suspension would be a suitable discipline, the referee recommended a 2-year suspension as the appropriate discipline. The referee further recommended that when respondent regains his license to practice law, he should be put under a period of probation and strictly monitored by another licensed Nebraska attorney for not less than 2 years. Neither party filed exceptions to the referee's report and recommendation.

ANALYSIS

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). This court entered an order in which we determined that the findings of fact set forth in the referee's report were deemed established and that therefore, the sole remaining issue before this court was the nature and extent of discipline. 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 findings of fact 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, 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. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (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, Neb. Ct. R. § 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. Bouda, 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*.

The evidence in the present case establishes, among other facts, that respondent neglected legal matters entrusted to him by his client, that respondent engaged in conduct which resulted

in his client's incurring $34,130.50 in sanctions, and that respondent was dishonest when he apparently altered the date of an order issued by the Workers' Compensation Court.

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 concludes that respondent should be suspended for 2 years dating back to the date of his temporary suspension, September 27, 2006. The court further concludes that upon reinstatement, respondent shall be on probation for a period of 2 years under the supervision of another attorney licensed in the State of Nebraska. Accordingly, because respondent satisfied his discipline of a 2-year suspension as of September 27, 2008, we prospectively grant his application for reinstatement, upon the condition that he pay the costs associated with these proceedings. Upon reinstatement, respondent shall be placed under the supervision of attorney Amy Sherman Geren for a period of 2 years.

CONCLUSION

It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 2 years retroactive from the date respondent was temporarily suspended, September 27, 2006. Respondent satisfied his discipline of a 2-year suspension as of September 27, 2008. We direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007), § 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 this court. Upon payment of his costs owed in association with these proceedings, respondent is prospectively reinstated to the practice of law. Upon reinstatement, respondent shall be under the supervision of Geren for a period of 2 years.

JUDGMENT OF SUSPENSION.

IN RE FAMILY TRUST CREATED UNDER THE ANDREZ P. AKERLUND TRUST OF JANUARY 6, 1974. U.S. BANK, N.A., TRUSTEE, APPELLEE, V. FRITZ AKERLUND, APPELLANT, AND ELLEN AKERLUND GONELLA, APPELLEE.

784 N.W.2d 110

Filed June 25, 2010. No. S-09-671.

1. **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.
2. **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.
3. **Trusts: Intent.** The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator.
4. **Trusts.** The interpretation of the words of a trust is a question of law.
5. **Trusts: Intent.** In interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument.

Appeal from the County Court for Douglas County: CRAIG Q. MCDERMOTT, Judge. Affirmed.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellant.

Donald R. Witt, Christina L. Ball, and Julie M. Karavas, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Ellen Akerlund Gonella.

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

WRIGHT, J.

NATURE OF CASE

U.S. Bank, N.A., the trustee of the family trust created under the Andrez P. Akerlund Trust of January 6, 1974, sought instruction from the Douglas County Court to determine how the assets of the family trust should be distributed. The court ordered the assets of the family trust divided and distributed

equally between Fritz Akerlund and Ellen Akerlund Gonella (Ellen). Fritz appeals, and we affirm.

SCOPE OF REVIEW

[1,2] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). 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. *Id.*

FACTS

On January 6, 1974, Andrez P. Akerlund signed a trust agreement consisting of two parts: a marital trust and a family trust. Upon Andrez' death, the trustee was directed to place half of Andrez' gross estate, as established by the Internal Revenue Service, in the marital trust for the benefit of his wife, Frances J. Akerlund. The remainder of the assets of Andrez' estate was to be placed in the family trust. The income from both trusts was to be paid to Frances during her lifetime, subject to the provision that in the event she remarried, the income from the family trust would then be divided equally between Andrez' children, Fritz and Ellen.

Frances had full power to distribute the assets in the marital trust either by power of appointment or by will. Upon Frances' death, the assets of the family trust and any assets remaining in the marital trust that had not previously been distributed by Frances were to be distributed pursuant to paragraph II(4)(a) and (b) of the trust agreement:

> a. One-half of this trust shall, if possible, be held in trust for . . . Fritz . . . in a separate trust. In establishing the trust I request that the following real estate be placed in [Fritz'] trust: The East Half of the Southeast Quarter of Section 10; the Northwest Quarter[ ]of Section 11 . . . except 2.3 acres deeded to the State; the South Half of Section 11, all in Township 16, Range 9, Douglas County, Nebraska. In connection with this direction as to the real estate, any supporting personal property including

insurance pertaining to this real estate shall be allot[t]ed to [Fritz'] trust.

b. The remaining assets shall be allocated to [Ellen's] trust.

Paragraph II(9) directed the trustee to hold, manage, administer, and control the assets of the trusts in accordance with the following terms and provisions:

a. A substantial portion of my assets are involved in farm properties which are being operated by Willard Wedberg. I direct that insofar as may be possible, the trustees shall continue the arrangement with Willard in connection with the operation of these properties. In the event of Willard's death or disability, I direct that insofar as is possible, the Trustees continue to operate these farm units so as to retain them in the family. Upon termination of the trust, I request that the beneficiaries insofar as possible continue to operate these as a unit. In that connection, I have directed that certain farms be placed in the trust for eventual distribution to [Fritz] and I wish that [Fritz] and his children continue to operate and conduct the farming operations as long as is feasible, since these farms have been in the family for many years and I hope that they can so remain.

Andrez died on May 6, 1978. At that time, the federal estate tax return filed in his estate showed a total gross estate of $1,527,937.55, and an adjusted gross estate of $1,430,208.32. The Douglas County farm referenced in paragraph II(4)(a) of the family trust consisted of 557.7 acres and was appraised at $840,780. The trustee distributed all of the nonfarm property and an undivided 26.43-percent interest in the farm to the marital trust.

Frances died on April 2, 2008. Prior to her death, she distributed the remaining assets of the marital trust equally between Fritz and Ellen, including the 26.43-percent interest in the farm. Therefore, Fritz and Ellen each have approximately a 13-percent interest in the farm.

The assets held in the family trust upon Frances' death consisted of an undivided 73.57-percent interest in the farm and

securities and other liquid investments with an approximate market value of $117,981. The parties estimated that the farm had a value of approximately $5,000 per acre. Currently, Fritz and Ellen reside in California, and neither has participated in the management or operation of the farm.

On August 7, 2008, the trustee of the family trust filed a "Petition for Instruction and Declaration of Rights Under Nebraska Uniform Trust Code Section 30-3812." The trustee stated it did not know how to distribute the assets in the family trust between Fritz and Ellen because certain provisions of the trust agreement stated that half of the trust "'shall'" be allocated to Fritz and other provisions of the trust agreement "'request'" and "'direct'" that the farm be placed in trust for Fritz. The trustee noted that it was impossible to comply with all of the provisions, because the Farm constituted more than half the value of the assets in the family trust.

Ellen argued that the farm and the remaining assets should be divided equally between her and Fritz. Fritz argued that he should receive the entire farm and that Ellen should receive the remaining assets, which amounted to approximately $117,000.

At trial, the affidavit of the vice president and trust officer for the trustee was offered and received into evidence as were a copy of the trust agreement and form 706, the "United States Estate Tax Return." The oral stipulation of the parties was placed on the record, and the court took the matter under advisement.

The court issued its order on June 10, 2009, finding that

> the assets of the Family Trust created under the Andrez P. Akerlund Trust of January 6, 1974, should be divided and distributed as follows:
>
> 1. An undivided one-half interest in the farm property to Fritz . . . and an undivided one-half interest in the farm property to Ellen . . . and;
>
> 2. An undivided one-half interest in all other remaining assets of the Family Trust to Fritz . . . and an undivided one-half interest in all other remaining assets of the Family Trust to Ellen . . . .

ASSIGNMENT OF ERROR

Fritz claims, summarized and restated, that the court erred in distributing half the family trust to Fritz and the other half to Ellen instead of distributing the entire farm to Fritz and the remaining assets to Ellen.

ANALYSIS

Fritz claims that it was Andrez' intention to give him the entire farm even if the value of the farm exceeded half the value of the family trust. Ellen claims that Andrez intended to treat both children equally and that he expressed a preference to fund Fritz' half with the farm, if possible.

[3-5] The primary rule of construction for trusts is that a court must, if possible, ascertain the intention of the testator or creator. *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004). The interpretation of the words of a trust is a question of law. *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997). Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). 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. *Id*. In interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument. *Smith v. Smith*, 246 Neb. 193, 517 N.W.2d 394 (1994).

Andrez' trust agreement provides for two separate trusts. Paragraph I(1) states:

> Upon the death of [Andrez] there shall be placed in the marital trust . . . property which has a value equal to ½ of [Andrez'] gross estate . . . less the value of any other property which . . . Frances . . . might have received because of his death, which has been included in [Andrez'] gross estate.

Paragraph II(1) provides: "Upon the death of [Andrez] there will be placed in the family trust the remainder of the assets

of [Andrez'] estate less that placed in the marital trust and that used for taxes, claims, and expenses."

Paragraph II(4) of the trust agreement provides that upon the death of Frances,

> the trustees shall hold the assets of this family trust and any unappointed assets received from the marital trust . . . :
>
> a. One-half of this trust shall, if possible, be held in trust for . . . Fritz . . . in a separate trust. . . .
>
> b. The remaining assets shall be allocated to [Ellen's] trust.
>
> . . . .
>
> d. The principal and any undistributed income shall be distributed to each individual beneficiary as follows:
>
> (1) As each child reaches the age of 35 . . . one-third of the trust to him or her.
>
> (2) When said child shall attain the age of 40 . . . one-half of the then remainder of that child's trust to him or her.
>
> (3) When said child shall attain the age of 45, that child's trust shall terminate and the remainder of his or her share thereof shall be transferred to him or her.
>
> e. If . . . the Trustee . . . shall determine that such child is in need of funds . . . the Trustee may pay to such child . . . portions of the principal . . . as the Trustee . . . shall deem necessary or advisable.

Fritz argues that regardless of the value of the farm, he should receive the entire farm because it is simply not possible for him to receive the entire farm and to receive only half of the family trust. He claims this is the only interpretation that would give meaning to the words "if possible" because it would always be possible for him to receive half of the trust. He argues that interpreting the language of the trust to mean that he receives only half of the trust renders the words "if possible" superfluous and meaningless, in violation of the rules of construction for trusts. He claims his position is further supported by paragraph II(4)(b), which instructs that Ellen is to receive the remaining assets of the trust rather than specifying that she is to receive the other half of the trust assets.

Ellen argues that other provisions of the trust indicate Andrez' intent. She notes that in the event Frances remarried, the income from the marital trust was to be divided equally between Fritz and Ellen. Ellen argues that Andrez did not intend for Fritz to receive the entire farm in the event that it made up more than half of the value of the family trust, and she interprets the words "if possible" to mean that Fritz' share of the trust was to be funded with the farm to the extent possible.

Our examination of the trust instrument and the federal estate tax return leads us to conclude that Andrez intended to divide his estate into two separate trusts. The first was the marital trust, in which he placed half of his gross estate as established by the Internal Revenue Service less any value of other property that Frances might have received because of his death that was included in his gross estate. The division was to be made giving full consideration to changes in the value of these assets such as would permit the division to conform to all requirements of the Internal Revenue Code.

The second trust—the family trust—was to consist of the remainder of the assets of Andrez' estate less those placed in the marital trust and used for taxes, claims, and expenses. Half of the family trust was to be held in trust for Fritz, and the remainder was to be allocated to Ellen. This is the same language by which Andrez placed half of his gross estate in the marital trust and the remainder of the assets in the family trust. Furthermore, if Fritz was to receive the entire farm, there would be no remaining assets to be allocated to Ellen as part of the family trust. Such an interpretation would render many of the provisions of paragraph II(4)(b) through (4)(e) meaningless because there would be no assets in the family trust except the farm.

The federal estate tax return filed after Andrez' death lists the value of the farm at $840,780, which is greater than half the total gross estate of $1,527,937. The gross estate reduced by the funeral expenses and expenses incurred in administering the property and Andrez' debts left an adjusted gross estate of $1,430,208. The tax return shows that the marital deduction was $715,104. Because the value of the farm was

$840,780—more than half of the gross estate—26.43 percent of the farm was conveyed to the marital trust. Thus, it was not possible to allocate half the assets of the gross estate to the marital trust without including part of the farm. Ultimately, 26.43 percent of the farm was reconveyed by Frances to Fritz and Ellen in equal shares. It was not possible to convey the farm to Fritz as half of the family trust.

Upon Frances' death, the assets of the family trust consisted of 73.57 percent of the farm and $117,981 in securities and other liquid assets. The court ordered that an undivided half interest in the farm property be allocated to Fritz and that a half interest in the farm property be allocated to Ellen. It further ordered that an undivided half interest in all the remaining assets of the family trust be allocated to Fritz and Ellen in equal shares. We find no error in this distribution of the property.

CONCLUSION

Andrez' intention was to create two trusts upon his death: the marital trust and the family trust. He also intended to divide the family trust equally between his and Frances' two children, Fritz and Ellen. If possible, Fritz was to receive the farm as his half interest in the family trust. Because the farm exceeded half the value of the gross estate, it was not possible for Fritz to receive the entire farm. The county court did not err in its division of the trust property. The judgment of the county court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RYAN T. PRESCOTT, APPELLANT.
784 N.W.2d 873

Filed June 25, 2010. No. S-09-721.

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. **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.
4. ____: ____: ____: ____. 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.
5. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.
6. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.
7. **Investigative Stops: Motor Vehicles: Probable Cause.** Traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle.
8. **Constitutional Law: Search and Seizure: Motor Vehicles.** In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved that violation.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
11. ____: ____: ____. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.
12. ____: ____: ____. An officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests.
13. **Investigative Stops: Police Officers and Sheriffs.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.
14. ____: ____. Courts must determine whether reasonable suspicion exists on a case-by-case basis.
15. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention. It is something more than an

inchoate and unparticularized hunch—but less than the level of suspicion required for probable cause.

16. **Drunk Driving: Police Officers and Sheriffs: Testimony.** A police officer may testify to the results of horizontal gaze nystagmus field sobriety testing if it is shown that the officer has been adequately trained in the administration and assessment of the test and has conducted the testing and assessment in accordance with that training.
17. **Drunk Driving: Blood, Breath, and Urine Tests.** To be considered valid, blood tests under Neb. Rev. Stat. § 60-6,197 (Reissue 2004) shall be performed pursuant to methods approved by the Department of Health and Human Services.
18. **Drunk Driving: Blood, Breath, and Urine Tests: Appeal and Error.** Any deficiencies in the techniques used to test the blood alcohol level in driving under the influence cases generally are of no foundational consequence, but only affect the weight and credibility of the testimony.
19. **Administrative Law: Drunk Driving: Blood, Breath, and Urine Tests: Words and Phrases.** Under 177 Neb. Admin. Code, ch. 1, §§ 001.16 and 001.21 (2004), a technique is defined as a set of written instructions which describe the procedure, equipment, and equipment preventive maintenance necessary to obtain an accurate alcohol content test result. A method, however, is the name of the principle of analysis.
20. **Indictments and Informations: Pleadings.** A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged.
21. **Constitutional Law: Statutes: Pleadings.** Ordinarily, one must file a motion to quash in order to preserve a constitutional challenge to the facial validity of a statute.

Appeal from the District Court for Hall County, WILLIAM T. WRIGHT, Judge, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Judgment of District Court affirmed.

T. Charles James, of Langvardt & Valle, P.C., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Following a bench trial before the Hall County Court, Ryan T. Prescott was found guilty of driving under the influence

(DUI). The county court found it to be Prescott's second offense and sentenced him to 6 months' probation. Prescott appealed to the Hall County District Court, which affirmed. Prescott then filed this appeal. We granted Prescott's petition to bypass.

BACKGROUND

Prescott was stopped for speeding at about 8 p.m. on July 31, 2007, in Hall County, Nebraska. Trooper Robert Almquist of the State Patrol had visually estimated that Prescott was speeding, then clocked Prescott by radar traveling 65 miles per hour in a 55-mile-per-hour zone.

Upon approaching Prescott's stopped vehicle, Almquist observed a firearm in the vehicle. As such, Almquist had Prescott turn off the vehicle and raise his hands. Prescott complied, and Almquist approached closer to get Prescott's license and registration. At that time, Almquist testified, he detected a moderate odor of alcohol.

Almquist and Prescott then had a seat in Almquist's patrol car. During this interaction, Almquist noted a moderate odor of alcohol coming from Prescott's breath. In addition, after questioning, Prescott admitted that he had not had anything to eat since 11:30 a.m., that he weighed about 165 pounds, and that he had been drinking alcohol prior to driving. Specifically, Prescott indicated that he had consumed two beers since leaving work at around 6 p.m. Almquist also learned that Prescott had a prior arrest for DUI.

Almquist then administered three field sobriety tests, as well as a preliminary breath test (PBT). Prescott showed signs of impairment on the horizontal gaze nystagmus (HGN) test and the nine-step walk-and-turn test. He then performed the one-leg stand test as instructed, but failed the PBT. Almquist placed Prescott under arrest and transported him to a hospital for a blood draw. A sample was drawn and tested. It showed that Prescott had a blood alcohol content of .093 of 1 gram of alcohol per 100 milliliters of blood.

Prescott was charged in Hall County Court with second-offense DUI. Prescott filed a motion to suppress all evidence seized after the traffic stop. He also alleged in that motion that

Neb. Rev. Stat. § 60-6,197.04 (Reissue 2004) was unconstitutional. The county court denied Prescott's motion to suppress. A bench trial was then held. Prescott was found guilty and was sentenced to 6 months' probation. The conviction and sentence were affirmed on appeal to the Hall County District Court. Prescott now appeals to this court.

ASSIGNMENTS OF ERROR

On appeal, Prescott assigns, restated, that the county court erred in (1) concluding that there was probable cause to support the stop of his vehicle; (2) concluding that there was reasonable suspicion to perform field sobriety tests on him; (3) concluding that there was probable cause to arrest him, because the field sobriety tests did not establish impairment; (4) not finding that the results of the PBT lacked sufficient foundation to be admissible; and (5) admitting the results of his blood test. In addition, Prescott also assigns that § 60-6,197.04 is unconstitutional on its face and as applied.

STANDARD 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.[1] 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.[2]

[3,4] 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] An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.[4]

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[1] *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

[2] *Id.*

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

[4] *Id.*

[5] In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous.[5] But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.[6]

[6] The constitutionality of a statute is a question of law, regarding which the Supreme Court is obligated to reach a conclusion independent of the determination reached by the trial court.[7]

ANALYSIS

Probable Cause for Stop

Almquist testified that he stopped Prescott for speeding, based on his visual observation, which was confirmed by radar. In his first assignment of error, Prescott contends that the State did not sufficiently prove that he was speeding and that thus, probable cause for the stop was not shown. In particular, Prescott argues that under Neb. Rev. Stat. § 60-6,192(1) (Reissue 2004), the State failed to show sufficient foundation to introduce into evidence the radar results allegedly showing that Prescott was speeding.

[7-9] Traffic violations, no matter how minor, create probable cause to stop the driver of a vehicle.[8] In determining whether the government's intrusion into a motorist's Fourth Amendment interests was reasonable, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved that violation.[9] Instead, an officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.[10]

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[5] *Id.*

[6] *Id.*

[7] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

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

[9] See *id.*

[10] *Id.*

In *State v. Howard*,[11] this court was presented with similar facts. A driver was charged with reckless driving. Part of the case against him was based upon the speeds he was traveling. We concluded that the State did not need to corroborate the officer's testimony regarding the speed of the vehicle where the charge pending against the driver was not speeding.[12] We find *Howard* applicable here and conclude that the State did not need to corroborate Almquist's testimony that he stopped Prescott for speeding. Prescott's first assignment of error is without merit.

Reasonable Suspicion to Perform Field Sobriety Tests

[10-15] In his second assignment of error, Prescott argues that Almquist lacked reasonable suspicion to perform field sobriety tests. Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.[13] In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.[14] We have further held that an officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests.[15] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.[16] Courts must determine whether reasonable suspicion exists on a case-by-case basis.[17] Reasonable

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[11] *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997).

[12] See, also, *State v. Hiemstra*, 6 Neb. App. 940, 579 N.W.2d 550 (1998), *disapproved on other grounds, State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003).

[13] *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] See *id.*

suspicion entails some minimal level of objective justification for detention. It is something more than an inchoate and unparticularized hunch—but less than the level of suspicion required for probable cause.[18]

In this case, Almquist testified that he conducted field sobriety tests after noting a moderate odor of alcohol coming first from Prescott's vehicle and later from Prescott himself. In addition, Almquist testified that Prescott told him that he had consumed two beers and, further, had not had anything to eat since lunch that day (the stop was at approximately 8 p.m.). This was sufficient to provide Almquist with reasonable suspicion to conduct field sobriety tests on Prescott. Prescott's second assignment of error is without merit.

Establishment of Impairment by Field Sobriety Tests

In his third assignment of error, Prescott assigns that the field sobriety tests administered to him did not establish that he was impaired and contends that accordingly, Almquist lacked probable cause to arrest him. Almquist administered three field sobriety tests to Prescott in advance of a PBT: the HGN test, the nine-step walk-and-turn test, and the one-leg stand test. Prescott successfully completed the one-leg stand test, but showed signs of impairment on the other two.

Starting first with the HGN test, Prescott argues that Almquist did not perform the test in keeping with the requirements set forth in the National Highway Traffic Safety Administration manual[19] detailing the test. In particular, Prescott complains that the manual indicates that the test should take 80 seconds, but that it did not take Almquist 80 seconds to administer the test.

[16] This court has held that a police officer may testify to the results of HGN field sobriety testing if it is shown that the officer has been adequately trained in the administration and

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[18] See *id.*

[19] National Highway Traffic Safety Administration, DWI Detection and Standardized Field Sobriety Testing Student Manual (2006).

assessment of the test and has conducted the testing and assessment in accordance with that training.[20]

In this case, Almquist testified to his training regarding the HGN test. He explained what the HGN test was and explained that impaired persons often show an involuntary jerking of the eye, known as nystagmus. In addition, Almquist explained the steps he took to administer the test to Prescott and testified that Prescott showed four indicators on the test, demonstrating impairment. This finding of impairment is consistent with the manual. The manual indicates that with four indicators present, it is likely that a person's blood alcohol concentration is above .10.

Prescott's argument appears to be without merit. First, it is not at all clear from the record exactly how long it took Almquist to perform the test. Nor is there anything in the record, in particular in the manual, suggesting that the HGN indicators are not valid if the test did not take 80 seconds to perform. Finally, the manual itself notes:

> The procedures outlined in this manual describe how the [field sobriety tests] are to be administered under ideal conditions. We recognize that the [tests] will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal . . . may have some affect [sic] on the evidentiary weight given to the results. However, this does not necessarily make the [tests] invalid.[21]

We next turn to the nine-step walk-and-turn test. Prescott argues that Almquist could have asked him "proper medical questions pursuant to his training"[22] to establish whether his "normal gait"[23] could have caused him to miss the heel-to-toe

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[20] *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

[21] DWI Detection and Standardized Field Sobriety Testing Student Manual, *supra* note 19, preface.

[22] Brief for appellant at 26-27.

[23] *Id.* at 26.

steps during this particular field sobriety test. But Prescott does not argue that he actually does suffer from any abnormality in his "normal gait." There is no evidence in the record that Prescott's inability to successfully complete the nine-step walk-and-turn test was due to his "normal gait." Moreover, this would not affect the admissibility of the test results, but instead goes to the weight or credibility of this evidence.

Prescott's third assignment of error is without merit.

Administration of PBT

In his fourth assignment of error, Prescott argues that there was insufficient foundation to support the admissibility of the results of the PBT. He further contends that without these results, Almquist lacked probable cause to arrest him for DUI.

Prescott first argues that the breath testing device used to perform the PBT on Prescott was not an approved device under the pertinent regulations. Specifically, to be approved, a device must use fuel cell analysis, but Almquist did not testify that the particular model he used had such analysis. And while a review of Almquist's testimony reveals that he did not specifically testify that the device used had fuel cell analysis, the record does show that Almquist testified that he followed title 177 of the Nebraska Administrative Code[24] in administering the PBT. Prescott did not rebut this claim. We conclude that this testimony is sufficient to support the introduction of this evidence.[25]

Prescott also asserts that there was insufficient evidence that the device had been properly calibrated. But Almquist testified that it was calibrated as required under title 177 and that he confirmed this fact prior to administering the PBT to Prescott.

Prescott next contends that the State failed to offer into evidence a checklist to show what times Almquist utilized to establish the 15-minute observation period required under

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[24] 177 Neb. Admin. Code, ch. 1 (2004).

[25] See *State v. Green*, 223 Neb. 338, 389 N.W.2d 557 (1986). See, also, *State v. Trampe, supra* note 12.

title 177. This court held in *State v. Dail*[26] that the actual checklist need not be entered into evidence; it is sufficient that the officer testify that he followed the instructions in the checklist in administering the test.

Finally, Prescott argues that there was insufficient evidence to support a finding that he was actually observed by Almquist for the full 15 minutes and also insufficient evidence as to the digital results of the test. But the record does not support this contention. A review of the video of the stop shows that at least 15 minutes elapsed between the initial contact between Almquist and Prescott and the administration of the PBT. And on the video, Almquist is heard telling Prescott that his result was .093.

Prescott's fourth assignment of error is without merit.

Admissibility of Results of Blood Test

In his fifth assignment of error, Prescott argues that it was error for the county court to receive into evidence the results of the blood test finding his blood alcohol content to be .093. The basis for this argument is Prescott's contention that the State did not establish compliance with title 177.

[17-19] To be considered valid, blood tests under Neb. Rev. Stat. § 60-6,197 (Reissue 2004) shall be performed pursuant to methods approved by the Department of Health and Human Services.[27] Any deficiencies in the techniques used to test the blood alcohol level in DUI cases generally are of no foundational consequence, but only affect the weight and credibility of the testimony.[28] Under title 177, a technique is defined as a "set of written instructions which describe the procedure, equipment, and equipment preventive maintenance necessary to obtain an accurate alcohol content test result."[29] A method, however, is "the name of the principle of analysis."[30]

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[26] *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988).

[27] Neb. Rev. Stat. § 60-6,201(3) (Cum. Supp. 2008).

[28] *State v. Green, supra* note 25.

[29] 177 Neb. Admin. Code, ch. 1, § 001.21.

[30] *Id.* at § 001.16.

Prescott's first argument is that the person who drew his blood failed to put the full date or time on the tubes of blood she drew from him and thus failed to comply with title 177. Title 177 does provide that the following shall be listed on the label of the specimen container: name of person tested, date and time of collection, and initials of person collecting specimen.[31]

A review of the record shows that title 177 was complied with. The initials of the collector are on the container, as is the time of collection. The date, but not the year, is also on the label. But the year, along with the month and day, is on the security seal on the container. And that month and day match those on the label and also match the whole date listed on the requisition form also in the record. Moreover, any deficiency in the date would go to the weight of this evidence and not to its admissibility.

Prescott next contends that § 005.02 of title 177, chapter 1, was not complied with in that there was insufficient evidence presented to show that the specimen container in which his blood was collected contained an anticoagulant. But the collector of the specimen testified that there was such an anticoagulant in the tube, as it was placed there by the manufacturer.

Prescott also argues that there was insufficient evidence that the hospital was properly certified to test his blood. Prescott relies on § 60-6,201(3) and *State v. Trampe*,[32] to support this argument.

The technologist testified that the hospital was certified and that, in addition, she had a permit to test blood in the manner in which she did. Neither § 60-6,201(3) nor *Trampe* explicitly provides that an actual copy of the certification is necessary. And both § 60-6,201(3) and *Trampe* relate to certification in the context of the collection of a specimen by a person who does not hold the proper permit: In certain instances, medical personnel of a properly certified facility can take samples without a permit, and in those situations, more evidence of certification

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[31] *Id.* at § 005.03.

[32] *State v. Trampe, supra* note 12.

might be necessary. Neither *Trampe* nor § 60-6,201(3) holds what Prescott claims they do. Prescott's argument on this point is without merit.

Prescott next asserts that the technologist was required under 177 Neb. Admin. Code, ch. 1, § 006.04C1c, to "[i]ntroduce at least 0.050 ml volume of specimen into the sample cartridge" when testing a sample under the radiative energy attenuation method and that there was no testimony that the technologist did so.

Prescott is correct that there was not testimony on this point. However, the technologist did testify that she conducted all testing as required by title 177. And as noted above, title 177 does require a .050 milliliter volume of specimen. We conclude that the technologist's testimony was sufficient to show that the proper volume of specimen was introduced.[33]

Finally, Prescott contends that the technologist's permit did not authorize her to conduct testing via the radiative energy attenuation method that was used in this case. But under title 177, one of the approved testing methods for a Class A permit, which the technologist in this case had, was the radiative energy attenuation method using the analyzer employed in this case. Prescott's argument that the technologist was not authorized in this case is without merit.

Prescott's fifth assignment of error is without merit.

Constitutionality of § 60-6,197.04

In his sixth and final assignment of error, Prescott argues that § 60-6,197.04 is unconstitutional as applied and on its face.

Section § 60-6,197.04 provides in part:

> Any peace officer who has been duly authorized to make arrests for violation of traffic laws of this state or ordinances of any city or village may require any person who operates or has in his or her actual physical control a motor vehicle in this state to submit to a preliminary test of his or her breath for alcohol concentration if the officer has reasonable grounds to believe that such person has

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[33] See *State v. Green, supra* note 25. See, also, *State v. Trampe, supra* note 12.

> alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident.

The crux of Prescott's position is that this section is unconstitutional because a breath test is a search, and a search must be supported by probable cause. In Prescott's view, the reasonable grounds required by § 60-6,197.04 are constitutionally insufficient, and instead, an officer must have probable cause to require a person to submit to a PBT.

As an initial matter, we note that the State argues that Prescott waived the constitutional issue by failing to file a motion to quash and additionally by failing to insist upon a specific ruling by the county court.

[20,21] Neb. Rev. Stat. § 29-1808 (Reissue 2008) provides that "[a] motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." While ordinarily one must file a motion to quash in order to preserve a constitutional challenge to the facial validity of a statute,[34] in this case the statute in question, § 60-6,197.04, was not the charging statute. Nor was its application in this instance apparent from the face of the record. Under such circumstances, not only was it unnecessary for Prescott to file such a motion, it would have been inappropriate to do so. We therefore reject the State's assertion that Prescott waived his facial challenge by failing to file a motion to quash.

We also reject the State's argument that Prescott waived his constitutional argument by failing to insist upon a ruling on his constitutional challenge as set forth in his motion to suppress. In this case, the county court denied Prescott's motion to suppress. Implicit in that finding was the county court's rejection of Prescott's constitutional argument.

Having concluded that Prescott did not waive his constitutional challenge, we address the merits of his claim that § 60-6,197.04 is unconstitutional because it does not require probable cause to administer a PBT. We assume without

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[34] See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999).

deciding that a PBT would constitute a search under the Fourth Amendment.

The Vermont Supreme Court recently addressed this issue of whether probable cause was necessary to support a PBT in *State v. McGuigan*.[35] There, the court concluded:

> PBTs are common tools in the investigatory kit officers use to ascertain whether probable cause exists to believe that an individual has been driving under the influence of alcohol. PBTs are "quick and minimally intrusive" yet "perform[] a valuable function as a screening device" to detect drunk driving. . . . The relatively limited intrusion into a suspect's privacy is outweighed by the important public-safety need to identify and remove drunk drivers from the roads. . . . We thus find it reasonable, under . . . the Fourth Amendment . . . for an officer to administer a PBT to a suspect if she can point to specific, articulable facts indicating that an individual has been driving under the influence of alcohol.[36]

This court cites this same reasoning in *State v. Royer*[37] in concluding that field sobriety tests may be justified upon a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs.

In *Royer*, we noted that courts had concluded that field sobriety tests were more akin to a *Terry* stop as authorized by *Terry v. Ohio*,[38] and were reasonable so long as an officer could point to "'specific articulable facts'"[39] supporting the stop and limited intrusion. In this case, we agree that the administration of a PBT is more in line with field sobriety testing and a *Terry* stop than it would be with a formal arrest. We therefore conclude that the administration of a PBT does not need to be supported by probable cause.

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[35] *State v. McGuigan*, 184 Vt. 441, 965 A.2d 511 (2008).

[36] *Id.* at 449, 965 A.2d at 516-17 (citations omitted).

[37] *State v. Royer, supra* note 13.

[38] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[39] *State v. Royer, supra* note 13, 276 Neb. at 179, 753 N.W.2d at 340.

Because a PBT is quick and minimally intrusive, and because the State has a compelling interest in removing drunk drivers from its highways, we find that an officer is reasonable in administering a PBT if he can point to specific, articulable facts indicating that an individual has been driving under the influence of alcohol. Prescott's sixth and final assignment of error is without merit.

CONCLUSION

We find no merit to Prescott's assignments of error. The decision of the district court is affirmed.

AFFIRMED.

DONALD HOOPER AND MARILYN HOOPER, HUSBAND AND WIFE, APPELLEES, V. FREEDOM FINANCIAL GROUP, INC., ET AL., APPELLANTS.

784 N.W.2d 437

Filed June 25, 2010. No. S-09-796.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. ____: ____. 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.
5. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
6. **Securities Regulation.** The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Jerry W. Katskee and Rubina S. Khaleel, of Katskee, Henatsch & Suing, for appellants.

Clifford T. Lee, of Rasmussen & Mitchell, for appellees.

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

STEPHAN, J.

Following a bench trial, the district court for Douglas County found Freedom Financial Group, Inc. (FFG), J. Patrick Pierce (Pierce), Carolyn K. Pierce (Carolyn), and Westley M. Pierce (Westley) jointly and severally liable to Donald Hooper and Marilyn Hooper for violations of the Securities Act of Nebraska.[1] FFG and the Pierces appeal from that judgment. We affirm.

I. BACKGROUND

Prior to 2003, Pierce; his wife, Carolyn; and their son, Westley, were principals in a group of interrelated corporations which included Freedom Group, Inc., and its six subsidiaries, two of which were Freedom Financial, Inc., and FFG. These companies were headquartered on a multiacre tract in Omaha which also included the residence of Pierce and Carolyn, as well as an equestrian center which Pierce and Carolyn operated.

Freedom Financial was a Nebraska corporation registered with the Securities and Exchange Commission (SEC) as a broker-dealer of securities. It sold various financial products to the public through registered representatives located in 125 offices. As a broker-dealer, Freedom Financial was responsible for performing the due diligence process for financial products to be sold by its registered representatives. The Pierces were all directors of Freedom Financial and were responsible for establishing the policies and procedures of the company and for ensuring general compliance with such policies. Pierce was the president of Freedom Financial.

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[1] Neb. Rev. Stat. §§ 8-1101 to 8-1123 (Reissue 2007).

FFG was formed in February 2001 as a holding company for the purpose of acquiring a trust company and other financial entities. Pierce was an officer and director of FFG, and Westley was a director.

Michael Casper was the owner and president of Capital Equity Fund, Inc. (CEF), and a principal in other companies. The Freedom Group entities began a relationship with Casper in 2001, in connection with a stock offering by a company in which Casper had an interest. Although Freedom Financial was initially involved in the offering, it withdrew its participation due to concerns about the offering's compliance with securities regulations.

Around the same time, FFG announced a private placement stock offering in which it sought $10 million in capital to acquire a trust company and other financial entities. After some FFG stock had been sold, Olde South Trust, Inc., in which Casper had an ownership interest, made an offer to purchase $15 million of FFG stock under a new private offering. FFG and Olde South Trust signed a funding agreement in June 2001. But in August 2001, FFG signed a new funding agreement with Ambassador Trust, Inc., in which Casper also had an interest. Ambassador Trust agreed to provide FFG with $15 million in capital prior to the end of 2001 so that FFG could acquire a bank and a trust company. FFG and Ambassador Trust also entered into a separate funding agreement whereby Ambassador Trust agreed to provide FFG with an additional $10.5 million so that FFG could acquire a second financial company to operate as a clearing broker-dealer. These agreements replaced the original FFG agreement with Olde South Trust. By the end of 2001, Ambassador Trust had not provided any of the promised funds, and FFG used other funds to complete its acquisition of a South Dakota trust company, which became Presidents Trust Company, LLC. In 2002, Ambassador Trust provided FFG and Presidents Trust Company with $310,000 pursuant to additional funding agreements executed in March, April, and May of that year.

In late 2001, Freedom Financial entered into an agreement with Casper regarding the private placement offering for preferred stock of CEF, a Tennessee corporation organized

in 2001 to engage primarily in the business of charged-off consumer debt receivables. Casper held 80 percent of the common stock of CEF and served as its president and one of its directors. Freedom Financial served as the "Broker/Dealer Manager" for the offering. The CEF preferred stock was not registered with the SEC or any state securities commission. Pierce testified that there are specific requirements for this type of offering, including that all investors be accredited, meaning that each investor had $1 million in net worth or met other specified criteria.

In its role as the managing broker-dealer for the CEF offering, Freedom Financial was responsible for (1) approving broker-dealers involved with the sale, including reviewing representatives to make sure they had the necessary license to sell the CEF stock; (2) reviewing advertising and promotional literature used to market the CEF offering; and (3) reviewing information on proposed investors to ensure they met the requirements necessary to purchase the CEF stock. Pierce testified that Freedom Financial exercised due diligence in reviewing the CEF offering prior to agreeing to be the managing broker-dealer. While the record suggests that CEF was responsible for preparing its marketing brochure and private placement memorandum, Pierce or other representatives of Freedom Financial reviewed the materials prior to their use in the CEF offering. The CEF offering became effective in October 2001.

At the time of the CEF offering, Heartland Financial Group was an Omaha investment and insurance firm, whose employees, Carl Wyllie and Jerry Dickinson, were also registered representatives of Freedom Financial. The Hoopers purchased CEF stock through Wyllie and Dickinson on March 28, 2002. Prior to the sale, the Hoopers provided Wyllie with information about their finances and their past experience with investing, which was mostly limited to Donald's retirement fund. That fund, then valued at $105,000, represented approximately 25 percent of the Hoopers' combined net worth. After reviewing the financial information, Wyllie ultimately recommended that the Hoopers invest Donald's retirement fund account in CEF stock.

Wyllie gave the Hoopers a marketing brochure which described the CEF stock as having "[n]o stock market risk"; as being "[s]uitable for investing by qualified and retirement plans, including IRA, 401(k), and 403(b)"; and as a "great investment vehicle for seniors." Wyllie told the Hoopers that they were getting "beat up" in the stock market and that CEF provided a more stable, safer investment and a better return than their previous investments. Wyllie also stated that the CEF stock would provide a guaranteed 11-percent rate of return over a 3-year period, and a 9-percent return if the stock were sold earlier. Dickinson was present during this discussion.

Wyllie also provided the Hoopers with the private placement memorandum for CEF. Donald testified that he did not read the materials but stated that Wyllie reviewed the documents with him. Marilyn testified that she reviewed the information on the risk factors associated with the CEF stock as described in the private placement memorandum but relied on Wyllie, who equated the risk with that of a savings account. There was never any discussion between the Hoopers and Wyllie or Dickinson about the connection between Freedom Financial, FFG, Presidents Trust Company, or CEF. The Hoopers authorized Wyllie to transfer the entire balance of $105,000 from Donald's existing retirement account to invest in the CEF stock. Due to a surrender fee in connection with the transfer, the Hoopers' initial investment was reduced to $94,000.

In conjunction with the investment, Dickinson asked Donald to sign numerous documents, including a "Prospective Investor Questionnaire." Donald signed or initialed the documents where Dickinson had indicated, despite the fact that the questionnaire had not been completed. Dickinson told the Hoopers that he would fill in the necessary information. The Hoopers did not review the completed application documents until after they were notified about problems with the CEF stock in May 2003. At this time, they realized that information regarding their net worth, investment experience, and risk tolerance was misstated to make them appear to be accredited investors. Pierce testified that the application documents were completed when received by Freedom Financial and that the company

had no reason to suspect that the Hoopers had not completed the application.

The Hoopers did not receive dividends from the CEF stock they purchased, nor did they receive regular financial reports. They received a letter in January 2003 from Casper, which stated that even though 2002 was a "difficult time for all participants in the investment markets" and CEF "experienced [its] share of disappointment," the portion of CEF funds invested in distressed debt portfolios had performed "pretty much as expected."

Sometime in 2002, Freedom Financial resigned as the managing broker-dealer for the CEF stock offering. Pierce testified that Freedom Financial resigned in part because of sales made by representatives not approved by Freedom Financial. Pierce also testified that Freedom Financial stopped CEF sales because of concerns that funds raised from the CEF offering were being sent to FFG through the funding agreement and because Freedom Financial was concerned about sales to unaccredited investors. Pierce initially claimed that on March 11, 2002, he sent a resignation letter and a cease-and-desist order on all CEF sales by Freedom Financial representatives. However, upon a review of telephone records, Pierce testified the next day that Freedom Financial withdrew as managing broker-dealer on March 11 but did not order CEF sales halted until June 7. Pierce also claimed that he issued a disgorgement order for all money invested in CEF so it could be returned to investors.

In April 2003, Freedom Financial, FFG, and their parent, Freedom Group, filed suit against Casper and his various entities, including CEF, for breach of contract, common-law fraud, and conversion. The Hoopers received a letter from Heartland Financial Group, dated May 8, 2003, stating that there was a potential problem with the CEF offering, including "some alleged misconduct." The letter indicated that Freedom Financial had filed a lawsuit against CEF. In June, Freedom Financial invited the Hoopers to join the lawsuit by signing a participation agreement, which would have waived any claim against any of the Freedom Group entities. The Hoopers

participated in a conference call with Freedom Financial's legal counsel, but they chose not to sign the agreement. Portions of the suit were eventually dismissed by the court, and the remaining portion was voluntarily dismissed by the plaintiffs. On or about August 18, CEF redeemed all of the Hoopers' stock for $44,810.70.

Also in 2003, the various Freedom Group companies were the subjects of an investigation by the SEC which ultimately led to the cessation of business by all Freedom Group companies. At issue in the investigation was a product designed and sold by Presidents Trust Company, known as the "Fixed Income Trust." The SEC determined that the Fixed Income Trust was an unregistered security, sold in violation of federal regulations, and began an investigation into all Freedom Group entities and offerings. In 2004, as part of a settlement with the SEC, Pierce consented to an order barring him from associating with any broker, dealer, or investment advisor.

The Hoopers initiated an arbitration proceeding against Freedom Financial, Heartland Financial Group, Wyllie, and Dickinson with respect to their CEF investment. In 2004, they received an arbitration awarding the amount of $83,214.70, allocated among the various parties to the arbitration proceeding.

In 2005, the Hoopers filed the present action against FFG and the Pierces. Other original defendants, including CEF, were dismissed from the case and are not parties to the appeal. The Hoopers' claim against FFG and the Pierces is based upon alleged violations of the Securities Act of Nebraska in connection with the CEF stock transaction. Following trial, the district court found that FFG and the Pierces were jointly and severally liable to the Hoopers under the provisions of § 8-1118. The court further found that the Hoopers sustained damages in the amount of $88,942.39, calculated on the basis of the initial investment of $105,000, less the redemption proceeds of $44,810.70 plus interest. Judgment for this amount, together with costs and attorney fees to be determined at a later date, was entered against FFG and the Pierces. Following additional hearings, pursuant to the Hoopers' request for attorney

fees and posttrial motions filed by FFG and the Pierces, the district court determined the Hoopers' attorney fees to be $29,617.46 and entered judgment in this additional amount. FFG and the Pierces (hereinafter appellants) then commenced this timely appeal.

II. ASSIGNMENTS OF ERROR

Appellants generally assign, consolidated and restated, that the trial court erred (1) in finding that appellants violated § 8-1118, (2) by not requiring the Hoopers to provide expert testimony, and (3) in its calculation of damages. Appellants also assign as error various factual findings of the court.

III. STANDARD OF REVIEW

[1-4] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.[2] An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.[3] Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.[4] 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.[5]

[5] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.[6]

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

[3] *Id.*

[4] *Id.*

[5] *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 755 N.W.2d 382 (2008); *Eicher v. Mid America Fin. Invest. Corp., supra* note 2.

[6] *Id.*

IV. ANALYSIS

1. Liability Under Securities Act of Nebraska

[6] The Securities Act of Nebraska (hereinafter the Act) is modeled after the 1956 Uniform Securities Act.[7] This court has stated that the Act "should be liberally construed to afford the greatest possible protection to the public."[8] The Act provides:

> It shall be unlawful for any person to offer or sell any security in this state unless (1) such security is registered by notification under section 8-1105, by coordination under section 8-1106, or by qualification under section 8-1107, (2) the security is exempt under section 8-1110 or is sold in a transaction exempt under section 8-1111, or (3) the security is a federal covered security.[9]

Civil liability for violation of the Act is governed by § 8-1118, which provides in pertinent part:

> (1) Any person who offers or sells a security in violation of section 8-1104 or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the untruth or omission, shall be liable to the person buying the security from him or her . . . .

We have interpreted the phrase "[a]ny person who . . . sells" as used in § 8-1118(1) to include one who does not actually transfer title to a security, but who solicits its purchase, "motivated at least in part by desire to serve his or her own financial interests or those of the securities owner."[10]

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[7] See 7C U.L.A. app. I (2006). See, also, *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986) (Grant, J., dissenting).

[8] *Labenz v. Labenz*, 198 Neb. 548, 550, 253 N.W.2d 855, 857 (1977).

[9] § 8-1104.

[10] *Wilson v. Misko*, 244 Neb. 526, 538, 508 N.W.2d 238, 248 (1993).

Although Freedom Financial is not a party to this case, the district court found that it "offered or sold unregistered securities in Nebraska and sold securities by means of untrue statements of material fact and omissions to state a material fact," in violation of § 8-1118(1). Appellants' liability was predicated on this finding pursuant to § 8-1118(3), which provides in pertinent part:

> (3) Every person who directly or indirectly controls a person liable under subsections (1) and (2) of this section, including every . . . director, or person occupying a similar status or performing similar functions of a partner, limited liability company member, officer, or director . . . shall be liable jointly and severally with and to the same extent as such person, unless able to sustain the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

The district court found that the Pierces were directors of Freedom Financial and that they did not meet their burden of proving that they did not know, and in the exercise of reasonable care could not have known, of the facts upon which Freedom Financial's liability was based. The court further determined that FFG directly or indirectly controlled Freedom Financial and that it likewise did not meet its burden of proving that it did not know, and in the exercise of reasonable care could not have known, of such facts.

(a) Expert Testimony Not Required

We find no merit in appellants' argument that the district court erred in not requiring proof by expert testimony regarding the standard of care applicable to investment advisors. This is not a professional negligence case, and the Hoopers were not required to prove a standard of care. To establish statutory civil liability under the Act, the Hoopers were required to prove only that Freedom Financial violated § 8-1118(1) by offering or selling an unregistered security which was required by law to be registered, or by selling a security by means of an untrue statement or omission of a material fact, and that appellants

had derivative liability under § 8-1118(3). No expert testimony was required to prove the facts necessary to establish this statutory liability.

(b) Violation of § 8-1118(1) by Freedom Financial

The district court found that Freedom Financial violated § 8-1118(1) in two ways: (1) by selling unregistered securities and (2) by selling the CEF stock by means of untrue statement of material facts and omissions of facts. Appellants do not assign error to the finding that Freedom Financial "offered or sold unregistered securities." And the record supports the finding. In their federal lawsuit against Casper and others, Freedom Financial, FFG, and Freedom Group alleged that "Freedom Financial sold $1,433,788.91 of the preferred stock of CEF to its clients." It is undisputed that the CEF stock was unregistered, and there is no claim on appeal that the stock itself or the transaction in which it was sold to the Hoopers had retained its purported exempt status.[11] Likewise, there is undisputed evidence that the CEF stock was recommended and sold to the Hoopers by registered representatives of Freedom Financial. We note that the findings of the district court incorrectly identify Wyllie and Dickinson as registered representatives of "Freedom Financial Group, Inc.," but it is clear from Pierce's testimony that they were, in fact, registered representatives of Freedom Financial. There is evidence that Freedom Financial had a financial interest in the transaction, in that it was to receive a commission on the sale of the CEF preferred stock and a related entity, FFG, received financing from CEF through the proceeds of the offering.

We find no merit in appellants' argument that the district court erred in finding that the stock was sold by means of "untrue statements of material facts and omissions of fact."[12] The evidence establishes that the stock was sold by means of the untrue statements contained in the marketing brochure approved by Freedom Financial and provided to the Hoopers

[11] See §§ 8-1104, 8-1110, and 8-1111.

[12] Brief for appellants at 7.

by Wyllie and Dickinson, who reinforced the untrue statements regarding risk, return, and suitability in the sales pitch and recommendations they made to the Hoopers. It is likewise clear that the Hoopers were unsophisticated investors who relied upon Wyllie's assurances that the CEF stock was as described in the sales pamphlet, notwithstanding its inconsistencies with the offering memorandum. Thus, the evidence, considered under our standard of review, is sufficient to support the finding that Freedom Financial violated § 8-1118(1) both by selling unregistered securities in violation of § 8-1104 and by means of untrue statements and concealment of material facts.

(c) Liability of Directors and FFG Under § 8-1118(3)

It is undisputed that at all relevant times, each of the three Pierce defendants were directors of Freedom Financial, and that Pierce served as president of the corporation. As such, they were responsible for establishing the policies and procedures of the company and for ensuring general compliance with such policies. Under Nebraska's Blue-Sky Law,[13] which preceded the Act, we held that officers and directors of a corporation which violated the law were subject to statutory civil liability, regardless of their direct participation in the sale, if they knew, or in the exercise of reasonable care could have known, of the facts upon which liability was based.[14] This principle is now codified in § 8-1118(3). Although we have not previously addressed the liability of officers and directors under the Act, courts in other states have construed similar adaptations of the Uniform Securities Act to impose strict liability on officers and directors unless the statutory defense of lack of knowledge is proved.[15] We construe § 8-1118(3) in the same manner.

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[13] Neb. Rev. Stat. §§ 81-302 to 81-349 (Reissue 1958).

[14] See, *Huryta v. White*, 184 Neb. 24, 165 N.W.2d 354 (1969); *Loewenstein v. Midwestern Inv. Co.*, 181 Neb. 547, 149 N.W.2d 512 (1967); *Davis v. Walker*, 170 Neb. 891, 104 N.W.2d 479 (1960).

[15] See, e.g., *Lean v. Reed*, 876 N.E.2d 1104 (Ind. 2007); *Taylor v. Perdition Minerals Group, Ltd.*, 244 Kan. 126, 766 P.2d 805 (1988).

There is ample evidence to support the district court's finding that, as directors, Pierce, Carolyn, and Westley did not meet their burden of proving that they did not know, and in the exercise of reasonable care could not have known, of the facts upon which Freedom Financial's liability was based. Carolyn and Westley did not testify and thus provided no evidence on this point. There is nothing in the record to suggest that they did not have access to information concerning Freedom Financial's involvement in the CEF offering. Pierce testified that he was personally involved in the offering on behalf of Freedom Financial, that he knew the stock was not registered, and that his office reviewed the marketing brochure which contained the untrue and misleading statements about the stock. Pierce gave conflicting testimony about when he first learned that FFG was receiving funds from the proceeds of the CEF offering, and the district court found that his testimony on this point was not credible.

Likewise, there is competent evidence to support the finding of the district court that FFG controlled Freedom Financial by ensuring its ongoing participation in the CEF offering which was intended to provide financing for FFG's planned acquisitions and that FFG did not meet its burden of proving that it did not know, and in the exercise of reasonable care could not have known, of the facts upon which Freedom Financial's liability was based. FFG and Freedom Financial were subsidiaries of the same parent corporation. Pierce served as an officer and director of both subsidiary corporations as well as the parent corporation. He was personally involved in the companies' transactions involving CEF and other entities controlled by Casper. The evidence supports a reasonable inference that FFG was an active participant in a plan whereby Freedom Financial would serve as managing broker-dealer of the CEF stock offering in order to generate funds through which CEF or other Casper entities would provide financing for FFG.

2. Damages

One who purchases securities sold in violation of the Act may sue

> to recover the consideration paid for the security, together with interest at six percent per annum from the date of

> payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages shall be the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at six percent per annum from the date of disposition.[16]

Appellants contend that the district court erred in determining the amount of the Hooper's original investment to be $105,000. They argue that the amount was less than that amount because of a surrender fee incurred when Donald's retirement account was liquidated in order to make the CEF investment. But the district court's finding is supported by appellants' responses to requests for admission which were received in evidence. Each of the appellants admitted that the consideration paid by the Hoopers for the CEF stock was $105,000. The district court relied upon this evidence in its finding.

Appellants also contend that the damage award should have been reduced by amounts which Wyllie and Dickinson paid to the Hoopers pursuant to the arbitration award. We conclude that the record is insufficient to resolve this issue, and we therefore do not address it.

V. CONCLUSION

We have considered each of the appellants' assignments of error directed to factual findings made by the district court, and to the extent they are necessary to the determination of liability or damages, we conclude that they are without merit. For the reasons discussed herein, we conclude that the district court did not err in finding Pierce, Carolyn, Westley, and FFG liable to the Hoopers in the amount of $88,942.39, together with taxable costs and attorney fees. We affirm the judgment.

AFFIRMED.

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[16] § 8-1118(1).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. SHANNON J. SAMUELSON, RESPONDENT.

783 N.W.2d 779

Filed June 25, 2010. No. S-09-914.

1. **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 respondent generally, and (6) the respondent'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. ____. 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.
4. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.
5. ____. A pattern of attorney neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public.
6. ____. Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.

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

The Counsel for Discipline of the Nebraska Supreme Court brought this action against attorney Shannon J. Samuelson. Samuelson failed to respond to the charges. We sustained the Counsel for Discipline's motion for judgment on the pleadings and reserved the issue of the appropriate sanction. We now order that Samuelson be disbarred.

BACKGROUND

Samuelson was admitted to the practice of law in the State of Nebraska on April 25, 2002, and he practiced law in Hastings, Nebraska. Sometime around June 2009, Samuelson abandoned his practice and, according to family members, left the state. His current whereabouts are unknown. We have since appointed a trustee to inventory Samuelson's files and take whatever action is necessary to protect the interests of Samuelson's former clients. To this date, the Client Assistance Fund has received 12 claims totaling $33,000 as a result of Samuelson's abandoning his practice. The current action concerns four counts of misconduct stemming from his neglect and mismanagement of legal matters for four clients during the last year of his practice.

Count one pertains to Samuelson's representation of a client (Client 1), who retained Samuelson to prosecute a divorce and paid him $1,200. Samuelson filed the complaint for dissolution and attended a hearing where the property settlement agreement was filed and approved by the district court. Samuelson was directed to prepare and submit a decree for the court's approval, but he failed to do so. Client 1's divorce was eventually finalized by the trustee.

Count two stems from Samuelson's representation of a second client (Client 2), who retained Samuelson in September 2008 to represent her in a child custody and child support modification action. Samuelson filed an answer on Client 2's behalf and appeared at a hearing on the same date. Subsequently, the judge entered a temporary order directing the parties to enter into mediation and take parenting classes. Samuelson failed to inform Client 2 of the need to take a parenting class. Client 2 attempted to reach Samuelson for several months and, as spring approached, was concerned about the fact that the temporary order had provided for only Thanksgiving and Christmas vacations, and did not discuss the Easter 2009 holiday. It had been assumed that a permanent order would have been entered before then. After being unsuccessful in her attempts to reach Samuelson by telephone, Client 2 was able to see Samuelson briefly during an unannounced visit. However, Samuelson told Client 2 that he was too busy to meet and that he would call.

Client 2 never heard from Samuelson again. Samuelson did not advise either Client 2 or the district court that he was withdrawing from her case.

Count three involves Samuelson's representation of a third client (Client 3) in two pending cases—a domestic abuse protection order and a dissolution of marriage. Client 3 gave Samuelson $4,500 on March 12, 2009, as an advance payment. Samuelson cashed the check, but did not place any part of it into his trust account. Samuelson met with Client 3 several times to discuss the cases, and Samuelson reviewed a stipulation for temporary custody sent by the spouse's attorney. But, after that, Client 3 was never again able to get in touch with Samuelson. Samuelson did not seek leave to withdraw from the cases and did not notify Client 3 that he was no longer representing him. None of the unearned fees were returned to Client 3.

Finally, count four concerns Samuelson's representation of a fourth client (Client 4), who paid Samuelson $5,000 in advanced fees to prosecute an action for dissolution of marriage. Samuelson cashed the check but did not deposit the funds into his trust account. Samuelson filed a complaint and appeared at first to be providing competent representation by filing motions and attending hearings on temporary allowances and an application for a domestic relations protection order. In June 2009, however, Samuelson disappeared. He did not notify the court or Client 4 that he would no longer be handling the case.

Samuelson's actions in handling the legal matters of these four clients violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (duty to act with reasonable diligence), 3-501.4 (duty to properly communicate with client), 3-501.15 (duty to maintain trust account and safekeeping of property), 3-501.16 (duty to protect client's interests when terminating representation), and 3-508.4 (duty to follow Rules of Professional Conduct).

ANALYSIS

[1] Having granted judgment on the pleadings, the sole issue before us is the appropriate discipline. 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.

To determine the appropriate discipline in Samuelson'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 Samuelson generally, and (6) Samuelson's present or future fitness to continue in the practice of law.[1]

[2-4] Each case justifying discipline of an attorney must be evaluated individually under the particular facts and circumstances of that case.[2] 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.[3] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[4]

[5] We have previously disbarred attorneys who, like Samuelson, neglected their clients' cases and failed to cooperate with the Counsel for Discipline during the disciplinary

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[1] See *State ex rel. Counsel for Dis. v. Smith*, 278 Neb. 899, 775 N.W.2d 192 (2009).

[2] See *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[3] *Id.*

[4] *Id.*

proceedings.[5] In particular, a pattern of attorney neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public.[6]

[6] And, in this case, Samuelson not only neglected and ultimately abandoned the legal matters of his clients, but he also mismanaged their funds. We have said that, absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.[7]

Because Samuelson neither responded to the Counsel for Discipline nor filed a pleading, we have no basis for considering any factors that mitigate in Samuelson's favor. Instead, these failures to cooperate with the Counsel for Discipline and respond to the charges at any point during this disciplinary process indicate a disrespect for this court's disciplinary jurisdiction.[8] The record shows that Samuelson is either unable or unwilling to respond to the charges and that, through a pattern of neglect of his clients and mismanagement of client funds, he is not fit to practice law.

CONCLUSION

We order that Samuelson be disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

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[5] See, e.g., *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006); *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 708 N.W.2d 606 (2005); *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[6] See *State ex rel. NSBA v. Johnston*, 251 Neb. 468, 558 N.W.2d 53 (1997).

[7] *State ex rel. Counsel for Discipline v. Jones, supra* note 5; *State ex rel. Counsel for Dis. v. Gilroy*, 270 Neb. 339, 701 N.W.2d 837 (2005).

[8] See *State ex rel. Counsel for Dis. v. Smith, supra* note 1.

BARBARA A. RICKS, APPELLEE, V. DANIEL VAP, ALSO KNOWN AS DANIEL S. VAP, AND JOE L. VAP, APPELLEES, AND BLANCHE VAP ET AL., APPELLANTS.

784 N.W.2d 432

Filed June 25, 2010. No. S-09-991.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
2. **Mines and Minerals.** Nebraska's dormant mineral statutes, Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2004), expressly require the record owner of a severed mineral interest to publicly exercise the right of ownership by performing one of the actions specified in § 57-229 during the statutory dormancy period.
3. **Statutes: Legislature: Intent: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to 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.

Appeal from the District Court for Hitchcock County: DAVID URBOM, Judge. Affirmed.

George G. Vinton for appellants.

Daylene A. Bennett, of Burger & Bennett, P.C., for appellee Barbara A. Ricks.

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

GERRARD, J.

Nebraska's dormant mineral statutes[1] provide that a severed mineral interest shall be considered abandoned if, for a period of 23 years, its "right of ownership" is not publicly exercised by its record owner. Among the ways in which the record owner can exercise the right of ownership are "leasing" or "transferring" the mineral interest with a recorded instrument.[2] But if a severed mineral interest is abandoned, the owner of the surface estate can sue to terminate the mineral interest.[3]

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[1] Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2004).

[2] § 57-229(1).

[3] § 57-228.

In this case, the record owners of severed mineral interests executed leases which were allowed to expire at the end of their 5-year terms. The owner of the surface estate sued to terminate the mineral interests more than 25 years after the leases were executed and recorded, but just over 21 years after the leases expired. The question presented in this appeal is whether the 23-year period prescribed by the dormant mineral statutes began to run when the leases were executed and recorded or when they expired. Because we conclude that the 23-year dormancy period began to run when the leases were executed and recorded, we affirm the judgment of the district court which had properly granted relief to the owner of the surface estate.

BACKGROUND

There are two parcels of land at issue in this appeal: the northwest and southwest quarters of a section of land in Hitchcock County, Nebraska. The record owner of the surface estate is Barbara A. Ricks, the plaintiff in this case. Ricks is also the record owner of a one-half interest in the mineral estate for both parcels. The record owner of the remaining mineral interest in the northwest quarter was Daniel Vap, and the record owner of the remaining mineral interest in the southwest quarter was Joe Vap, Daniel's father. Daniel and Joe are deceased, and this action is being defended by their various heirs, who we refer to collectively as the "Vap heirs."

The last activity regarding the mineral estate recorded in Hitchcock County are two leases of the mineral interests now claimed by the Vap heirs. The mineral estate for the northwest quarter was leased to the Gemini Corporation (Gemini) for a 5-year term by Daniel and his wife in a lease dated November 22, 1983, and recorded on January 19, 1984. The mineral estate for the southwest quarter was the subject of two 5-year leases to Gemini, both dated December 7, 1983: one executed by Joe's widow and the other by Joe's children and their spouses. One of the southwest quarter leases was recorded on January 19, 1984, and the other was recorded on March 6. Although the record does not seem to conclusively establish it, we assume for purposes of this appeal that Gemini made the

payments necessary under the leases to extend them for their full 5-year terms.

Ricks filed her complaint to terminate the allegedly abandoned mineral interests on January 22, 2009. The Vap heirs answered, alleging that the right of ownership in the disputed mineral interests had been publicly exercised at the termination of the leases, in 1988—less than 23 years before Ricks' complaint was filed. Ricks moved for summary judgment, which the district court granted, reasoning that the statutory period had only been extended from the dates the leases were executed, more than 23 years earlier. The Vap heirs appeal.

ASSIGNMENT OF ERROR

The Vap heirs assign, consolidated and restated, that the district court erred in determining that the leases did not constitute a public exercise of the right of ownership of the severed mineral interests within 23 years before the filing of the action, so that the mineral interests could not be considered abandoned under the dormant mineral statutes.

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.[4]

ANALYSIS

This case turns on the meaning of Nebraska's dormant mineral statutes. Generally, dormant mineral statutes were enacted to address title problems that developed after mineral estates were fractured.[5] At common law, mineral interests could not be abandoned.[6] But permanent or long-term mineral interests could be created during a period of activity in a particular industry, and those interests did not terminate when the activity

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[4] See *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[5] See, generally, Timothy C. Dowd, *Clearing Title of Long-Lost Mineral Owners*, 54 Rocky Mtn. Min. L. Inst. 30-1 (2008); Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray*, 70 N.D. L. Rev. 541 (1994).

[6] See Dowd, *supra* note 5.

ceased.[7] So, the mineral estate could be held by owners who had long disappeared from the area, leaving no trace.[8] When the record owner of severed mineral interests could not be contacted, the dormant interests could cloud the titles of surface owners, and further development of the mineral estates became nearly impossible.[9] Legislatures sought to remedy some of those problems by enacting statutes to reunite dormant mineral estates with surface estates.[10]

Nebraska's dormant mineral statutes are representative of those concerns.[11] Section 57-228 provides:

> Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record . . . .

The court shall enter judgment terminating the severed mineral interest and vesting title in the surface owner if the court "shall find that the severed mineral interest has been abandoned."[12] And § 57-229 explains in part:

> A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county

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[7] See Ronald W. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 Land & Water L. Rev. 73 (1972).

[8] See *id.*

[9] See, Dowd, *supra* note 5; Polston, *supra* note 5; Polston, *supra* note 7.

[10] See Dowd, *supra* note 5.

[11] See, generally, Committee on Public Works Hearing, L.B. 158, 77th Leg., 1st Sess. 14 (Feb. 10, 1967); Floor Debate, 77th Leg., 1st Sess. 477-78 (Feb. 17, 1967).

[12] § 57-230.

> where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located.

There is no evidence in this case of any drilling or mining activity or of a recorded claim of interest. Instead, the question is whether the right of ownership claimed by the Vap heirs was publicly exercised pursuant to § 57-229(1). Specifically, the Vap heirs argue that they or their predecessors in interest exercised the right of ownership by "leasing" or "transferring" the mineral interests.

The Vap heirs rely on a Michigan case, *Energetics v Whitmill*,[13] that arose under similar circumstances, and in which the Michigan Supreme Court held that the interests at issue were not abandoned. But we find *Whitmill* to be distinguishable, because of an important difference between the Nebraska and Michigan dormant mineral statutes.

In *Whitmill*, severed oil and gas interests had been leased for a 10-year period, but the lease expired, and several years later, the surface owners claimed title pursuant to the Michigan dormant mineral statute. Whether the 20-year dormancy period had run depended on whether the period began to run at the beginning or end of the lease term. The Michigan statute provided, in relevant part, that an oil or gas interest "'in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred . . . for a period of 20 years shall, in the absence of the issuance of a drilling permit . . . be deemed abandoned.'"[14]

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[13] *Energetics v Whitmill*, 442 Mich. 38, 497 N.W.2d 497 (1993).

[14] See, *id.* at 40 n.2, 497 N.W.2d at 499 n.2; Mich. Comp. Laws Ann. § 554.291 (West 2005).

The Michigan Supreme Court rejected the argument that the mineral interests had been "leased" during the lease term, explaining that if such a construction of the statute were adopted, "there would be nothing to prevent the owner of a severed interest from executing a lease with a primary term much longer than twenty years. Thus, a severed interest might be sheltered from the operation of the act for an indefinite period."[15] And had the Michigan Legislature intended that result, it could have explicitly provided that the dormancy period would not run while the severed interest was *subject* to a lease.[16]

The court found, however, that when the lease expired, the oil and gas interest had been "'transferred'" within the meaning of the Michigan statute.[17] The court explained that the lease itself was a transfer of the oil and gas interest, so when the rights conferred by the lease reverted back to the lessor, the interest was "'transferred'" back.[18]

[2] But the Michigan court's reasoning was grounded in the unique language of the Michigan statute, which, as set forth above, simply required that an oil or gas interest be "sold, leased, mortgaged or transferred" to avoid abandonment, without regard to who (if anyone) initiated the action.[19] Nebraska's statute, on the other hand, expressly requires "the record owner of such mineral interest" to "exercise[] publicly the right of ownership" by performing one of the actions specified in the statute during the statutory period.[20] In other words, the *Whitmill* court's reasoning regarding whether the mineral interest had been "transferred" is inapplicable under Nebraska's statute, and the court's reasoning regarding when the interest had been "leased" supports the district court's conclusion, in

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[15] *Whitmill, supra* note 13, 442 Mich. at 46, 497 N.W.2d at 501.

[16] See *id.*

[17] *Id.* at 46, 497 N.W.2d at 502.

[18] *Id.*

[19] See Mich. Comp. Laws Ann. § 554.291.

[20] See § 57-229.

this case, that it had been leased *by the record owner* only when the lease was executed and properly recorded.

The record in this case is clear that the record owners of the disputed mineral interests last "leased" the interests within the meaning of the statute at the time the leases were executed and properly recorded, because that was when *they* publicly exercised their right of ownership. And even assuming, without deciding, that the expiration of the leases in this case resulted in a "transferring" of the disputed mineral interests, such a transfer was initiated either by the lessee or simply by operation of law—not by the record owners.

[3] To conclude otherwise would be contrary to both the language and purpose of the dormant mineral statutes. Statutory language is to be given its plain and ordinary meaning,[21] and our duty in discerning the meaning of a statute is to 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.[22] It is consistent with the statutory purpose of preventing abandonment of mineral estates to require an absent owner of dormant mineral interests to actively exercise those interests. And the plain language of § 57-229 provides that a severed mineral interest is abandoned unless the record owner of the interest is the one who publicly exercises it.

In this case, that did not happen during the 23 years preceding Ricks' complaint. Had the Vap heirs wanted to preserve their interests during that time, they could have recorded a verified claim of interest in Hitchcock County. Instead, they permitted the interests to remain dormant, which is precisely what the dormant mineral statutes are intended to address. Therefore, we find no merit to their assignment of error.

CONCLUSION

The last time Daniel, Joe, or the Vap heirs publicly exercised their right of ownership to the severed mineral interests disputed

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[21] *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008).

[22] See *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

in this case was when they leased and properly recorded the interests to Gemini, more than 25 years before Ricks filed her complaint to terminate and extinguish those interests. The district court did not err in granting Ricks the relief she requested. The district court's judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF REBECCA B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. REBECCA B., APPELLEE.

783 N.W.2d 783

Filed June 25, 2010. No. S-09-1041.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
3. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Double Jeopardy: Probation and Parole.** The Double Jeopardy Clause generally is not violated by a reconsideration or revocation of probation.
5. **Criminal Law: Probation and Parole.** A motion to revoke probation is not a criminal proceeding.
6. **Probation and Parole: Juvenile Courts.** A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
7. ____: ____. A probation revocation hearing usually involves a limited inquiry by the trial judge, focusing on whether the defendant or juvenile has been convicted or adjudicated for another offense or failed to comply with a specific condition of probation.
8. ____: ____. A probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding.
9. **Criminal Law: Probation and Parole: Sentences.** Violation of probation is not itself a crime or offense; the statute provides a mechanism whereby the previous probation is revoked and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.

10. **Double Jeopardy: Probation and Parole.** Any punishment resulting from revocation of an individual's probation is punishment that relates to the person's original offense; therefore, an individual's prosecution for the same conduct in a different proceeding does not violate double jeopardy principles.
11. ____: ____. Double jeopardy is not implicated by probation revocation proceedings.

Appeal from the County Court for Madison County: DONNA F. TAYLOR, Judge. Exception dismissed.

Joseph M. Smith, Madison County Attorney, and Gail E. Collins for appellant.

Melissa A. Wentling, Madison County Public Defender, and Sharon E. Joseph for appellee.

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

GERRARD, J.

Rebecca B. was adjudicated under the Nebraska Juvenile Code[1] and placed on probation by the county court for Madison County, sitting as a juvenile court, and ordered to complete a court-supervised juvenile drug treatment program. After Rebecca failed two chemical tests, the court ordered Rebecca to serve two periods of detention at a detention center. Neither Rebecca nor the State objected to or appealed from the drug court orders, and Rebecca served the detentions. Then, the State filed a motion to revoke Rebecca's probation based on the same test results for which she had been detained. The juvenile court dismissed the motion to revoke probation, and the State appealed to the Nebraska Court of Appeals rather than the district court.

The primary issue presented here is jurisdictional. Ordinarily, any final order entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from the district court.[2] But when a county attorney files an appeal "in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy," the appeal must

[1] See Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008 & Supp. 2009).

[2] § 43-2,106.01(1).

be taken by exception proceedings to the district court pursuant to Neb. Rev. Stat. §§ 29-2317 to 29-2319 (Reissue 2008).[3] Therefore, we consider whether the revocation proceedings constitute a situation where the juvenile has been placed legally in jeopardy.

BACKGROUND

On January 29, 2009, the Madison County Court, sitting as a juvenile court, adjudicated Rebecca to be a juvenile within § 43-247(1) and (3)(b). Following a dispositional hearing on March 23, the juvenile court placed Rebecca on supervised probation for a period of 1 year. As a condition of her probation, Rebecca was ordered to attend and successfully complete the "Northeast Nebraska Juvenile Treatment program," a court-supervised program also known as the juvenile drug treatment court. The juvenile drug treatment court is an approved drug court program created pursuant to Neb. Ct. R. § 6-1201 et seq., and we will refer to it as the "drug court" in order to distinguish between the parallel proceedings that took place.

On May 5, 2009, the drug court conducted a hearing concerning allegations that Rebecca had used marijuana. The drug court found that Rebecca had failed a drug test and, as a "sanction," ordered her incarcerated at a juvenile detention center (JDC) for 2 days. On May 8, Rebecca reported to the JDC and served her 2-day detention. Neither Rebecca nor the State objected to or appealed the drug court order. On May 26, the drug court conducted another hearing concerning allegations that Rebecca had used alcohol. The drug court found that Rebecca had failed a drug and alcohol test. As a sanction, the drug court ordered Rebecca detained at the JDC for 1 day. Rebecca reported to the JDC on May 29 and served her detention as ordered. Again, neither Rebecca nor the State objected to or appealed the drug court order; thus, we do not opine on the appropriateness of the detention orders.[4]

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[3] § 43-2,106.01(2)(d).

[4] But see *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010).

The State also filed a motion to revoke probation, alleging that Rebecca violated her probation by using marijuana on April 21, 2009, and alcohol between May 1 and 12. Rebecca moved for dismissal of the State's amended motion to revoke probation or, in the alternative, an absolute discharge of the underlying case. After a hearing, the juvenile court dismissed the motion for revocation of probation and overruled the motion for absolute discharge. In its order, the court found that Rebecca's "detention(s) have been served as sanctions for the same violations the State alleges in its Motion to Revoke Probation."

The State appealed to the Court of Appeals. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[5]

ASSIGNMENT OF ERROR

The State assigns that the juvenile court erred in concluding that the motion to revoke probation should be dismissed.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional issues not involving factual disputes as a matter of law, which requires the appellate court to reach independent conclusions.[6]

ANALYSIS

The State argues that the juvenile court lacked jurisdiction to sanction Rebecca in the drug court proceedings[7]; therefore, the State argues that because the earlier sanctions were unlawfully imposed, the juvenile court erred in relying on them in refusing to sanction Rebecca in the probation revocation proceeding. Rebecca argues, on the other hand, that she actually was deprived of her liberty and that doing so again would violate the Double Jeopardy Clause.

[2] But before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional

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[5] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[6] *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006).

[7] See *In re Interest of Dakota M., supra* note 4.

issues.[8] At issue in this case is § 43-2,106.01, which governs appellate jurisdiction for juvenile courts.[9] We note that § 43-2,106.01 has been amended effective July 15, 2010,[10] but the amendment does not affect our analysis in this opinion.

Section 43-2,106.01(1) provides that a final order or judgment "entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals." And § 43-2,106.01(2) provides that an appeal may be taken by a county attorney, "except that in any case determining delinquency issues in which the juvenile has been placed legally in jeopardy, an appeal of such issues may only be taken by exception proceedings pursuant to sections 29-2317 to 29-2319."

As is clear from § 43-2,106.01(1), most cases arising under that statute are governed by Neb. Rev. Stat. § 25-1912 (Reissue 2008), which sets forth the requirements for appealing district court decisions.[11] But the plain language of § 43-2,106.01(2)(d) carves out an exception for delinquency cases in which jeopardy has attached. In such cases, the county attorney is limited to taking exception pursuant to the procedures of §§ 29-2317 to 29-2319. Sections 29-2317 to 29-2319 outline exception proceedings, which allow prosecuting attorneys to "take exception to any ruling or decision of the county court . . . by presenting to the court a notice of intent to take an appeal to the district court."[12] Section 29-2317 requires exception to a county court judgment to be taken to the district court sitting as an appellate court. Specifically, the prosecuting attorney is to file a notice of appeal in the county court, then file the notice in the district court within 30 days.

Here, after the Madison County Court, sitting as a juvenile court, filed its order dismissing the motion to revoke probation,

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[8] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[9] See *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

[10] See, 2010 Neb. Laws, L.B. 800, § 25; Neb. Const. art. III, § 27.

[11] *In re Interest of Sean H., supra* note 6.

[12] § 29-2317(1).

the State filed notice of its intent to appeal the juvenile court's order. The State chose to file the appeal, however, not with the district court, but with the Court of Appeals, and we then moved the appeal to our docket. Rebecca argues that we lack jurisdiction over this appeal, because pursuant to § 43-2,106.01(2)(d), the State should have appealed the juvenile court judgment to the district court sitting as an appellate court. Specifically, Rebecca contends that the State was required to appeal to the district court because she was placed "legally in jeopardy," as that phrase is used in § 43-2,106.01(2)(d).

[3] In order to determine whether Rebecca was placed legally in jeopardy in this context, we begin by setting forth the basic propositions of law regarding double jeopardy. The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect an individual against a second prosecution for the same offense after an acquittal or conviction.[13] Specifically, the Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[14]

[4-6] But, the Double Jeopardy Clause generally is not violated by a reconsideration or revocation of probation.[15] And a motion to revoke probation is not a criminal proceeding.[16] A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.[17]

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[13] See *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

[14] *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[15] *United States v. Clark*, 741 F.2d 699 (5th Cir. 1984).

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

[17] See *State v. Bourdeau*, 448 A.2d 1247 (R.I. 1982).

[7-9] We have stated that a probation revocation hearing usually involves a limited inquiry by the trial judge, focusing on whether the defendant or juvenile has been convicted or adjudicated for another offense or failed to comply with a specific condition of probation.[18] It is well established that a probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding.[19] Furthermore, violation of probation is not itself a crime or offense; the statute provides a mechanism whereby the previous probation is revoked and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.[20]

[10,11] Because probation revocation proceedings are not directed at attempting to punish the activity that was alleged to violate the terms of probation, but merely reassess whether the probationer may still be considered a risk, the federal courts have routinely concluded that double jeopardy is not implicated in adult probation revocation proceedings.[21] State courts in other jurisdictions have similarly concluded, with respect to adult offenders, that any punishment resulting from revocation of a defendant's probation is punishment that relates to the person's original offense; therefore, an individual's prosecution for the same conduct in a different proceeding does not violate double jeopardy principles.[22] And those principles also apply

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[18] See *State v. Hernandez*, 273 Neb. 456, 730 N.W.2d 96 (2007).

[19] See *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[20] See, Neb. Rev. Stat. § 29-2268(1) (Reissue 2008); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

[21] See, *Clark, supra* note 15; *United States v. Miller*, 797 F.2d 336 (6th Cir. 1986); *United States v. Whitney*, 649 F.2d 296 (5th Cir. 1981).

[22] See, *Ashba v. State*, 580 N.E.2d 244 (Ind. 1991); *State v. Chase*, 588 A.2d 120 (R.I. 1991), *overruled on other grounds, State v. Gautier*, 871 A.2d 347 (R.I. 2005); *State v. Lange*, 237 Mont. 486, 775 P.2d 213 (1989); *State v. Holcomb*, 178 W. Va. 455, 360 S.E.2d 232 (1987).

to revocation of probation in juvenile proceedings.[23] Simply stated, it is black letter law that double jeopardy is not implicated by probation revocation proceedings.[24]

In other words, double jeopardy is not implicated in probation revocation proceedings because the proceedings are a continuation of the original underlying conviction or adjudication. The jeopardy that is attached is the jeopardy that attached in the underlying prosecution or adjudication. Obviously, those principles would have implications for the merits of Rebecca's double jeopardy argument, potentially in another proceeding. But in this case, their jurisdictional implications come first. Application of § 43-2,106.01(2)(d) turns on whether the juvenile has been placed in jeopardy by the juvenile court, not by whether the Double Jeopardy Clause bars further action.[25] And here, Rebecca was placed legally in jeopardy within the meaning of § 43-2,106.01(2)(d) when she was originally adjudicated on January 29, 2009, when the court accepted her guilty plea.[26]

Rebecca's revocation hearing was a continuation of her original adjudication where jeopardy attached, and therefore, Rebecca was and continued to be legally in jeopardy. And because Rebecca was placed legally in jeopardy within the meaning of § 43-2,106.01(2)(d), the State was required to take an exception proceeding to the district court according to the procedures outlined in § 29-2317. It did not do so, and therefore, we lack jurisdiction over the merits of its appeal.

CONCLUSION

The plain language of § 43-2,106.01(2)(d) requires the State to file its exception proceeding according to §§ 29-2317 to 29-2319. Because the State failed to comply with the

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[23] See, *Matter of Lucio F.T.*, 119 N.M. 76, 888 P.2d 958 (N.M. App. 1994); *Porter v. State*, 43 Ark. App. 110, 861 S.W.2d 122 (1993); *In the Interest of B. N. D.*, 185 Ga. App. 906, 366 S.E.2d 187 (1988).

[24] See, *Gautier, supra* note 22; *Hardy v. U.S.*, 578 A.2d 178 (D.C. 1990).

[25] See, *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008); *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[26] See *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

statutory procedures outlined in § 29-2317, as incorporated by § 43-2,106.01, we lack jurisdiction to consider the State's exception. Because this case is not properly before this court, we dismiss the exception proceeding for lack of jurisdiction.

EXCEPTION DISMISSED.

HEAVICAN, C.J., not participating.

NEBCO, INC., A NEBRASKA CORPORATION, APPELLANT, V. THERESA K. MURPHY, A NEBRASKA CITIZEN, AND CATHERINE D. LANG, IN HER CAPACITY AS THE COMMISSIONER OF LABOR FOR THE STATE OF NEBRASKA, APPELLEES.

784 N.W.2d 447

Filed July 2, 2010. Nos. S-09-484, S-09-691.

1. **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.
2. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Employment Security: Words and Phrases.** Misconduct under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008) has been defined as behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.

Appeals from the District Court for Lancaster County: KAREN B. FLOWERS and PAUL D. MERRITT, JR., Judges. Affirmed.

Shannon L. Doering and Luke F. Vavricek for appellant.

James D. McFarland for appellee Theresa K. Murphy.

John H. Albin and Thomas A. Ukinski for appellee Catherine D. Lang.

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

MILLER-LERMAN, J.

NATURE OF CASE

In these consolidated cases, NEBCO, Inc., appeals two orders, each of which relates to unemployment benefits paid to a former NEBCO employee, appellee Theresa K. Murphy. In the first case, case No. S-09-484, the district court for Lancaster County affirmed the Nebraska Appeal Tribunal's decision that Murphy was not partially disqualified from receiving unemployment benefits because there was insufficient evidence that she had engaged in workplace misconduct. In the second case, case No. S-09-691, the district court affirmed the appeal tribunal's decision that NEBCO's unemployment insurance experience account could be charged for Murphy's unemployment benefits. We affirm the district court's orders in both cases.

STATEMENT OF FACTS

Murphy was employed by NEBCO as a truckdriver. Murphy's employment was terminated on July 25, 2008, because of five separate driving accidents which occurred within a 3-year period.

In two separate accidents that occurred on September 11 and 13, 2005, the truck Murphy was driving struck a city light pole. The third accident occurred on September 11, 2007, when the truck Murphy was driving damaged a culvert as she was entering a construction site. In the fourth accident, which occurred April 24, 2008, Murphy backed a truck into construction forms and damaged the forms. Finally, on July 22, 2008, the truck Murphy was driving damaged a culvert as she was entering a construction site. After each of the first four accidents, NEBCO responded with a combination of counseling regarding vehicle handling and safety as well as discipline including a suspension and a reduction in pay. NEBCO terminated Murphy's employment following the final accident after determining

that the truck was put into a tipped position that presented a safety hazard.

Murphy applied for unemployment benefits. An adjudicator for the Nebraska Department of Labor concluded in a notice of determination dated August 13, 2008, that because her actions amounted to misconduct, Murphy was disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008) for the week her employment ended and the 12 weeks immediately following such week, which the adjudicator specified as the period from July 20 through October 18. The adjudicator noted that Murphy had been discharged from her job "for having too many work related accidents for which [she was] responsible or at fault" and determined that Murphy was disqualified from benefits because her "carelessness or negligence resulting in these accidents was contrary to the best interests of the employer and constitute[d] misconduct in connection with the work." The adjudicator further determined that NEBCO was "not chargeable for this employment on any future claim."

Murphy appealed the adjudicator's August 13, 2008, determination to the Nebraska Appeal Tribunal. In a decision filed September 25, 2008, the appeal tribunal reversed the adjudicator's ruling with respect to the partial disqualification and determined that Murphy "was discharged under nondisqualifying conditions" and was entitled to benefits for the weeks at issue to the extent she was otherwise eligible. The appeal tribunal found that the evidence did not support a finding that Murphy "wantonly, deliberately or willfully caused the accidents" and instead that "the accidents occurred as [Murphy] in good faith proceeded to perform her job as she understood it to be."

The appeal tribunal next considered whether Murphy "was negligent to [such a] degree or [with such] recurrence as to manifest culpability, wrongful intent or evil design." In this regard, the appeal tribunal made the following specific findings: The September 11, 2007, accident was not the result of negligence, and instead, the evidence supported Murphy's claim that she could not see the culvert in the mud. The two accidents in 2005 manifested driver negligence but, the appeal

tribunal noted, Murphy was counseled and disciplined at the time and approximately 3 years passed before the accident of April 24, 2008. That accident involved "some negligence" but "was not major," and the "damage caused was modest" and consisted mainly of nuisance. The final incident on July 22, 2008, evidenced negligence, but again, the "damage was humble" and the "greater part of the damage" was nuisance.

In summary, the appeal tribunal stated that "[n]one of the four accidents evidencing negligence were major accidents" and that the "damage in each case was modest." The appeal tribunal noted the timelag between the September 2005 accidents and the termination of Murphy's employment in July 2008 and stated that the accidents of September 11, 2007, and April 24, 2008, "were apparently accidents that the drivers not infrequently experience on the construction sites due to the conditions and circumstances the drivers face and are expected to negotiate." The appeal tribunal expressed that it was "concerned with the final incident" of July 22, 2008, because the evidence indicated that Murphy "knew or should have known better particularly in light of the earlier warnings, suspension and remedial driver training." However, the appeal tribunal concluded that it was "not convinced the degree of negligence or the recurrence . . . supports the degree of culpability required for a holding of misconduct." In its September 25, 2008, order, the appeal tribunal reversed the adjudicator's determination that Murphy was partially disqualified for unemployment benefits.

On October 6, 2008, under a separate docket number, a different administrative law judge of the appeal tribunal filed a decision with respect to NEBCO's unemployment insurance experience. In that order, it was noted that the appeal tribunal had previously ruled in Murphy's favor on the issue of whether she was disqualified from receiving benefits. With regard to the issue whether NEBCO's experience account could be charged with respect to unemployment benefits paid to Murphy, the appeal tribunal noted that "[i]n order to qualify for noncharging of its experience account, the employer must establish," inter alia, that "a claimant's separation from employment was under disqualifying conditions." Because Murphy had not

been disqualified, the appeal tribunal determined that NEBCO's unemployment insurance experience account would be charged with respect to Murphy's employment.

NEBCO appealed both the September 25 and October 7, 2008, orders of the appeal tribunal to the district court for Lancaster County. Each appeal was docketed separately by the district court and was assigned to a different judge. On appeal to this court, the order regarding whether Murphy was disqualified from receiving unemployment benefits is the subject of the appeal in case No. S-09-484 and the order regarding whether NEBCO's unemployment insurance experience account could be charged is the subject of the appeal in case No. S-09-691. We refer herein to the proceedings in each case at the district court level by the numbers the appeals are assigned in this court.

In case No. S-09-484, the district court reviewed the appeal tribunal's September 23, 2008, decision de novo on the record. After reviewing the record, in an order filed April 29, 2009, the court found the facts to be the same as those set out in the appeal tribunal's decision and concluded that the facts failed to support a finding of misconduct. The court therefore affirmed the September 23, 2008, decision of the appeal tribunal that Murphy was not disqualified from receiving benefits.

In case No. S-09-691, the district court reviewed the appeal tribunal's October 6, 2008, decision de novo on the record. In an order filed June 29, 2009, the court concluded that because the appeal tribunal's September 23, 2008, decision had been affirmed in case No. S-09-484, the case at issue with respect to the unemployment insurance experience account was "moot," and it therefore affirmed the tribunal's October 6 order to the effect that Murphy's unemployment benefits were chargeable. The court further noted in its order that in her answer, Murphy sought an award of attorney fees and costs under Neb. Rev. Stat. § 25-824(2) (Reissue 2008). The court concluded that NEBCO's appeal of the October 6 order was neither frivolous nor made in bad faith, and it therefore ordered that each party was to pay its or her own attorney fees and costs.

NEBCO appealed each district court order separately to the Court of Appeals. The Court of Appeals granted NEBCO's

motion to consolidate the two appeals. We subsequently moved the consolidated cases to this court's docket.

ASSIGNMENTS OF ERROR

NEBCO asserts in case No. S-09-484 that the district court erred by (1) concluding that the evidence failed to support a finding of misconduct for purposes of § 48-628(2), (2) basing such conclusion in part upon the severity of damage caused by the misconduct rather than the misconduct itself, and (3) concluding that Murphy was not disqualified from receiving unemployment benefits as a result of misconduct.

NEBCO asserts in case No. S-09-691 that the district court erred when it determined (1) that NEBCO's account was properly chargeable for benefits paid to Murphy and (2) that Murphy's separation from employment was not under disqualifying conditions.

We note that Murphy argues in her appellate briefs in both cases Nos. S-09-484 and S-09-691 that the district court erred by failing to award her attorney fees and costs. However, she does not denominate such arguments as cross-appeals in accordance with Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008), and we therefore do not consider such arguments on appeal. See, *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

STANDARDS OF REVIEW

[1] 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. *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[2,3] In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998). When reviewing a judgment

for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

The District Court Decided the Attorney Fee Issue in Both Cases, and the Orders Were Final and Appealable.

Although, as stated above, we do not consider Murphy's arguments that the district court erred by failing to award her attorney fees, we note that in her brief in case No. S-09-484, Murphy asserts that the court failed to rule on her request for attorney fees and costs. Because failure to rule on all issues in a case could mean that there was not a final, appealable order, we must consider whether this court has jurisdiction over these appeals. We conclude that the court either explicitly or impliedly rejected Murphy's requests for attorney fees and costs asserted in her answer in both cases Nos. S-09-484 and S-09-691, that the orders in both cases were appealable, and that this court has jurisdiction over these appeals.

In case No. S-09-691, the district court noted in its order entered June 29, 2009, that in her answer filed in that court, Murphy sought an award of attorney fees and costs under § 25-824(2). The court denied such request and ordered that each party was to pay its or her own attorney fees and costs. Therefore, the district court ruled on the request for attorney fees in the order from which appeal is taken in case No. S-09-691.

Murphy asserts that in case No. S-09-484, the district court failed to rule on her request for attorney fees and costs under § 25-824(2) asserted in her answer and that this court lacks jurisdiction over case No. S-09-484 because there is no final order. We reject this argument.

In *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003), we noted that a party had requested an award of attorney fees and costs in her answer to the other party's application to terminate child support. The district court entered an order in which it denied the application "and granted no other relief as to either party." 266 Neb. at 380, 665 N.W.2d at 585. We

determined that "[t]he silence of the judgment on the issue of attorney fees must be construed as a denial of [the] request under these circumstances." *Id.*

Similarly, in case No. S-09-484, Murphy requested in her answer to NEBCO's complaint filed in district court that she be awarded reasonable attorney fees and costs pursuant to § 25-824. Murphy did not file a separate motion for attorney fees. In its order entered April 29, 2009, the district court affirmed the decision of the appeal tribunal and ordered no further relief. We determine that under these circumstances, the court's silence on the issue of attorney fees must be construed as a denial of Murphy's request. See *id.*

Because the district court disposed of the attorney fee requests in both cases Nos. S-09-484 and S-09-691, the order appealed from in each case is appealable and this court has jurisdiction over these appeals.

Case No. S-09-484: The District Court Did Not Err by Concluding That NEBCO Failed to Show That Murphy's Employment Was Terminated for "Misconduct" Under § 48-628(2).

In case No. S-09-484, NEBCO asserts that the district court erred by determining that the evidence failed to support a finding of misconduct for purposes of § 48-628(2) and concluding that Murphy was not partially disqualified from receiving unemployment benefits as a result of misconduct. The district court adopted the findings of the appeal tribunal. NEBCO argues that the district court erred by basing its finding of no misconduct in part upon the severity of damage caused by the misconduct rather than the misconduct itself. We conclude that although a determination of misconduct is properly based on the employee's conduct rather than the severity of damage caused thereby, the court in this case did not err in finding no misconduct and thus concluding that Murphy was not disqualified from receiving unemployment benefits. Finding no error on the record, we reject this assignment of error.

Under § 48-628(2) of Nebraska's Employment Security Law, Neb. Rev. Stat. § 48-601 et seq. (Reissue 2004 & Cum.

Supp. 2008), an employee may be partially or totally disqualified from receiving benefits if he or she is found to have been "discharged for misconduct connected with his or her work." A partial disqualification is effective for the week of the discharge "and for the twelve weeks which immediately follow such week." § 48-628(2). An individual may be totally disqualified if the "misconduct was gross, flagrant, and willful, or was unlawful." *Id.* In the present case, the adjudicator determined that Murphy was disqualified from benefits for the week her employment ended plus 12 weeks. Given this partial disqualification, it is clear that the adjudicator determined that Murphy was discharged for misconduct but did not find that such misconduct was gross, flagrant, and willful, or unlawful.

[4] "[M]isconduct" for purposes of § 48-628(2) is not statutorily defined. However, in case law, "misconduct" under § 48-628(2) has been defined as behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. See *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

The appeal tribunal in the present case found that the evidence did not support a finding that Murphy "wantonly, deliberately or willfully caused the accidents" that gave rise to her discharge. Instead, the appeal tribunal found that the "accidents occurred as [Murphy] in good faith proceeded to perform her job as she understood it to be." The appeal tribunal further found that one of Murphy's accidents was not the result of negligence and that while her four other accidents evidenced negligence, such negligence did not support "the degree of culpability required for a holding of misconduct." In its de novo review, the district court agreed with the tribunal that "the facts fail to support a finding of misconduct as defined by the applicable case law."

NEBCO asserts on appeal that Murphy's negligence in connection with the accidents rose to a level of culpability that supports a finding of misconduct. NEBCO notes that the appeal tribunal found that, at least with regard to the final accident, Murphy "'knew or should have known better particularly in light of the earlier warnings, suspension and remedial driver training.'" Brief for appellant at 9. NEBCO argues that because Murphy knew or should have known better, the accidents were a result of something more than mere negligence and evidenced a level of culpability sufficient to constitute misconduct. NEBCO further asserts that the appeal tribunal's decision "wrongfully addresses the degree of culpability in terms of the severity of the resulting damage, rather than in terms of the presence or existence of misconduct." *Id.* In support of its argument, NEBCO notes that the appeal tribunal stated that "[n]one of the four accidents evidencing negligence were major accidents" and that the "damage in each case was modest."

We agree with NEBCO that the degree of damage caused should not be a determining factor in whether an employee engaged in misconduct. Instead, the focus should be on the employee's culpability as demonstrated by his or her conduct and intentions. Under the definition of "misconduct" developed in the case law, misconduct generally involves intentional actions as indicated by the phrases "wanton and willful disregard of the employer's interests," "deliberate violation of rules," and "disregard of standards of behavior." *Douglas Cty. Sch. Dist. 001*, 254 Neb. at 320-21, 576 N.W.2d at 472. Misconduct may also involve negligence on the part of the employee, but only when it "manifests culpability, wrongful intent, evil design, or intentional and substantial disregard." *Id.* at 321, 576 N.W.2d at 472. Damage caused by an employee's action would not be determinative of whether an employee engaged in misconduct and would be potentially relevant only to the extent it indicated culpability or intent.

Although we agree that damage is not a determining factor in whether misconduct occurred, we do not think that the appeal tribunal or the district court in this case based the conclusion that there was no misconduct on the degree of damage. In this regard, we note that the appeal tribunal specifically

found Murphy's accidents were of the type that drivers in her industry "not infrequently experience on the construction sites" and that even where Murphy was negligent, the appeal tribunal was "not convinced the degree of negligence . . . supports the degree of culpability required for a holding of misconduct." Reading the appeal tribunal order as a whole, we ascertain that its conclusion was properly based on the determination that Murphy's negligence did not manifest culpability, wrongful intent, evil design, or intentional and substantial disregard of NEBCO's interests or Murphy's duties. We determine that the decision of the appeal tribunal, adopted by the district court, is supported by competent evidence. See *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

The present case may be contrasted to cases such as *Raheem v. Com., Unempl. Comp. Bd. of Review*, 60 Pa. Commw. 324, 327, 431 A.2d 1112, 1113 (1981), in which the court affirmed a finding that an employee was discharged for willful misconduct because he "was consistently reckless in the performance of his assigned duties, to the direct detriment of his employer." In *Raheem*, there was evidence that the employee engaged in "several instances of intentional or reckless acts" including "reckless operation" of a truck on a construction site and involvement in an accident in which the employee was driving the employer's truck and failed to report the accident to the employer. 60 Pa. Commw. at 326-27, 431 A.2d at 1113. In *Kimble v. Director, Ark. Emp. Sec. Dept.*, 60 Ark. App. 36, 959 S.W.2d 66 (1997), the court found that five preventable accidents in a 6-month period could support a finding of misconduct. The court in *Kimble* indicated that it could be inferred that this recurring pattern of carelessness manifested an indifference constituting substantial disregard of the employer's interests and of the employee's duties and obligation.

The present case is more similar to *Foster v. Mississippi Employment Sec. Com'n*, 632 So. 2d 926 (Miss. 1994), in which the Mississippi Supreme Court reversed a determination that an employee had been discharged for "work-related misconduct" when, during a 6-month tenure as a carwasher, the employee on five occasions backed vehicles into stationary objects. The employee was given training after each incident

and, after the fourth incident, was given a suspension and was warned his employment would be terminated if further accidents occurred. The Mississippi Supreme Court stated that although an employer may be justified in terminating the employment of an "'accident-prone'" employee, accidents that are the result of mere negligence do not amount to willful misconduct. *Id.* at 928. The court noted that there was no evidence that the incidents were anything but accidental or that the employee willfully or recklessly disregarded his supervisor's instructions. The court concluded that "[w]ithout more, mere ineptitude cannot disqualify a terminated employee from receiving unemployment compensation benefits." *Id.* at 929. See, also, *Myers v. Unemployment Comp. Bd. of Review*, 533 Pa. 373, 625 A.2d 622 (1993) (three accidents with employer's truck—on May 1 and September 4 and 5, 1989—did not constitute misconduct where evidence failed to show any intentional and deliberate conduct on employee's part).

Although Murphy was involved in five accidents on the job, the accidents were spread over a 3-year period and do not indicate a consistent or concentrated pattern of behavior. While the appeal tribunal found four of the accidents to be the result of Murphy's negligence, it did not find any of the accidents to be the result of intentional, reckless, or deliberate acts. NEBCO presented no evidence that Murphy acted intentionally or that she took unacceptable deliberate action such as failing to report any of the accidents.

We conclude that based on the evidence, there is no error appearing on the record. The appeal tribunal and the district court did not err in determining that Murphy's accidents were the result of mere negligence or ineptitude rather than any reckless or intentional actions on her part, the latter of which would constitute "misconduct" under § 48-628(2). Disqualification for unemployment benefits is appropriate under § 48-628(2) when the employee is discharged for misconduct. Because the district court determined there was no misconduct, the court logically concluded that Murphy was not disqualified from receiving benefits. The district court did not err, and we reject NEBCO's assignments of error and therefore affirm the district court's order in case No. S-09-484.

Case No. S-09-691: The District Court Did Not Err by Concluding That NEBCO's Account Was Chargeable for Benefits Paid to Murphy.

NEBCO asserts in case No. S-09-691 that the district court erred when it determined that Murphy's separation from employment was not under disqualifying conditions and concluded that NEBCO's account was properly chargeable for benefits paid to Murphy. We conclude that because the court in case No. S-09-484 did not err in concluding that Murphy was not disqualified from receiving benefits, it follows that the court did not err in case No. S-09-691 when it concluded that NEBCO's account was chargeable for benefits paid to Murphy.

Section 48-652(3)(a) provides in relevant part:

> No benefits shall be charged to the experience account of any employer if (i) such benefits were paid on the basis of a period of employment from which the claimant . . . left work from which he or she was discharged for misconduct connected with his or her work . . . and (ii) the employer has filed timely notice of the facts on which such exemption is claimed in accordance with rules and regulations prescribed by the commissioner.

The appeal tribunal in case No. S-09-691 concluded that NEBCO "cannot meet the first of the two requirements for non-charging of its unemployment insurance experience account" because, in case No. S-09-484, it had been determined that Murphy was not discharged for misconduct. The district court affirmed.

NEBCO's argument on appeal in case No. S-09-691 is contingent on its being successful in its appeal to this court in case No. S-09-484, in which it argued that the district court had erred when it concluded that Murphy was not disqualified from receiving unemployment benefits because Murphy had not engaged in misconduct. We have concluded in case No. S-09-484 that the court did not so err. Thus, the district court did not err in case No. S-09-691 when it determined that Murphy's separation from employment was not under disqualifying conditions and therefore concluded that under § 48-628(2), NEBCO's account was properly chargeable for

benefits paid to Murphy. We reject NEBCO's assignments of error. Because the district court's ruling in case No. S-09-691 conforms to the law, we affirm.

CONCLUSION

We conclude in case No. S-09-484 that the district court did not err when it determined that Murphy was entitled to unemployment benefits because NEBCO had failed to establish that Murphy's employment was terminated for misconduct under § 48-628(2) and when it accordingly affirmed the appeal tribunal's decision. We conclude in case No. S-09-691 that the district court did not err when it concluded that NEBCO's account was chargeable for benefits paid to Murphy and accordingly affirmed the appeal tribunal's decision. We therefore affirm the orders of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PAULA B. HUTCHINSON, RESPONDENT.

784 N.W.2d 893

Filed July 2, 2010. No. S-09-805.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. 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.
3. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney disciplinary case in light of its particular facts and circumstances.
4. ____. 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. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

6. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is a grave matter and a threat to the credibility of attorney disciplinary proceedings.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Paula B. Hutchinson. In the charges, the Counsel for Discipline alleged that respondent violated her oath of office as an attorney licensed to practice law in the State of Nebraska and various provisions of the Nebraska Rules of Professional Conduct based on her neglect of client matters. This court granted judgment on the pleadings as to the facts in the formal charges and set the matter for oral argument. After reviewing the matter, we find that the proper sanction is suspension from the practice of law.

STATEMENT OF FACTS

As alleged in the formal charges, respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. At the times relevant to this case, respondent was engaged in the private practice of law with an office located in Lincoln, Nebraska.

On October 27, 2008, the Counsel for Discipline received a grievance letter from Dorsey Taylor. Taylor alleged that he hired respondent to file a petition for writ of certiorari with the U.S. Supreme Court and paid respondent a fee of $5,000. Taylor alleged that respondent failed to keep him informed about his case, failed to file the requested petition, and refused to refund any portion of his advance fee payment.

After receiving Taylor's grievance, the Counsel for Discipline sent two letters to respondent in 2008, one in late October and the other in mid-November. On November 25, respondent informed the Counsel for Discipline via telephone that she would send a written response to Taylor's grievance within a week. The Counsel for Discipline did not receive this response from respondent, and thereafter, it contacted respondent again on December 16 and received no response. The Counsel for Discipline also contacted respondent on January 5, February 25, and March 3, 2009. Respondent never replied.

On March 19, 2009, the Counsel for Discipline filed an application with the Nebraska Supreme Court to temporarily suspend respondent's license to practice law. This court issued an order directing respondent to show cause why her license should not be suspended. The order was mailed to respondent by certified mail; she either failed or refused to accept the certified mail. On April 20, respondent was personally served with a copy of the order to show cause, and on April 27, she filed a motion for extension of time to respond. In that motion, she stated that she had been seriously ill from February to April 2009 and that during her illness, she had contacted her clients and made necessary arrangements for them. She also stated that the attorney she had retained to represent her in the disciplinary matter had recently suffered a heart attack. After we granted an extension, respondent filed her response to the motion to show cause on May 11. In this response, respondent again stated that she had been critically ill and that her attorney had suffered a heart attack. She also noted that she had spoken to the Counsel for Discipline and that she planned to submit a response to Taylor's complaint "this week."

The Counsel for Discipline filed a reply to respondent's response to the order to show cause on May 21, 2009. In this filing, the Counsel for Discipline noted that respondent had not addressed why she had failed to respond to Taylor's grievance from November 2008 until February 2009. It also noted that it had not yet received the promised response to the Taylor grievance and that on May 15, respondent had notified it that she was again hospitalized. This court issued an order on June 4, suspending respondent from the practice of law until

further order of the court. Respondent never filed a response to Taylor's grievance.

On March 26 and April 2, 2009, the Counsel for Discipline received additional grievance letters from clients alleging that respondent had neglected their cases. The Counsel for Discipline served notice of the grievances on respondent, but she failed to respond. On May 21, the Counsel for Discipline received a grievance letter from an attorney alleging that respondent had previously represented his client in a criminal case and that although he had made repeated attempts to secure the client's file from respondent, she had failed and refused to respond. The Counsel for Discipline served notice of this grievance on respondent, but she failed to respond.

The Counsel for Discipline alleges that respondent's conduct constitutes a violation of her oath of office as an attorney licensed to practice law in the State of Nebraska and violations of the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.5 (fees), and 3-508.4 (misconduct).

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[1] 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.[2] In the instant case, this court granted the Counsel for Discipline's motion for judgment on the pleadings as to the facts; therefore, the only issue before us is the type of discipline to be imposed.

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

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[1] *State ex rel. Counsel for Dis. v. Tarvin*, 279 Neb. 399, 777 N.W.2d 841 (2010); *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008).

[2] *Id.*

(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.

[3-5] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney disciplinary case in light of its particular facts and circumstances.[3] 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.[4] We have also noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[5]

Here, respondent did not respond to the charges filed against her and has failed to present any evidence of mitigating circumstances. She has no history of prior disciplinary actions. In a similar case,[6] we suspended an attorney for a minimum of 1 year. That attorney, like respondent, had neglected several client matters and had refused to comply and respond to inquiries from the Counsel for Discipline. The attorney had no record of prior disciplinary matters, and the neglect did not involve misuse of client funds.

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[3] *State ex rel. Counsel for Dis. v. Tarvin, supra* note 1; *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[4] *Id.*

[5] *State ex rel. Counsel for Dis. v. Tarvin, supra* note 1; *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[6] *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000).

[6] We view an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as a grave matter and as a threat to the credibility of attorney disciplinary proceedings.[7] Respondent's failure to reply to repeated inquiries from the Counsel for Discipline demonstrates nothing less than a total disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[8]

In light of the foregoing precedent and the particular facts of this case, and with no mitigating circumstances apparent from the pleadings, we find and hereby order that respondent should be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 2 years, effective on June 3, 2009, the date of our order of temporary suspension. Any application for reinstatement filed by respondent after the minimum suspension period shall include a showing which demonstrates her fitness to practice law. Respondent is directed to comply with Neb. Ct. R. § 3-316 and to pay costs and expenses of these proceedings.

JUDGMENT OF SUSPENSION.

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[7] *Id.*

[8] See *id.*

ROBERT A. STRAUB, APPELLEE, V. CITY OF SCOTTSBLUFF, A POLITICAL SUBDIVISION, AND LEAGUE ASSOCIATION OF RISK MANAGEMENT, APPELLANTS.

784 N.W.2d 886

Filed July 2, 2010. No. S-09-1121.

1. **Workers' Compensation: Appeal and Error.** On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. ____: ____. In workers' compensation cases, an appellate court is obligated to make its own determinations regarding questions of law.
3. **Workers' Compensation.** The dual purpose rule provides that if an employee is injured in an accident while on a trip which serves both a business purpose and a personal purpose, the injuries are compensable as arising out of the course and

scope of employment, provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey.

4. ____. An employee's injury which occurs en route to a required medical appointment that is related to a compensable injury is also compensable, as long as the chosen route is reasonable and practical.
5. **Workers' Compensation: Appeal and Error.** Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, 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.
7. **Workers' Compensation: Appeal and Error.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2004), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

Appeal from the Workers' Compensation Court. Affirmed.

John W. Iliff and Jessica S. Wolff, of Gross & Welch, P.C., L.L.O., for appellants.

Kristine R. Cecava and Michael J. Javoronok, of Javoronok & Neilan, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The City of Scottsbluff and the League Association of Risk Management (collectively appellants) appeal the decision of the three-judge panel of the Nebraska Workers' Compensation Court, affirming the trial court's award. The trial court awarded Robert A. Straub the maximum weekly wage of $600 for 1 3/7 weeks of total temporary disability and $229.21 for 298 4/7 weeks for a 35-percent loss of earning power.

BACKGROUND

Straub is a sergeant with the Scottsbluff Police Department and was employed in that capacity when he suffered injuries as a result of two accidents within a 6-week period of time. The first accident occurred on June 25, 2006, when Straub was struck by a passing vehicle during a routine traffic stop. Straub recorded the traffic stop, and the recorded video was made part of the record as a DVD. From the DVD, it appears as though Straub was struck in his left hip by the side mirror of the passing vehicle. He also suffered a puncture wound to his lower leg. Straub stated that he did not know how his lower leg was punctured, but that it happened during the accident.

After the accident, Straub went to a hospital emergency room and stated that he was hurting "from [his] hips to [his] toes." The doctor who treated him recommended that Straub use ice and follow up as soon as possible with an orthopedist. The accident resulted in a fractured left iliac wing and lower back complaints with associated soft tissue injuries. Straub's chosen orthopedist recommended that Straub take some time off of work. Straub testified that he had begun taking days off at the time of the incident and had returned to work on Wednesday, June 28, 2006. Straub testified that he continued to have pain in his hip, lower back, and midback, and pain and numbness in his legs.

Straub further testified that he continued to have pain and that his orthopedist ordered an MRI. On August 7, 2006, while on his way to a hospital for the MRI, Straub's vehicle was hit by another vehicle. Straub had taken the day off from work and had taken his children to a babysitter's house. The accident occurred between the babysitter's house and the hospital. Straub testified that the impact occurred on the driver's side and that he was thrown forward in the vehicle. Straub testified that his chest, back, and neck ached immediately after the accident and that he later developed shoulder pain. Straub stated that he had braced himself against the vehicle's dashboard on impact and that he believed that was how his shoulder had been injured.

The Workers' Compensation Court found that both accidents were work related and compensable. Specifically, the trial court, citing Larson's Workers' Compensation Law,[1] determined that the car accident was compensable because Straub was on his way to a doctor's appointment due to injuries received during the first work-related incident. The trial court did not find sufficient evidence that Straub's shoulder injuries stemmed from a work-related accident, but did find sufficient evidence that his left hip, lower back, and left lower leg were injured. The trial court found that Straub had a 35-percent loss of earning power as a result of the accidents. The trial court then awarded $600 to Straub for 1⅗ weeks for total temporary disability and $229.21 per week for 298⅘ weeks for a 35-percent loss of earning power. Appellants were also ordered to pay medical expenses for or on behalf of Straub, or to reimburse Straub or his health care provider.

Appellants appealed the decision of the trial court, and the three-judge panel of the Workers' Compensation Court issued an order of affirmance on review. Appellants appeal from that order, and we affirm the award.

ASSIGNMENTS OF ERROR

Appellants assign, restated and consolidated, that the trial court erred in determining that (1) the accident on August 7, 2006, occurred within the scope and course of Straub's employment, (2) Straub had a 35-percent loss of earning capacity, and (3) the DVD of the first accident shows that Straub's left hip was injured.

STANDARD OF REVIEW

[1] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[2]

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[1] 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 10.07 (2009).

[2] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[2] In workers' compensation cases, an appellate court is obligated to make its own determinations regarding questions of law.[3]

ANALYSIS

STRAUB'S INJURIES ON AUGUST 7, 2006, WERE COMPENSABLE

Appellants first argue that Straub's injuries on August 7, 2006, were not compensable injuries because they did not arise out of and in the course of his employment. The record indicates that after Straub's first accident, his orthopedist ordered an MRI to be administered at a Scottsbluff hospital. Straub was not working on the day of the appointment, and he drove from his house to the babysitter's house to drop off his children before driving to the hospital. The second accident occurred on the way to the hospital from the babysitter's house.

[3] The trial court cited *Kraus v. Jones Automotive, Inc.*,[4] for the proposition that a trip serving a dual purpose was still compensable under certain circumstances. The dual purpose rule provides:

> [I]f an employee is injured in an accident while on a trip which serves both a business and a personal purpose, the injuries are compensable as arising out of the course and scope of employment provided the trip involves some service to be performed on the employer's behalf which would have occasioned the trip, even if it had not coincided with the personal journey.[5]

In *Kraus*, the Court of Appeals held that a plaintiff who had been on a business trip from Omaha, Nebraska, to Lincoln, Nebraska, was acting within the course and scope of his employment even though he had embarked on a private errand.

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[3] *Id.*

[4] *Kraus v. Jones Automotive, Inc.*, 3 Neb. App. 577, 529 N.W.2d 108 (1995), citing *Jacobs v. Consolidated Tel. Co.*, 237 Neb. 772, 467 N.W.2d 864 (1991).

[5] *Jacobs, supra* note 4, 237 Neb. at 775, 467 N.W.2d at 866.

The record demonstrated that the plaintiff had driven from Lincoln toward Grand Island, Nebraska, on a personal errand, but had turned around and was returning to Omaha when he was killed in a one-vehicle accident.[6]

The trial court also cited Larson's Workers' Compensation Law § 10.07, "Accident During Trip to Doctor's Office,"[7] which states that an accident occurring on a trip to a doctor's office or a place of testing ordered by the doctor is generally compensable if the original injury was also compensable. The trial court also pointed out that the Workers' Compensation Court routinely orders payment for mileage to and from doctor's visits and testing.

We have specifically declined to address this issue in the past.[8] And while some courts have rejected the rule found in Professor Larson's treatise,[9] other courts have allowed workers to recover for injuries sustained on the way to a medical appointment for a compensable injury.[10] We find *Taylor v. Centex Construction Co.*[11] particularly persuasive in this case.

In *Taylor*, the employee sustained an eye injury in the course of his employment. He was granted leave to go to the doctor. After the doctor's appointment, the employee stopped for lunch and to have the company truck serviced, and he then proceeded to drive back to work. While driving back to his jobsite, the employee was involved in a car accident and was injured. The

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[6] *Kraus, supra* note 4.

[7] 1 Larson & Larson, *supra* note 1.

[8] *Phipps v. Milton G. Waldbaum & Co.*, 239 Neb. 700, 477 N.W.2d 919 (1991).

[9] *Bear v. Anson Implement, Inc.*, 976 S.W.2d 553 (Mo. App. 1998); *Lee v. Industrial Com'n*, 262 Ill. App. 3d 1108, 635 N.E.2d 766, 200 Ill. Dec. 427 (1994); *Gayler v. North American Van Lines*, 566 N.E.2d 84 (Ind. App. 1991).

[10] *Manuel v. Davidson Transit Org.*, No. M2007-01580-CV-R3-WC, 2008 WL 4367492 (Tenn. Spec. Workers' Comp. Panel 2008); *Kehr Mid-West Iron v. Bordner*, 829 N.E.2d 213 (Ind. App. 2005); *American Mut. Ins. v. Hernandez*, 252 Wis. 2d 155, 642 N.W.2d 584 (2002); *Taylor v. Centex Construction Co.*, 191 Kan. 130, 379 P.2d 217 (1963).

[11] *Taylor, supra* note 10.

employer argued that the second injury was not compensable, because it did not arise out of or in the scope of his employment and because he deviated from the most direct route back to work.[12]

The Kansas court found that because the workers' compensation statute required employees to undergo medical treatment for work-related injuries, an injury sustained on the way to such medical treatment occurred in the course and scope of his employment.[13] The court also found that there was nothing in the workers' compensation statute that required the employee to take the most direct route between the doctor's office and his place of employment, but only that the route selected be reasonable and practical, and one that would not materially delay the employee's return to work.[14]

[4] The Nebraska Workers' Compensation Act, like the statutory scheme in *Taylor*, provides that if an employee fails to avail himself or herself of medical or surgical treatment, he or she can lose those benefits.[15] We have also allowed compensation for travel to and from necessary medical services in the past.[16] We find that an employee's injury which occurs en route to a required medical appointment that is related to a compensable injury is also compensable, as long as the chosen route is reasonable and practical.

Having determined that an injury sustained on the way to a doctor's appointment is compensable, we apply the rule in *Kraus*[17] and *Jacobs v. Consolidated Tel. Co.*[18] Under our dual purpose rule, an injury arising out of a trip with both a business and a personal purpose is compensable if the trip was

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Neb. Rev. Stat. § 48-120(2)(c) (Cum. Supp. 2006). See, also, *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991).

[16] *Behrens v. American Stores Packing Co.*, 228 Neb. 18, 421 N.W.2d 12 (1988); *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959).

[17] *Kraus, supra* note 4.

[18] *Jacobs, supra* note 4.

occasioned by a business purpose. We find that an employee who is injured while en route to a medical appointment for a covered injury is acting within the course and scope of his or her employment, as long as the route taken is reasonable and practical.[19] Much like in *Kraus*, Straub had completed his personal errand of dropping off his children at the babysitter's house and was continuing on the business errand of attending his medical appointment.

We therefore find appellants' first assignment of error to be without merit.

Trial Court Was Not Clearly Wrong in Determining That Straub Had 35-Percent Loss of Earning Capacity

[5,6] Appellants next argue that Straub did not present sufficient evidence that he sustained a 35-percent loss of earning capacity. We note first that upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[20] In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, 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.[21]

The basis for the trial court's decision that Straub had a 35-percent loss of earning power was the report of the court-appointed vocational case manager. Under Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2008), a court-appointed vocational case manager's opinion is entitled to a rebuttable presumption of correctness. The trial court also considered a rebuttal report.

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[19] See, *Behrens, supra* note 16; *Pavel, supra* note 16.

[20] *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009).

[21] *Id.*

The court-appointed vocational case manager's report stated that Straub was limited to "'Light'" physical activity, which represented a loss of earning capacity. That report estimated Straub's loss of earning power at 46 percent, including his shoulder injuries. The rebuttal report listed Straub's loss of earning capacity as somewhere between 0 and 15 percent, and placed him in the "Medium" range of physical capabilities.

The trial court determined that the court-appointed vocational case manager's report was rebutted in part, specifically as to the shoulder injuries and overhead reaching. The trial court concluded that considering the orthopedist's reports and the reports of the vocational counselors, Straub suffered a 35-percent loss of earning capacity. Appellants essentially argue that the court-appointed vocational case manager's report was not competent, and they argue that the trial court should not have given that report the weight that it did.

We note, however, that both the rebuttal report and the court-appointed vocational case manager's report state that Straub has some restrictions due to his injuries. The trial court in its order recognized both reports and the differences between them and stated that it had considered both reports when making its decision. Thus, we cannot say that the trial court's decision was clearly wrong.

In conjunction with its assertion that the court-appointed vocational case manager's report was not credible, appellants also argue that Straub has not sufficiently demonstrated a loss of earning capacity, because Straub continues to work for the Scottsbluff Police Department and because his wages have increased. Appellants also argue that because Straub is a statutory civil service employee, he cannot suffer a loss of earning capacity.

[7] In *Davis v. Goodyear Tire & Rubber Co.*,[22] however, we stated:

> Earning power, as used in Neb. Rev. Stat. § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job

[22] *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 688, 696 N.W.2d 142, 147 (2005).

> obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.

We continued:

> Thus, the mere fact that after an injury, the employee receives, or is offered, his or her former wages, or a larger sum, does not necessarily preclude recovery of compensation under the workers' compensation statutes. . . . The fact that an employee is still employed and still paid the same or better does not, of itself, mean he or she has not experienced some loss of earning capacity.[23]

We find appellants' second assignment of error to be without merit.

DVD Showed Evidence of Injury to Straub

Finally, appellants claim the DVD, found at exhibit 2, does not show that Straub's hip had been injured. As noted, we review the decision of the trial court for clear error and its findings will not be otherwise overturned.[24]

The DVD shows a vehicle sideswipe Straub as he was conducting a routine traffic stop. The vehicle knocked Straub into the stopped vehicle, and then Straub limped away. The DVD later shows Straub stopping the vehicle that hit him, while Straub continued to limp. Appellants argue that Straub is not a credible witness because he told his orthopedist that he had been knocked down but the DVD did not support that claim.

First, we note that our review of the record contains no such statement by Straub. Straub testified that he was struck by a passing vehicle, and the notes from his chiropractor indicate that Straub reported being struck by a vehicle. In its order, the trial court stated that it found Straub's testimony credible and noted that Straub had been injured in the course of his employment in the past but had never made any workers'

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[23] *Id.* at 688-89, 696 N.W.2d at 147.

[24] *Bishop, supra* note 20.

compensation claims. The trial court also viewed the DVD. Based on the record before us, we find that the trial court did not clearly err in determining that Straub had injured his hip during the first accident. Appellants' third assignment of error is without merit.

CONCLUSION

We find Straub's second accident, which occurred while en route to a required medical appointment for compensable injuries, was also compensable. We also find the trial court did not commit clear error when determining that Straub sustained a 35-percent loss of earning capacity or when finding that the DVD, found at exhibit 2, showed that Straub's left hip was injured.

AFFIRMED.

DONALD B. EIKMEIER, APPELLANT, V. THE CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

CHERYL ECKERMAN, APPELLANT, V. THE CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

783 N.W.2d 795

Filed July 2, 2010. Nos. S-09-1183, S-09-1184.

1. **Statutes: Appeal and Error.** The determination of the applicability of a statute is a question of law, and when considering a question of law, the appellate court makes a determination independent of the trial court.
2. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.
3. **Employer and Employee: Employment Contracts: Wages.** A payment will be considered a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.

Appeals from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Jeff C. Miller, Duncan A. Young, and Keith I. Kosaki, of Young & White Law Offices, for appellants.

Alan M. Thelen, Deputy Omaha City Attorney, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Donald B. Eikmeier and Cheryl Eckerman (plaintiffs) signed severance agreements with the city of Elkhorn (Elkhorn) prior to the annexation of Elkhorn by the City of Omaha (Omaha). After litigation and an appeal to this court, Omaha approved resolutions for compensation to Eikmeier and Eckerman but denied their claims for attorney fees and prejudgment interest.

The plaintiffs filed separate lawsuits in Douglas County District Court seeking attorney fees and prejudgment interest. The cases were consolidated, and the district court affirmed the actions of the Omaha City Council (City Council). The plaintiffs appeal from that judgment. We affirm.

SCOPE OF REVIEW

[1] The determination of the applicability of a statute is a question of law, and when considering a question of law, the appellate court makes a determination independent of the trial court. *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

FACTS

Eikmeier and Eckerman are former employees of Elkhorn. Eikmeier was the city administrator, and Eckerman was the city clerk. Each signed a severance agreement with Elkhorn providing for compensation if their employment was terminated due to the annexation of Elkhorn by Omaha.

Omaha annexed Elkhorn on March 1, 2007, at which time the plaintiffs' employment was terminated. Before the effective date of the annexation, Omaha sought declaratory judgments that the severance agreements violated the Nebraska

constitutional provision prohibiting the payment of extra compensation to public employees after services have been rendered. We ultimately determined that the severance agreements did not violate Neb. Const. art. III, § 19, and were valid and enforceable. *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

The plaintiffs filed claims pursuant to Neb. Rev. Stat. § 14-804 (Reissue 2007), seeking wages, attorney fees, and prejudgment interest. Eikmeier sought $56,167.55 in compensation and $18,722.52 in attorney fees, and Eckerman sought $10,906.79 in compensation and $3,635.60 in attorney fees. On April 14, 2009, the City Council approved resolution No. 334 for Eikmeier to receive compensation of $52,535.57 and resolution No. 335 for Eckerman to receive compensation of $10,890.52. It denied the plaintiffs' requests for attorney fees and prejudgment interest.

Eikmeier and Eckerman filed separate lawsuits seeking attorney fees pursuant to the Nebraska Wage Payment and Collection Act (NWPCA), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004 & Cum. Supp. 2008), specifically § 48-1231, and prejudgment interest on the awarded amounts. They did not dispute the amounts determined by the City Council; they simply contended that the City Council should have also awarded them attorney fees and prejudgment interest.

Relying on our opinion in *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985), the district court determined that the compensation pursuant to the severance agreements was not compensation for labor or services, but was severance pay or liquidated damages which became due upon termination of employment. Determining that severance pay did not fall under the NWPCA, the court found that the City Council's denial of attorney fees was appropriate. The court also concluded that Eikmeier and Eckerman could not recover prejudgment interest because such interest does not accrue against political subdivisions pursuant to Neb. Rev. Stat. § 45-103.04(2) (Reissue 2004). Accordingly, the court affirmed the actions of the City Council. Eikmeier and Eckerman appeal.

ASSIGNMENTS OF ERROR

Eikmeier and Eckerman claim that the district court erred in (1) failing to award attorney fees and (2) failing to award prejudgment interest.

ANALYSIS

Attorney Fees

[2] 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. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). After recovering payments due under their severance agreements with Elkhorn, Eikmeier and Eckerman sought attorney fees pursuant to the NWPCA. The issue is whether the amounts recovered in accordance with the severance agreements are wages within the scope of the NWPCA.

The NWPCA allows an employee having a claim for wages which are not paid within 30 days of the regular payday to recover the unpaid wages through the courts. See § 48-1231. If the employee is successful, he or she is entitled to recover attorney fees in an amount no less than 25 percent of the unpaid wages. See *id*. Wages are "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." § 48-1229(4).

[3] When applying § 48-1229, we have held that a payment will be considered a wage subject to the NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met. *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 755 N.W.2d 382 (2008). The plaintiffs argue that payments under the severance agreements constituted deferred compensation for labor or services and not severance pay. They claim the payments were consideration for their promises to continue to work for Elkhorn until it was annexed by Omaha.

We addressed the issue whether compensation paid after the termination of employment is wages for purposes of the

NWPCA in *Heimbouch v. Victorio Ins. Serv., Inc.*, 220 Neb. 279, 369 N.W.2d 620 (1985). In *Heimbouch*, an insurance salesman who was an independent contractor sought payment of "'Termination Compensation'" pursuant to a contract with the insurance company. 220 Neb. at 281, 369 N.W.2d at 622. We concluded that the compensation due under the contract was not payment for labor or services rendered but was a severance payment or liquidated damages which became due upon the termination of the parties' relationship.

Likewise, in *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989), we rejected the claim that severance pay constituted wages under the NWPCA. Gene L. Babb was president of a union, Local 1015, which merged with a second union, Local 271. After the merger, Babb's employment was terminated. Babb sought severance pay from Local 271 in accordance with a policy adopted by Local 1015 prior to the merger, on the grounds that Local 271 had accepted all obligations of Local 1015 under the merger agreement.

When Local 271 refused to pay, Babb invoked the arbitration provision of the merger agreement. The arbitrators denied his claim, and Babb appealed, claiming that Local 271 was in violation of the NWPCA. Relying on *Heimbouch, supra*, we concluded that the NWPCA did not apply to a "severance payment which becomes due upon termination of employment." *Babb*, 233 Neb. at 832, 448 N.W.2d at 172.

Similar to the severance agreement in *Babb*, Eikmeier and Eckerman were entitled to receive payment only if their employment was terminated due to the annexation, consolidation, or merger of Elkhorn with another municipal entity. They were already receiving regular wages and benefits in exchange for their labor and services performed for Elkhorn. Although the payments served as an incentive for Eikmeier and Eckerman to remain employed by Elkhorn, the payments are not automatically characterized as in exchange for labor or services. The payments pursuant to the severance agreements were not earned and did not accrue through Eikmeier's and Eckerman's continued labor. Eikmeier and Eckerman were not entitled to compensation if they resigned, if they were

terminated for just cause, or if the annexation did not occur. Therefore, the payments are not compensation for labor or services rendered.

Eikmeier and Eckerman also attempt to characterize our opinion in *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008), as a finding that the severance agreement payments were wages. We disagree. In *City of Omaha*, we determined that the severance agreements were valid and enforceable and were not an unconstitutional gratuity. We did not determine and it cannot be inferred that we concluded the severance payments were wages under the NWPCA. As such, Eikmeier's and Eckerman's claims of res judicata and collateral estoppel are not applicable.

We find the compensation paid to Eikmeier and Eckerman pursuant to the severance agreements was severance pay and is not subject to the NWPCA. Their claims for attorney fees were properly denied.

Prejudgment Interest

Eikmeier and Eckerman also seek prejudgment interest on their claims accruing from July 29, 2008—the date of our mandate confirming the validity of the severance agreements. They claim that the amount of their claims was easily calculated as of the time of the mandate.

Generally, prejudgment interest accrues on the unpaid balance of liquidated claims arising from an instrument in writing from the date the cause of action arose until the entry of judgment pursuant to Neb. Rev. Stat. §§ 45-103.02(2) and 45-104 (Reissue 2004). However, this rule is subject to § 45-103.04, which states:

> Interest as provided in section 45-103.02 shall not accrue prior to the date of entry of judgment for:
>
> (1) Any action arising under Chapter 42; or
>
> (2) Any action involving the state, a political subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment.

The plaintiffs argue that § 45-103.04(2) should be read to prohibit prejudgment interest against a political subdivision only when the claim involves a "negligent or wrongful act or omission." We find no merit to this argument. The phrase "negligent or wrongful act or omission" appears between two clauses that specifically and exclusively discuss government employees. Accordingly, we interpret § 45-103.04(2) to prohibit prejudgment interest for (1) any action involving the state, (2) any action involving a political subdivision of the state, or (3) any action involving an employee of the state or political subdivision for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment.

This clarification is in line with our decision in *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991), determining that § 45-103.04 (Reissue 1988) precluded the plaintiff's claim for prejudgment interest against the city of Broken Bow for claims accruing on or after January 1, 1987. Likewise, we conclude that § 45-103.04 (Reissue 2004) precludes Eikmeier's and Eckerman's claims against Omaha for prejudgment interest on their severance agreement payments.

CONCLUSION

We conclude that the payments received by Eikmeier and Eckerman were not wages under the NWPCA; therefore, the plaintiffs are not entitled to attorney fees. Furthermore, § 45-103.04 prohibits their claims for prejudgment interest. Eikmeier's and Eckerman's claims were properly denied, and the judgment of the district court is affirmed.

AFFIRMED.

JONI R. SCHLATZ AND STUART J. SCHLATZ, COTRUSTEES OF THE AMERICAN FAMILY TRUST, APPELLANTS, V. RON BAHENSKY, AN INDIVIDUAL, ET AL., APPELLEES.

785 N.W.2d 825

Filed July 9, 2010. No. S-09-866.

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.

Appeal from the District Court for Merrick County: MICHAEL J. OWENS, Judge. Reversed and remanded for further proceedings.

Mark A. Beck, of Beck Law Office, P.C., L.L.O., for appellants.

Blake J. Schulz and Cathleen H. Allen, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee Ron Bahensky.

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

MILLER-LERMAN, J.

NATURE OF CASE

This case arises out of a dispute to real property between beneficiaries of a trust and heirs to an estate. This appeal is taken from an order of the district court for Merrick County granting the motion for summary judgment filed by an heir, defendant Ron Bahensky (appellee), and quieting title to the disputed property in the name of the decedent, Irene Bahensky (Irene). The plaintiffs-appellants, Joni R. Schlatz and Stuart J. Schlatz in their capacity as successor cotrustees of the American Family Trust, appeal. Because we determine that there are genuine issues of material fact, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

At issue in this case is the ownership of two parcels of real estate located in Merrick County, Nebraska, described by the court as

> The West Half of the Northeast Quarter of Section Ten (10), Township Twelve (12) North, Range Eight (8) West of the Sixth P.M., Merrick County, Nebraska; and The West Half of the Southeast Quarter of Section Three (3), Township Twelve (12) North, Range Eight (8) West of the Sixth P.M., Merrick County, Nebraska.

Appellants are the successor cotrustees of the American Family Trust, the trust that currently holds the last recorded deed to the property at issue. They filed this action to quiet title in the name of the American Family Trust or in the name of the purported beneficiaries of this trust. On the record before us, appellee, one of several defendants, is an heir of Irene. The case may be generally characterized as one involving a dispute among the beneficiaries of a trust and the heirs to an estate.

Prior to June 17, 1967, the real property at issue was owned by Melvin Bahensky (Melvin) and Irene as joint tenants. On June 17, the real estate was conveyed by Melvin and Irene as joint tenants to Melvin and Irene as tenants in common. On July 11, 1978, by quitclaim deed, Melvin deeded his undivided one-half interest in the real estate to Irene. The deed was recorded on July 12. This transaction resulted in Irene's being the sole owner of the real estate at issue. Appellee argues that this was the last valid conveyance of the property. After this transaction, on July 12, Melvin and Irene began a series of conveyances, many of which appear to be based on forms circulated by individuals or organizations apparently designed to avoid taxes, reduce future probate expenses, plan their respective estates, and avoid attorney fees.

The first of these conveyances began with a quitclaim deed executed by Irene on July 12, 1978, conveying the property to Melvin and Janis A. Gustafson, trustees of the "I. Dammann Trust." The district court found that the parties failed to produce any evidence of the existence of the I. Dammann Trust. However, there was evidence produced that on approximately

the same date, a trust was recorded with the Howard County, Nebraska, register of deeds, and that trust was titled the "M & I Bahensky Trust." The district court therefore determined that the I. Dammann Trust and the M & I Bahensky Trust were one and the same. This finding is not challenged on appeal. As discussed further below, the district court concluded that the M & I Bahensky Trust was not valid, because it did not adequately identify the beneficiaries, and the legal consequences of this invalidity are the subject of this appeal.

On January 1, 1982, in a trustee's deed executed by Melvin, Irene, and Gustafson, "as all of the Trustees under Agreement dated July 10, 1978," the land was conveyed out of the M & I Bahensky Trust and to "Melvin D. Bahensky or Irene D. Bahensky or Jeffrey J. Reiss W.R.O.S."

On September 13, 1988, Melvin and Irene executed a quitclaim deed conveying the real estate to the "Green Acres Trust Co." (Green Acres Trust). The deed was not executed by Jeffrey J. Reiss as a grantor. On June 22, 1991, by warranty deed, the Green Acres Trust conveyed the real estate to the "Evergreen LTD [Trust]." On November 15, 1996, Irene, as trustee of the Evergreen LTD Trust, executed a quitclaim deed conveying the real estate to the American Family Trust, with Melvin as trustee. Appellants entered evidence purporting to show that beneficiaries of the American Family Trust were identified by amendments.

Melvin and Irene are now deceased, and appellants brought this action to quiet title to the real estate at issue in favor of the American Family Trust. Appellee filed a counterclaim. Appellee also filed a cross-claim against the other defendants in this matter—Reiss, Gustafson, and all persons claiming an interest in the property in question—in which appellee sought to quiet title in the name of Irene.

On April 23, 2009, appellee filed a motion for summary judgment on his counterclaim and cross-claim. A hearing was held on the motion on May 11. Defendants Reiss and Gustafson did not attend the hearing.

On August 3, 2009, the district court filed an order granting appellee's motion and quieting title in the name of Irene. As an initial matter, the court determined that the I. Dammann

Trust was in fact the M & I Bahensky Trust and, therefore, examined the latter trust document to determine the validity of the M & I Bahensky Trust and the impact of such validity on subsequent transfers.

In examining the M & I Bahensky trust, the district court noted that regarding beneficiaries, the M & I Bahensky Trust contained the following language:

> The Beneficial Interests, as a convenience, for distribution are divided into One Hundred (100) Units. They are non-assessable, non-taxable, non-negotiable, but transferable; and the lawful possessor thereof shall be construed the true and lawful owner thereof. The lawful owner may, if he so desires, cause his Beneficial Certificate to be registered with the Secretary of the Trust.

The district court observed that this language was found in the trust at issue in *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986). This court concluded that the trust at issue in *Schroeder* was invalid because it failed to adequately identify the beneficiaries. Based on the reasoning in *Schroeder*, the district court concluded that the transfer by Irene to the trustees of the M & I Bahensky Trust was "invalid and void." In its order, the district court continued that, "[t]herefore, all subsequent purported conveyances of such real estate are also void." The district court concluded that because the transfer to the M & I Bahensky Trust was void, ownership of the real estate devolved into a resulting trust in favor of Irene. The court concluded that there were no genuine issues of material fact and quieted title to the property in the name of Irene. This appeal followed.

ASSIGNMENTS OF ERROR

Appellants claim that the district court erred in (1) imposing a resulting trust in favor of the estate of Irene and (2) quieting title in the name of Irene.

STANDARDS 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. *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010). 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. *Id.*

ANALYSIS

On appeal, appellants claim that because the American Family Trust, as amended, indicates its intended beneficiaries with reasonable specificity, and because it is the last purported trust created by Irene, it demonstrated Irene's intentions. Appellants claim that the district court erred when it did not quiet title in the beneficiaries of that trust, rather than Irene. Appellants' argument presumes that the American Family Trust and conveyances into the trust are valid, presumptions which are not supported by the record. We reject appellants' argument on the summary judgment record before us, because there is a genuine issue of material fact (except as to the trustee's deed of January 1, 1982, which is invalid) as to the validity of the trusts formed and transfers made subsequent to the formation of the M & I Bahensky Trust, including the American Family Trust. However, because we do find error in the decision of the district court on grounds different from those asserted by appellants, we reverse and remand. Specifically, we conclude that the district court erred when it concluded that because the M & I Bahensky Trust was void, "all subsequent purported conveyances of such real estate are also void," thus necessarily quieting title in Irene.

The district court concluded that the M & I Bahensky Trust was not valid because it failed to adequately identify the beneficiaries. This conclusion was correct based on the reasoning in *First Nat. Bank v. Schroeder*, 222 Neb. 330, 332, 383 N.W.2d 755, 757 (1986), wherein we disapproved of a provision comparable to the instant case of "units of beneficial interest" without providing who was to receive the certificates of beneficial interest. The district court also correctly concluded that the failure of the M & I Bahensky Trust created a resulting trust in Irene as settlor. See *First Nat. Bank v. Daggett*, 242 Neb. 734,

497 N.W.2d 358 (1993). However, because a later transfer by Irene could potentially be valid, the district court erred when it reasoned that all subsequent purported conveyances were necessarily void and that therefore, it was required to quiet title in Irene.

The consequence of the failure of the M & I Bahensky Trust was that the interest sought to be transferred into the M & I Bahensky Trust was not effectively transferred and a resulting trust in favor of Irene was created. See *First Nat. Bank v. Daggett, supra*. See, also Restatement (Third) of Trusts § 7 (2003). Therefore, Irene retained her beneficial interest in the real property and the corresponding power to dispose of it. See, e.g., *Collins v. Collins*, 46 Ariz. 485, 52 P.2d 1169 (1935).

On the record before us, and given the deficiencies of the M & I Bahensky Trust, it is clear that the purported transfer by "Trustee's Deed" from the M & I Bahensky Trust to "Melvin D. Bahensky or Irene D. Bahensky or Jeffrey J. Reiss W.R.O.S." on January 1, 1982, was not valid, because it was made by trustees of an invalid trust. However, contrary to the district court's determination, given the resulting trust in favor of Irene, Irene individually retained the power to transfer the real property and there remains the possibility that she did so effectively at a later date.

We have examined the record made on summary judgment to determine whether transfers made by Irene subsequent to the invalid trustee's deed of January 1, 1982, were effective. Chronologically, the next event in the record is a quitclaim deed by Melvin and Irene on September 13, 1988, to the Green Acres Trust. The trust document creating the Green Acres Trust and other facts surrounding the Green Acres Trust and its purported transfer to the Evergreen LTD Trust are not in the record. A valid transfer to the Green Acres Trust would be a prerequisite to the determination of the validity of the subsequent transfers by the Green Acres Trust to the Evergreen LTD Trust and thereafter by the Evergreen LTD Trust to the American Family Trust.

There are genuine issues of material fact on the record before us, including whether the Green Acres Trust is a valid trust and whether the purported conveyance into it was proper.

Viewing the evidence favorably to the nonmoving party as we must, appellants may be entitled to prevail, and we cannot say on this record that appellee, solely on the basis of the invalidity of the M & I Bahensky Trust, as the moving party, was entitled to judgment.

CONCLUSION

Because we determine there are genuine issues of material fact, the order of the district court granting appellee's motion for summary judgment and quieting title in the name of Irene is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

VITALIX, INC., APPELLANT, V. BOX BUTTE COUNTY BOARD OF EQUALIZATION, APPELLEE.

786 N.W.2d 326

Filed July 9, 2010. No. S-09-1074.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Stipulations.** Parties cannot stipulate to legal conclusions.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Gerard T. Forgét III, of Forgét Firm, P.C., L.L.O., for appellant.

No appearance for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

The Box Butte County assessor set the valuation for improvements to property made by the appellant, Vitalix, Inc. Vitalix protested the valuation, arguing that the property was exempt from taxation because it was public land being used for a public purpose. The Box Butte County Board of Equalization affirmed the county assessor's valuation, essentially denying an exemption. Vitalix appealed that decision to the Tax Equalization and Review Commission (TERC), which affirmed the board of equalization's decision. Vitalix appeals to this court. We affirm.

II. FACTUAL BACKGROUND

Vitalix manufactures nutritional supplements for livestock. Its plant is located on a parcel of real property owned in fee simple by the City of Alliance, Nebraska (City). The operative lease was signed by the City and Vitalix on December 17, 2004. At that time, the lease provided for the lease of the real property along with three buildings, identified as buildings Nos. 3000, 3001, and 3101, located on the real property.

Subsequently, an addition was built connecting buildings Nos. 3000 and 3001 to form a U-shaped contiguous structure. The lease between the City and Vitalix was amended in June 2005 to provide for this addition (referred to as the "Warehouse Addition"). The Warehouse Addition was constructed using community redevelopment funds obtained from the State of Nebraska by the City.

In 2007, the county assessor assessed the Warehouse Addition and certain other improvements to Vitalix in the amount of $897,051. The Warehouse Addition had been assessed at $570,935; the other property was assessed at $326,116. Only improvements were assessed to Vitalix; the land was assessed at zero and is exempt from taxation as property owned by the City. In addition, buildings Nos. 3000 and 3001 are exempt from taxation and have been since an exemption was granted to the City by the board of equalization in May 2005.

The issue on appeal is whether the Warehouse Addition is exempt from taxation as public property used for a public

purpose. Vitalix is not contesting the assessment of the other improvements to the parcel.

III. ASSIGNMENTS OF ERROR

On appeal, Vitalix assigns that TERC erred in (1) rejecting a stipulation of facts entered into by the parties and (2) denying an exemption from taxation for the Warehouse Addition.

IV. STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[1] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[3]

V. ANALYSIS

1. Parties' Stipulation

In its first assignment of error, Vitalix argues that TERC erred in rejecting the stipulation of facts entered into by the parties. At issue is the parties' stipulation stating that the parcel of land in question, "together with any appurtenant structure ('Warehouse Addition'), is owned in fee simple by the City . . . subject only to the leasehold interest of Vitalix." TERC notes that "[i]f only the land is described as the 'Warehouse Addition' for purposes of the stipulation, the stipulation conforms to the evidence. If 'Warehouse Addition' also refers to the warehouse constructed in 2004, it is contrary to the evidence."

[4] Because the ownership of the warehouse has bearing on whether it is exempt from taxation, TERC's concern with this stipulation is well founded. The above language—"[the] parcel of land . . . together with any appurtenant structure

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[1] *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009).

[2] *Id.*

[3] *Id.*

('Warehouse Addition'), is owned in fee simple by the City"—suggests that the parties could be attempting to stipulate that the Warehouse Addition is owned by the City. Such is a legal conclusion and cannot be the subject of a stipulation between the parties.[4] We conclude that TERC did not err by refusing to consider the parties' stipulation. Vitalix's first assignment of error is without merit.

2. TERC's Decision

In its second assignment of error, Vitalix argues that TERC erred in affirming the decision of the board of equalization. Vitalix contends that Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2006) provided an exemption for the Warehouse Addition. Section 77-202(1) provided in relevant part that "[t]he following property shall be exempt from property taxes: . . . [p]roperty of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose." Vitalix argues that upon its construction, the Warehouse Addition became a part of the real estate and thus was owned by the City and not by Vitalix. And because the land was used for a public purpose, namely because it was built upon using community redevelopment funds, it was exempt from taxation.

(a) Property of State or Governmental Subdivision

We turn first to TERC's finding that the Warehouse Addition was owned by Vitalix and thus not "[p]roperty of the state" or a governmental subdivision as required by § 77-202(1)(a).

The record in this case shows that the Warehouse Addition was included in a list of assets reported by Vitalix to the federal government for tax purposes. The lease between the City and Vitalix provided that "[w]ith prior permission of [the City, Vitalix] may make alterations or additions to the premises," but that "[i]n the absence of consent of [the City], all additions and alterations to the premises, including fixtures, made by

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[4] See, e.g., *Roberts v. Roberts*, 349 S.W.3d 886 (Ark. 2009); 73 Am. Jur. 2d *Stipulations* § 4 (2001). Cf. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

[Vitalix] shall become property of [the City] upon termination of the lease." Finally, the lease provided that "[a]ny fixtures, equipment or supplies not removed from the premises by [Vitalix] upon termination of the lease shall become property of [the City]." Neither of these exceptions is relevant in this case, as the City granted consent for the Warehouse Addition and the lease has not yet been terminated.

An addendum to the same lease specifically notes that *Vitalix*, and not the City, had constructed, on the real property that is the subject of the lease, a warehouse building. The record also includes a deed of trust between Vitalix, the institutions which financed the project, and the City. Both the addendum and the deed indicate that Vitalix is responsible for the repayment of all funds.

Vitalix's primary argument is that as a general rule, when improvements are made to leased real estate, the improvements become a part of the real estate and are owned by the landowner, not the tenant. And this is indeed the general rule.[5] But the general rule does provide for the converse upon agreement of the parties. And this lease, as is noted above, makes such provision: Any improvements become the City's property only under certain circumstances not at issue here. More importantly, the addendum to the lease does not include any language suggesting otherwise.

Neb. Rev. Stat. § 77-1374 (Reissue 2003) also supported the general conclusion that improvements do not necessarily become part of the underlying real estate, at least for taxation purposes. That section provided, in part, that "[i]mprovements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements as real property." Indeed, besides the Warehouse Addition, Vitalix has been assessed for other improvements to the leasehold interest in question, and it is not protesting that assessment.

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[5] See, *Schmeckpeper v. Koertje*, 222 Neb. 800, 388 N.W.2d 51 (1986); *Lienemann v. Lienemann*, 201 Neb. 458, 268 N.W.2d 108 (1978); *State v. Bardsley*, 185 Neb. 629, 177 N.W.2d 599 (1970), *overruled in part on other grounds, State v. Rosenberger*, 187 Neb. 726, 193 N.W.2d 769 (1972).

The burden is on Vitalix[6] to show that the Warehouse Addition was "[p]roperty of the state."[7] Vitalix failed to meet that burden. We conclude that TERC's conclusion that Vitalix and not the City owned the Warehouse Addition despite the fact that the building was constructed on real property owned by the City conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

(b) Public Purpose

Vitalix also argues that the construction of the Warehouse Addition was for a public purpose under § 77-202(1)(a), which provided in part:

> For purposes of this subdivision, public purpose means use of the property . . . to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes . . . .

Vitalix contends that because the Warehouse Addition was constructed as part of community redevelopment, it is for a public purpose. We disagree.

While community development was listed in § 77-202(1)(a), that section also noted that "public purpose means use of the property . . . to provide public services." Vitalix fails to show, and there is no other evidence to support the conclusion, that by operating its business, Vitalix is providing a public service. To the contrary, Vitalix is running a for-profit business manufacturing nutritional supplements for livestock. Simply purchasing the improvements with community redevelopment funds is insufficient to make the improvements be for a "public purpose." We therefore reject Vitalix's argument that the Warehouse Addition is being used for a "public purpose."

Vitalix's second assignment of error is without merit.

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[6] See Neb. Rev. Stat. § 77-5016(8) (Reissue 2009).

[7] See § 77-202(1)(a).

VI. CONCLUSION

The decision of TERC is affirmed.

AFFIRMED.

IN RE COMPLAINT AGAINST KENT E. FLOROM, COUNTY COURT JUDGE OF THE 11TH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. KENT E. FLOROM, RESPONDENT.

784 N.W.2d 897

Filed July 9, 2010. No. S-35-090001.

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. ____: ____: ____. In a review of the findings and recommendations of the Commission on Judicial Qualifications, upon its independent inquiry, the Nebraska Supreme Court must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 2008) have been violated.
3. ____: ____: ____. If violations of the Nebraska Code of Judicial Conduct and subsections of Neb. Rev. Stat. § 24-722 (Reissue 2008) are found, the Nebraska Supreme Court must then determine what discipline, if any, is appropriate under the circumstances.
4. **Judges: Disciplinary Proceedings.** Conduct that clearly violates the Nebraska Code of Judicial Conduct constitutes, at a minimum, a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 2008).
5. ____: ____. While the disciplinary recommendation of the Commission on Judicial Qualifications is entitled to be given weight, it is incumbent upon the Nebraska Supreme Court to independently fashion an appropriate penalty.
6. ____: ____. In a judicial discipline proceeding, the Nebraska Supreme Court weighs the nature of the offenses with the purpose of the sanctions and examines the totality of the evidence to determine the proper discipline.
7. ____: ____. In a judicial discipline proceeding, sanctions should be imposed where necessary to safeguard the bench from those who are unfit.
8. ____: ____. The Nebraska Supreme Court disciplines a judge not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society.

9. ____: ____. 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.
10. ____: ____. The discipline imposed on a judge must be designed to announce publicly the Nebraska Supreme Court's recognition that there has been misconduct. And appropriate discipline should discourage others from engaging in similar conduct in the future.
11. ____: ____. A suspension may be used to impress the severity of misbehavior upon those subject to discipline, but the primary motivation for proper conduct by judges must always be respect for the law, not fear of punishment.

Original action. Judgment of removal.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for relator.

Susan L. Kirchmann for respondent.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

PER CURIAM.

This is a judicial discipline case brought by the relator, the Nebraska Commission on Judicial Qualifications (Commission), against the respondent, Kent E. Florom, who has been a county judge in the 11th Judicial District of Nebraska since August 23, 1991. The facts of this case are largely undisputed, and the respondent admits his conduct was improper. Therefore, the primary issue presented in this proceeding is the discipline to be imposed. Because the respondent's course of conduct was clearly, repeatedly contrary to the rules of judicial conduct, and because suspension from office would be insufficient to correct the damage wrought by the respondent's behavior, we remove the respondent from his office as a judge.

BACKGROUND

KRAMER CASE

On February 9, 2008, Sharon Kramer, a North Platte school teacher and softball coach, asked the respondent to be an assistant coach for the youth softball team on which the respondent's daughter played. He accepted.

A few weeks later, the respondent heard a rumor that Kramer was about to be arrested. The respondent approached

the county attorney, Rebecca Harling, to discuss the case. Harling explained that the charge involved theft from the North Platte High School booster club. The respondent, assuming that it was some sort of misdemeanor theft, asked Harling whether, if Kramer paid restitution, that would satisfy the victim. Conflicting evidence suggests that the respondent may also have offered to persuade Kramer to pay restitution. Harling replied that Kramer's recordkeeping was so poor that the amount of restitution was unknown.

The respondent later explained that he had spoken to Harling because he wanted to find out about the allegations against Kramer and to find out whether his daughter was in any jeopardy. The respondent also claimed he had been aware of the amount of money that was involved in the softball team and had hoped it was not connected to the alleged crime. The respondent said he had not wanted his daughter's team to be hurt by association with Kramer's arrest. Harling, however, said that none of those concerns had been expressed to her at the time she and the respondent spoke.

On another occasion, Kramer's attorney, Russ Jones, and a different prosecutor were in the respondent's office on other business. They were discussing Kramer's case between themselves. The respondent interjected and asked whether jail time was being sought for Kramer. The respondent also asked the attorneys whether the case would be dismissed if restitution was paid, and said he would pay the restitution. The respondent told Jones to tell Harling that the respondent would put her on "'double secret probation.'" Jones believed the respondent was joking, but conveyed the message. The respondent later admitted there had been "no good reason" for him to have interrupted the attorneys' conversation, but also said he had just been joking.

Kramer was eventually charged with misdemeanor theft, pursuant to a plea agreement. The respondent recused himself from any official participation in the case. The matter was set for a plea and sentencing on June 20, 2008. That day, Jones told the respondent that the charges had become public and that there was media interest. The respondent suggested to Jones that Kramer could plead early, or plead by waiver, in

order to avoid an appearance in open court. Harling rejected those options.

Later, a few weeks after Kramer had been sentenced, the respondent asked Harling about subpoenas that had been issued to the school booster club from which Kramer had stolen. The respondent suggested he had heard about the subpoenas from law enforcement. Harling realized that the respondent was probably referring to subpoenas issued in connection with the revocation of Kramer's teaching license by the State Department of Education and that the respondent had apparently discussed the case with a police department investigator.

On July 7, 2008, the respondent had a telephone conversation with Jim Paloucek, who was a member of the North Platte school board and a lawyer practicing in Lincoln County, located within the 11th Judicial District. The respondent had heard a rumor that Paloucek and another member of the board were planning to take some sort of official action against Kramer as a result of her conviction. The respondent asked Jones, a close friend of Paloucek, to pass a message to Paloucek that if Paloucek took action against Kramer, Paloucek would be "'making an enemy'" he did not want to make. The respondent later admitted that he was the "enemy" Paloucek would be making and that he had not been joking. The respondent explained that he had been angry.

After hearing about the respondent's threat, Paloucek and his law partners placed a telephone call to the respondent and asked him to confirm that he made the threat. The respondent confirmed his threat, despite having been counseled by another judge that his actions could be construed as trying to influence a public official. Paloucek described the respondent as "cool," calm, and "matter of fact." The respondent said Paloucek would be making a mistake by taking action against Kramer. Paloucek and one of his partners also reported that the respondent told Paloucek that "favors extended in the past would not be extended in the future," although the respondent did not remember making that remark. Paloucek expressed a concern that the respondent was using his judicial office to try to influence Paloucek's actions as an elected official. The respondent replied that Paloucek should ask for recusal when

appearing in front of him. Paloucek and his law partners have done so since.

On July 15, 2008, the respondent wrote and signed a letter, on his judicial letterhead, that was intended to help Kramer keep her job with the North Platte school district. The letter stated, in relevant part:

> I have always felt that Sharon Kramer was a person of integrity. No one was more surprised than I at her breach of public trust. As a judge, I see thousands of cases each year where people have violated the law. Never have I seen anyone step forward with the remorse and self-responsibility that I witnessed from Sharon Kramer.

The letter also commended Kramer's contrition and acceptance of responsibility, and recommended that Kramer remain employed by the school district.

The respondent later explained that the July 15, 2008, letter had mistakenly been on judicial letterhead because his word processor defaulted to his judicial stationery. The respondent said that the July 15 letter had been intended to be confidential to Kramer, her attorney, and her union representative. But on November 13, the respondent wrote another letter on behalf of Kramer, this time to the Nebraska Professional Practices Commission, regarding Kramer's license to teach. That letter was on a personal letterhead, but was substantially the same, including the references to the respondent's judicial office.

Juvenile Case

In October 2007, L.W., a juvenile, came under the jurisdiction of the Lincoln County Court sitting as a juvenile court, and the respondent placed her on probation. L.W. was prosecuted by Harling, and L.W.'s assigned caseworker was Megan Luebbe, of the Nebraska Department of Health and Human Services. L.W. was also a player on the softball team that the respondent later agreed to coach. In March 2008, after the respondent agreed to coach L.W.'s softball team, Harling filed a motion to revoke L.W.'s probation. The respondent recused himself from the case. Nonetheless, after Luebbe appeared in the respondent's court on another matter, the respondent called Luebbe into his chambers and told her he was speaking to

her "as a softball coach and not as a judge." The respondent explained his interest in L.W.'s case, talked about her talent as a player, and asked about her placement recommendations.

Later, in order to facilitate L.W.'s participation with the team, the respondent and his wife served as her chaperones, which generally meant that after L.W.'s father dropped her off at tournaments, the respondent and his wife watched her. The respondent had chaperoned other players in the past, although none had been involved in the juvenile court system. Ultimately, L.W. was allowed to participate in softball tournaments she would not have been able to attend had the respondent not agreed to chaperone her.

And while L.W.'s juvenile case was pending, the respondent spoke to Harling several times about the case. On one occasion, the respondent asked Harling to "'take care of [his] shortstop,'" although the respondent later said he had just been teasing Harling. On other occasions, the respondent asked Harling about L.W.'s whereabouts and whether she would be permitted to play softball and travel with the team. The respondent also had several contacts with Luebbe regarding L.W.'s disposition. And despite the fact that the county judge handling the case advised the respondent that he would not discuss the case with the respondent, the respondent asked the assigned judge one morning, over coffee, whether L.W.'s case had proceeded to disposition.

Disciplinary Proceedings

The respondent's conduct was reported to the Commission, which initiated an investigation. The Commission filed a complaint charging the respondent with violating Canons 1, 2, 3, and 4 of the Nebraska Code of Judicial Conduct (Code).[1] This court appointed a master to conduct a hearing.[2] The Commission found clear and convincing evidence that the respondent had violated Canons 1, 2, 3, and 4, and additionally found clear and convincing evidence that the respondent's conduct was prejudicial to the administration of justice and

[1] See Neb. Code of Judicial Conduct §§ 5-201 to 5-204.

[2] See Neb. Ct. R. § 5-107.

had brought the judicial office into disrepute. The Commission recommended that the respondent be removed from his judicial office. The respondent filed a petition in this court objecting to certain conclusions reached by the Commission and to the Commission's disciplinary recommendation.

ASSIGNMENTS OF ERROR

The respondent argues that removal from the bench is arbitrary and unwarranted under the circumstances and that a sanction short of removal is appropriate.

STANDARD OF REVIEW

[1-3] 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.[3] Upon our independent inquiry, we must determine whether the charges against the respondent are supported by clear and convincing evidence and which, if any, canons of the Code and subsections of Neb. Rev. Stat. § 24-722 (Reissue 2008) have been violated.[4] If violations are found, we must then determine what discipline, if any, is appropriate under the circumstances.[5]

ANALYSIS

Code of Judicial Conduct Provisions

[4] Section 24-722(6) provides that a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Conduct that clearly violates the Code constitutes, at a minimum, a violation of this section.[6]

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[3] *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002).

[4] *Id.*

[5] *Id.*

[6] See *In re Complaint Against Marcuzzo*, 278 Neb. 331, 770 N.W.2d 591 (2009).

As relevant, the Code provides that "[a]n 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."[7] The Code also provides that "[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."[8] To that end, the Code states:

> 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. A judge shall not testify voluntarily as a character witness.[9]

The judicial duties of a judge take precedence over all the judge's other activities.[10] A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.[11] And a judge shall conduct all of the judge's extrajudicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.[12]

The Commission found that the respondent had violated the foregoing provisions of the Code and § 24-722(6). The respondent does not take issue with that conclusion, and on our de novo review, we agree. We find clear and convincing evidence,

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[7] § 5-201.

[8] § 5-202(A).

[9] § 5-202(B).

[10] § 5-203(A).

[11] § 5-203(B)(1).

[12] § 5-204(A).

as summarized above, that the respondent violated Canons 1, 2, 3, and 4 of the Code and § 24-722(6).

Appropriate Discipline

[5] The remaining issue is the appropriate discipline to be imposed. While the disciplinary recommendation of the Commission is entitled to be given weight, it is incumbent upon this court to independently fashion an appropriate penalty.[13]

[6-10] In a judicial discipline proceeding, 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.[14] Sanctions should be imposed where necessary to safeguard the bench from those who are unfit.[15] This court disciplines a judge not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society.[16] And it is one of the more important and difficult tasks we undertake. 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.[17] The discipline imposed on a judge must be designed to announce publicly this court's recognition that there has been misconduct. And appropriate discipline should discourage others from engaging in similar conduct in the future.[18]

The respondent argues that in cases presenting comparable circumstances, we have imposed sanctions of suspension, not removal from office. For example, most recently, in *In re Complaint Against Marcuzzo* (*Marcuzzo*),[19] a county judge's nephew was charged with a misdemeanor and reached a plea

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[13] *In re Complaint Against White, supra* note 3.

[14] *In re Complaint Against Krepela*, 262 Neb. 85, 628 N.W.2d 262 (2001).

[15] *Id.*

[16] *In re Complaint Against White, supra* note 3.

[17] *In re Complaint Against Marcuzzo, supra* note 6.

[18] See *In re Complaint Against White, supra* note 3.

[19] See *Marcuzzo, supra* note 6.

agreement that would have imposed a short jail sentence. But the judge's nephew failed to appear in court, so an arrest warrant issued and the plea offer was revoked. Judge Marcuzzo asked the prosecutor to keep the plea offer open and called his nephew's attorney, arranging a meeting between Judge Marcuzzo, his nephew, and the attorney. Judge Marcuzzo told them that he had arranged for a different county judge—not the judge assigned to the case originally—to accept his nephew's plea. That judge took the nephew's plea and sentenced him to probation. That incident, along with two instances of intemperate behavior, resulted in a 120-day suspension.[20]

The respondent also relies upon *In re Complaint Against White* (*White*),[21] in which a county judge, who was angered when one of her rulings was reversed on appeal to the district court, tried to secure further review of the ruling. Specifically, Judge White sought to assist the prosecutor in preparing an appeal. And when the prosecutor decided not to appeal, Judge White enlisted a friend on the district court bench to hear a petition to appoint a special prosecutor to appeal instead. This conduct resulted in a 120-day suspension.[22]

And in *In re Complaint Against Kneifl* (*Kneifl*),[23] a district court judge who was arrested for driving under the influence cursed at a police officer and threatened other officers with reprisals, saying that they "'better never be' in his court and that if they ever came before him in his court, they would 'be sorry.'" In another incident, the judge told a county attorney's partner that an acquaintance of the judge had been charged with driving under the influence and asked the partner or county attorney to see what could be done for the acquaintance. We imposed a 3-month suspension, along with alcohol evaluation and any recommended alcohol treatment.[24]

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[20] See *id.*

[21] See *White, supra* note 3.

[22] See *id.*

[23] *In re Complaint Against Kneifl*, 217 Neb. 472, 476, 351 N.W.2d 693, 696 (1984).

[24] See *id.*

On the other hand, in *In re Complaint Against Kelly*,[25] a judge was removed from office for interfering with a pending case. In that case, Judge Kelly's son was cited for a traffic infraction. Judge Kelly advised him to plead guilty and pay the fine. The judge removed the ticket from the court file and told his son to come back when he had the money to pay the ticket. But the fine was not paid for over a year, until after the ticket was found in Judge Kelly's desk drawer by another judge. In addition, both the sentencing judge and probation officer reported ex parte contacts with Judge Kelly concerning his son's compliance with the terms of his probation. Ultimately, we found that Judge Kelly's conduct warranted removal from the bench.[26]

In this case, contrary to the respondent's argument, we find that the respondent's conduct was more egregious than that which resulted in suspensions in *Marcuzzo*, *White*, and *Kneifl*. In *Marcuzzo*, the judge's interference in his nephew's case was an isolated instance that took place over the course of a few hours. In *White*, the judge's conduct was more prolonged, but was limited to a single case and lasted only a few days. And in *White*, while the judge's conduct was certainly improper, it was motivated by professional concern over a decision the judge believed to be incorrect—not a personal bias. By contrast, in this case, the respondent abused his judicial position to interfere in two different cases, over the course of several months, for entirely personal reasons.

And in neither *Marcuzzo* nor *White* did a judge threaten a member of the practicing bar with reprisal for acting against the judge's interests. Here, the respondent did precisely that. Not only was it reasonable for Paloucek and his partners to believe that the respondent had threatened to use his judicial power to disadvantage them and their clients, it was in fact the only reasonable interpretation of the respondent's behavior.

In *Kneifl*, an intoxicated judge tried to intimidate the police officers who were arresting him. But in this case, neither

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[25] See *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987).

[26] See *id.*

alcoholism nor duress mitigates the respondent's conduct. The respondent not only threatened members of the bar with abuse of judicial power, but repeated his threat, after ample time for reflection, and after having been dissuaded from doing so by the good advice of a fellow judge. There is no excuse for the respondent's conduct, and it is hard to imagine conduct that, coming from a judge, could be more damaging to the reputation of the judiciary.

And while the respondent's threats to Paloucek are certainly the most troubling part of this record, they are far from the only cause for concern. The respondent repeatedly made his personal interest in the outcome of a case known to several lawyers, who appeared before him regularly and would have good cause to worry about displeasing him. The respondent's claim that he was just "joking" is not an excuse.[27] The respondent invoked his judicial office repeatedly in serving as a character reference for a convicted criminal, despite the clear statement in the Code that a "judge shall not lend the prestige of judicial office to advance the private interests of the judge or others,"[28] and the even clearer comment that "judicial letterhead must not be used for conducting a judge's personal business."[29] Although "a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation," the respondent's reference to his judicial experience, when viewed in the context of other events, does not reflect the "sensitiv[ity] to possible abuse of the prestige of office" that the Code unequivocally requires.[30]

[11] It is difficult to see how suspension would serve the interests of deterrence when the respondent was cautioned, repeatedly, about the impropriety of his conduct. To begin with, his conduct on several instances was unquestionably contrary to unambiguous provisions of the Code. And he was confronted, at various times, with the implications of his conduct,

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[27] See *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998).

[28] § 5-202(B).

[29] Comment, § 5-202(B).

[30] *Id.*

by Paloucek and other attorneys, and even by a fellow judge. A suspension may be used to impress the severity of misbehavior upon those subject to discipline, but the primary motivation for proper conduct by judges must always be respect for the law, not fear of punishment. In this case, the respondent should have known that his conduct was unethical. However, he ignored the Code. Then he was told that his conduct was unethical, more than once. But he ignored those warnings, and kept doing it anyway. He demonstrated a disregard for ethical rules that a suspension cannot overcome.

We recognize that in a judicial discipline proceeding, the respondent's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline.[31] The respondent has served on the bench for nearly 19 years, and except for the conduct noted here, there is nothing in the record to suggest that his performance has been unsatisfactory. But the conduct evidenced here is a *course* of conduct, not an isolated incident.[32] And there are several lawyers in the 11th Judicial District whose confidence in the respondent's fairness as a judge cannot, we believe, be restored. Therefore, we conclude that removal from office is necessary to preserve the integrity of the judicial system.

CONCLUSION

As explained above, the respondent's course of misconduct demonstrates a lack of regard for the Code that seriously undermines public confidence in the judiciary. Therefore, we conclude that removal from office is the only appropriate remedy.

JUDGMENT OF REMOVAL.

HEAVICAN, C.J., not participating.

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[31] *In re Complaint Against Krepela, supra* note 14.

[32] See *In re Complaint Against Jones, supra* note 27.

A.W., MOTHER AND NEXT FRIEND OF C.B., AND A.W., APPELLANTS, V. LANCASTER COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS LINCOLN PUBLIC SCHOOLS, APPELLEE.

784 N.W.2d 907

Filed July 16, 2010. No. S-09-485.

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. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk.
5. ____. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
6. ____. It is for the fact finder in a negligence case to determine, on the facts of each individual case, whether or not the evidence establishes a breach of duty.
7. **Negligence: Words and Phrases.** A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
9. **Negligence: Liability: Public Policy.** In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification.
10. **Negligence.** Whether a duty exists is a policy decision, and a lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination.
11. ____. In a negligence case, a defendant's conduct should be examined not in terms of whether there is a "duty" to perform a specific act, but, rather, whether the conduct satisfied the duty placed upon an individual to exercise that degree of care as would be exercised by a reasonable person under the circumstances.
12. ____. Foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.

13. **Negligence: Tort-feasors.** Foreseeability helps define what conduct the standard of care requires under the circumstances and whether the conduct of an alleged tort-feasor conforms to that standard.
14. **Negligence: Proof.** Foreseeability is not a factor to be considered by courts when making determinations of duty.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

Vincent M. Powers, of Vincent M. Powers & Associates, for appellants.

John M. Guthery and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

GERRARD, J.

C.B., a kindergarten student at Arnold Elementary School in northwest Lincoln, Nebraska, was sexually assaulted in a school restroom during the school day. C.B.'s mother, A.W., sued the Lincoln Public Schools (LPS) on C.B.'s behalf, alleging that LPS' negligence permitted the assault to occur. The district court, however, entered summary judgment for LPS, reasoning that the assault was not foreseeable.

The fundamental issue in this appeal, as framed by the parties, is whether LPS had a legal duty to C.B. to protect him from the assault. But we conclude that our case law has, in the past, placed factual questions of foreseeability in the context of a legal duty when they are more appropriately decided by the finder of fact in the context of determining whether an alleged tort-feasor's duty to take reasonable care has been breached. As a result, we find that the questions of foreseeability presented in this appeal are matters of fact, not of law, and that there is a genuine issue of material fact regarding whether LPS' conduct met its duty of reasonable care. We reverse, and remand for further proceedings.

BACKGROUND

Assault of C.B.

On September 22, 2005, Joseph Siems entered Arnold Elementary School through the main entrance. The door was not locked, but there was a sign next to the entrance informing visitors that they needed to check in with the main office, which was just inside. If they checked in, they would be signed into the building and issued a visitor's nametag. The hallway inside the entrance was visible through glass windows to the two secretaries who worked in the office, and the secretaries were to watch the hallway to make sure that no visitors went past the office without signing in.

Siems went past the office without signing in. Apparently, Siems came in during the lunch hour, when one of the office secretaries was at lunch and the other was making photocopies. One of the regular secretaries was not working that day, and the replacement secretary may not have been instructed to make sure that everyone who came into the building checked in. For whatever reason, no one saw Siems come in the door. But Siems was spotted in the entrance hallway shortly thereafter by a teacher, Kathi Olson. Siems had a cigarette behind his ear and was carrying a backpack; Olson thought he looked out of place. Olson asked Siems if she could help him find anything, but he ignored her. Olson went directly to the office to see if anyone matching Siems' description had signed in.

Two other teachers, Kelly Long and Connie Peters, were monitoring some first graders when they also saw Siems in the hallway. They decided that Long would talk to Siems while Peters stayed with the students. Long saw the contact between Siems and Olson, and when Siems came near, Long asked Siems if she could help him. Siems did not respond, but after the question was repeated, Siems said he needed to use the restroom. Long pointed out a nearby restroom and told Siems that he needed to return to the main office after using the restroom. Siems went toward the restroom, and Long went to her classroom and used the telephone to report the incident to the main office. Long knew that there were no students in that restroom at the time. But Long did not watch Siems to

see where he went. Peters saw Siems go into the restroom that Long had indicated, then saw him come out and go back down the hallway. Then she lost sight of him. Although no one saw him, it is apparent that Siems went back down the hallway and into another restroom closer to the main entrance.

One of the school secretaries had seen Siems briefly in the hallway as she was returning from lunch. She answered the telephone when Long called the office. Olson was still there and had just determined that Siems had not signed in. After hearing from Olson and Long, the secretary went to the cafeteria to inform Shannon Mitchell, the administrator in charge of the school at the time. In the meantime, C.B., who was 5 years old, had returned from a trip to the restroom and told his teacher, Susan Mulvaney, that "there was a bad man in the restroom." C.B. later reported that Siems had pulled down C.B.'s pants and briefly performed oral sex on him. Mulvaney stayed at the door of her classroom, next to C.B., and watched the restroom door.

After speaking to the secretary in the cafeteria, Mitchell went to the restroom and saw Siems sitting in a stall. When Mitchell arrived, there were no children in the restroom. Mitchell also saw some children in the hallway approaching the restroom; she prevented them from entering. While doing so, she encountered Mulvaney, who told her what C.B. had said. Mitchell used Mulvaney's telephone to call the office and initiate a "Code Red" lockdown of the school, then went to the office and called the 911 emergency dispatch service.

The Code Red was initiated pursuant to the LPS "Safety and Security Plan" and "Arnold School Emergency Procedures and Security" guidelines that were in effect at the time. Those procedures had been put in place in compliance with LPS "Policy 6411" and "Regulation 6411.1," which required the establishment of district-wide and site-based emergency plans. Generally speaking, the LPS plan required school personnel responding to a trespasser to nonconfrontationally contact the trespasser and, based on what followed, consider calling a Code Red. The Arnold Elementary School procedures explained, generally, the individual responsibilities associated with a Code Red and described the lockdown procedures.

After initiating the Code Red and calling 911, Mitchell went to some benches in the hallway near the restroom and watched the restroom door, along with an assistant principal who was in the building and a school custodian. After being contacted by the assistant principal, Siems left the restroom and then the building, followed by the assistant principal and custodian. The custodian detained Siems as police arrived, and Siems was taken into police custody.

Procedural History

C.B.'s mother, A.W., filed this claim against LPS on C.B.'s behalf under the Political Subdivisions Tort Claims Act.[1] As relevant, A.W. alleged that LPS was negligent in failing to have an effective security system and in allowing a stranger to enter C.B.'s school. A.W. alleged that LPS failed to use reasonable care to protect C.B.

LPS filed a motion for summary judgment, supported by evidence of the events described above, Mulvaney's opinion that her actions were reasonable, and the opinion of LPS' director of security that the LPS and Arnold Elementary School emergency procedures were adequate. In response, A.W. adduced evidence of incidents near Arnold Elementary School that had been reported to the Lincoln Police Department between 2001 and 2005, although most of those incidents involved nonviolent crimes and took place outside of school hours.

The district court entered summary judgment for LPS. The court found that Siems' assault of C.B. was not foreseeable and that the police incident reports provided by A.W. were insufficiently similar to Siems' actions to place LPS on notice of the possibility of a sexual assault by an intruder. The court found that LPS had made a prima facie showing that its security plan was adequate and that A.W. had not rebutted that evidence. And the court found that even if the safety and security plan in effect was inadequate, it was exempt from the Political Subdivisions Tort Claims Act as a discretionary function.[2] A.W. appeals.

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[1] See Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007 & Supp. 2009).

[2] See § 13-910(2).

ASSIGNMENTS OF ERROR

A.W. assigns, consolidated and restated, that the district court erred in finding that (1) LPS did not owe a duty to protect C.B. from the danger of sexual assault by Siems, (2) the sexual assault of C.B. was not reasonably foreseeable, (3) LPS took reasonable steps to protect against foreseeable acts of violence on its premises, (4) Arnold Elementary School had a safety and security plan in effect at the time of the assault which complied with pertinent state law, and (5) the school's safety plan was discretionary.

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 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

Foreseeability and Duty Under Restatement (Third) of Torts

[3-6] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[5] The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk.[6] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[7] But it is for the fact finder to determine, on the facts of each

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[3] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

[4] *Id.*

[5] See *Ehlers v. State*, 276 Neb. 605, 756 N.W.2d 152 (2008).

[6] *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

[7] *Id.*

individual case, whether or not the evidence establishes a breach of that duty.[8]

A.W. first argues that LPS had a duty to protect C.B. from the danger of sexual assault, that the sexual assault of C.B. was reasonably foreseeable, and that LPS' response was inadequate to that foreseeable danger. In support of this argument, A.W. relies on the risk-utility test that we have used to determine the existence of a tort duty.[9] Under that test, we have considered (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.[10]

But LPS does not dispute that it would owe C.B. a duty to protect him against any reasonably foreseeable acts of violence on its premises.[11] So A.W.'s first three arguments are really three different ways of framing the same question: Was Siems' assault of C.B. reasonably foreseeable? A.W.'s arguments with respect to foreseeability boil down to two primary contentions: first, that the LPS employees who saw Siems on the day of the assault should have foreseen the danger that he represented and, second, that the neighborhood in which Arnold Elementary School is located was sufficiently dangerous to place LPS on notice of a danger that a student could be sexually assaulted.

In previous cases, because the existence of a legal duty is a question of law, we have also treated the foreseeability of a particular injury as a question of law.[12] This places us in the peculiar position, however, of deciding questions, as a matter of law, that are uniquely rooted in the facts and circumstances of a particular case and in the reasonability of the defendant's response to those facts and circumstances.

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[8] See *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[9] See, e.g., *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[10] See *id.*

[11] See, e.g., *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[12] See *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

For that reason, the use of foreseeability as a determinant of duty has been criticized, most pertinently in the recently adopted Restatement (Third) of Torts.[13] The Restatement (Third) explains that because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.[14] Indeed, foreseeability determinations are particularly fact dependent and case specific, representing "a [factual] judgment about a course of events . . . that one often makes outside any legal context."[15] So, by incorporating foreseeability into the analysis of duty, a court transforms a factual question into a legal issue and expands the authority of judges at the expense of juries or triers of fact.[16]

That is especially peculiar because decisions of foreseeability are not particularly "legal," in the sense that they do not require special training, expertise, or instruction, nor do they require considering far-reaching policy concerns.[17] Rather, deciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community—matters that have long been understood to be uniquely the province of the finder of fact.[18]

[7] In addition, we have defined a "duty" as an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.[19] Duty rules are meant to serve as broadly applicable guidelines for public

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[13] Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

[14] *Id.*, § 7, comment *j*.

[15] See, *Fazzolari v. Portland School Dist. No. 1J*, 303 Or. 1, 4, 734 P.2d 1326, 1327-28 (1987); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 Vand. L. Rev. 739 (2005).

[16] See *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007).

[17] See Cardi, *supra* note 15.

[18] See, *Gipson, supra* note 16; Cardi, *supra* note 15.

[19] See *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

behavior, i.e., rules of law applicable to a category of cases.[20] But foreseeability determinations are fact specific, so they are not categorically applicable, and are incapable of serving as useful behavioral guides.[21] And, as the Arizona Supreme Court explained, "[r]eliance by courts on notions of 'foreseeability' also may obscure the factors that actually guide courts in recognizing duties for purposes of negligence liability."[22]

[8,9] Instead, as the Restatement (Third) explains, an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[23] But, in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification.[24] A no-duty determination, then, is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case.[25] And such ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.[26]

For example, the Iowa Supreme Court adopted the Restatement (Third) in *Thompson v. Kaczinski*[27] and, in *Van Fossen v. MidAmerican Energy Co.*,[28] applied it to limit the duty owed by an employer of an independent contractor to a member of the household of an employee of the independent contractor. The court explained that foreseeability of the harm

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[20] See Cardi, *supra* note 15.

[21] *Id.*

[22] *Gipson, supra* note 16, 214 Ariz. at 144, 150 P.3d at 231, citing Cardi, *supra* note 15; Restatement (Third) of Torts, *supra* note 13, § 7.

[23] Restatement (Third) of Torts, *supra* note 13, § 7(a).

[24] *Id.*, § 7(b).

[25] See *id.*, § 7, comment *b.*

[26] See *id.*, comment *j.* See, also, *Gipson, supra* note 16.

[27] *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009).

[28] *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009).

was not part of the analysis, but that an exception to the general duty of reasonable care was warranted, as a matter of policy, based upon an independent contractor's control of the premises where the work was to be performed and the difficulty inherent in requiring an employer to supervise each aspect of an independent contractor's often specialized work.[29] We reached a similar conclusion in *Parrish v. Omaha Pub. Power Dist.*,[30] in which we—interestingly—discussed and determined the legal duties of a landowner and general contractor to a subcontractor based upon the same considerations, without relying upon foreseeability.

But in other cases, our law has not been so clear. As noted above, we have stated that as a general proposition, in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk.[31] That uncontroversial proposition coexists uneasily with the risk-utility principles set forth above, which did not always include foreseeability and were at first expressly intended to evaluate the duty owed by a landlord to a tenant.[32] Only later did we graft foreseeability onto the rubric[33] and apply it generally beyond the context of premises liability.[34]

The ensuing complications are illustrated by our reasoning in *Sharkey v. Board of Regents*,[35] in which we relied upon foreseeability in determining a university's legal duty to protect students on its campus from criminal activity. Although invoking our risk-utility test, our decision was grounded entirely in foreseeability. And we reasoned, in the end, that because the evidence showed that violent altercations were not unknown

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[29] See *id.*

[30] *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

[31] See, e.g., *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005); *Parrish, supra* note 30.

[32] See *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985).

[33] See *Schmidt, supra* note 19.

[34] See *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998).

[35] *Sharkey, supra* note 11.

at the location on campus where the plaintiff was attacked, the attack was foreseeable; thus, we held that the university owed a duty "to its students to take reasonable steps to protect against foreseeable acts of violence on its campus and the harm that naturally flows therefrom."[36]

In other words, we reasoned that because the attack at issue in that case was foreseeable, the defendant had a duty to protect against foreseeable acts of violence. Our reasoning was tautological. It is evident that the university had a landowner-invitee duty to protect against *foreseeable* acts even had the attack in that case *not* been foreseeable. While we purported to be discussing duty, we were in fact assuming the conclusion we claimed to be proving, and we were actually evaluating the sufficiency of the evidence to sustain a conclusion that the university had breached its duty to take reasonable care.

[10,11] Our mistake was a common one. As the Restatement notes, in a number of cases, courts have rendered judgments under the rubric of duty that are better understood as applications of the negligence standard to a particular category of recurring facts.[37] But the Restatement disapproves that practice and limits the determination of duty to articulated policy or principle, in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as a fact finder.[38] Simply put, whether a duty exists is a *policy* decision, and a lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination.[39] As the Wisconsin Supreme Court explained, in a negligence case, a defendant's conduct should be examined "'"not . . . in terms of whether . . . there is a duty to [perform] a specific act, but rather whether the conduct satisfied the duty placed upon individuals to exercise that degree

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[36] *Id.* at 182, 615 N.W.2d at 902.

[37] Restatement (Third) of Torts, *supra* note 13, comment *i.*

[38] *Id.*, comment *j.* Accord *Thompson, supra* note 27.

[39] See, *Thompson, supra* note 27; *Behrendt v. Gulf Underwriters Ins. Co.*, 318 Wis. 2d 622, 768 N.W.2d 568 (2009); *Gipson, supra* note 16.

of care as would be exercised by a reasonable person under the circumstances.'"'"[40]

[12] To summarize: Under the Restatement (Third), foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.[41] And if the court takes the question of negligence away from the trier of fact because reasonable minds could not differ about whether an actor exercised reasonable care (for example, because the injury was not reasonably foreseeable), then the court's decision merely reflects the one-sidedness of the facts bearing on negligence and should not be misrepresented or misunderstood as involving exemption from the ordinary duty of reasonable care.[42]

We find the reasoning of the Restatement (Third), and our fellow courts that have endorsed it, to be persuasive.[43] The circumstances of this case illustrate how incorporating foreseeability into a duty analysis can confuse the issues. Here, it is not disputed that LPS owed C.B. a duty of reasonable care. The duty of instructors to supervise and protect students is well established under the Restatement (Second) of Torts,[44] the Restatement (Third) of Torts,[45] and our current case law.[46] Instead, the question is whether Siems' assault of C.B. was

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[40] See *Behrendt, supra* note 39, 318 Wis. 2d at 634, 768 N.W.2d at 574.

[41] Restatement (Third) of Torts, *supra* note 13, comment *j.*

[42] See *id.*, comment *i.*

[43] See, *Thompson, supra* note 27; *Behrendt, supra* note 39; *Gipson, supra* note 16.

[44] See Restatement (Second) of Torts §§ 314A and 320, comment *b.* (1965).

[45] See Restatement (Third) of Torts, *supra* note 13, § 40(b)(5) (Proposed Final Draft No. 1, 2005).

[46] See, e.g., *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002).

reasonably foreseeable. That determination involves a fact-specific inquiry into the circumstances that might have placed LPS on notice of the possibility of the assault. Stated another way, it requires us to ask what LPS employees knew, when they knew it, and whether a reasonable person would infer from those facts that there was a danger. Those are *factual* inquiries that should not be reframed as questions of law.

Under the Restatement view, the basic analysis remains the same. The factual question is the same. But, it is properly reframed as a question of fact. LPS owed C.B. a duty of reasonable care. Did LPS, under the facts and circumstances of the case, conduct itself reasonably? Or, more precisely, was Siems' assault of C.B. reasonably foreseeable, such that LPS' duty of reasonable care required it to act to forestall that risk? Such an approach properly recognizes the role of the trier of fact and requires courts to clearly articulate the reasons, other than foreseeability, that might support duty or no-duty determinations.[47] And it correctly examines the defendant's conduct, not in terms of whether it had a "duty" to take particular actions, but instead in terms of whether its conduct *breached* its duty to exercise the care that would be exercised by a reasonable person under the circumstances.[48]

We do not view our endorsement of the Restatement (Third) as a fundamental change in our law. It is better understood as rearranging the basic questions that are posed by any negligence case and making sure that each question has been put in its proper place. But it does not change those questions. To say, as we have in the past, that a defendant had no duty, under particular circumstances, to foresee a particular harm is really no different from saying that the defendant's duty to take reasonable care was not breached, under those circumstances, by its failure to foresee the unforeseeable.

[13] But placing foreseeability in the context of breach, rather than duty, properly charges the trier of fact with determining whether a particular harm was, on the facts of the case, reasonably foreseeable—although the court reserves the right

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[47] See *Gipson, supra* note 16.

[48] See *Behrendt, supra* note 39.

to determine that the defendant did not breach its duty of reasonable care, as a matter of law, where reasonable people could not disagree about the unforeseeability of the injury. We have often said that "'"'[t]he risk reasonably to be perceived defines the duty to be obeyed[,]'"'"[49] but that proposition should now be understood as explaining how foreseeability helps define what conduct the standard of care requires under the circumstances and whether the conduct of the alleged tort-feasor conforms to that standard. These are determinations reserved for the finder of fact.[50] And the factors of our risk-utility test, which we have employed to determine the existence of a duty, are better applied as possible considerations in determining whether an actor's conduct was negligent.[51] As the Restatement (Third) explains:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[52]

[14] For the foregoing reasons, we find the clarification of the duty analysis contained in the Restatement (Third) of Torts, § 7, to be compelling, and we adopt it.[53] We expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty.[54]

Foreseeability in Present Case

We apply Restatement (Third) principles to our analysis of this case, to provide the parties and the district court with

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[49] E.g. *Knoll, supra* note 12, 258 Neb. at 7, 601 N.W.2d at 763.

[50] See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

[51] See, e.g., *Heins, supra* note 8.

[52] Restatement (Third) of Torts, *supra* note 13, § 3 at 29.

[53] See *Thompson, supra* note 27.

[54] See *Gipson, supra* note 16. See, also, *Thompson, supra* note 27; *Behrendt, supra* note 39.

clearer guidance of how the case should proceed on remand, and to establish Restatement (Third) precedent to guide other cases. We note, however, that our disposition of this appeal would have been the same regardless.

As noted above, A.W. argues that LPS had a duty to protect C.B. from the danger of sexual assault, that the sexual assault of C.B. was reasonably foreseeable, and that LPS' response was inadequate to that foreseeable danger. Primarily, A.W. contends that the neighborhood in which Arnold Elementary School is located was sufficiently dangerous to place LPS on notice of a danger that a student could be sexually assaulted and that the LPS employees who saw Siems on the day of the assault should have foreseen the danger that he represented.

And, as we also noted above, LPS' relationship with C.B. was such that LPS owed a duty of reasonable care with regard to risks that arose within the scope of that relationship. There is no argument in this case that there is any countervailing principle or policy warranting a modification of that duty in this class of cases. So, the parties' foreseeability arguments are properly framed as disputing whether, considering the foreseeable likelihood of harm, LPS exercised reasonable care under all the circumstances.[55] If, in light of all the facts relating to LPS' conduct, reasonable minds could differ as to whether the conduct lacked reasonable care, it is the function of the finder of fact to make that determination, and summary judgment was improper.[56] And it bears repeating that in an appeal from a summary judgment, we view the evidence in the light most favorable to the nonmoving party, A.W.[57]

Nonetheless, to begin with, we are not persuaded by A.W.'s evidence of criminal behavior in the area of the school. Evidence of prior criminal activity is a necessary component in the totality of the circumstances which must be considered in determining foreseeability.[58] Several instances of similar

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[55] See Restatement (Third) of Torts, *supra* note 13, § 3.

[56] See *id.*, § 8(b).

[57] See *Erickson, supra* note 3.

[58] See *Doe, supra* note 6.

criminal activity in a fairly contiguous area during a limited timespan may make other such incidents foreseeable, implicating a responsible party's duty to take reasonable care.

But the only evidence A.W. presents in this regard is a call log from the Lincoln Police Department for a three-block area near Arnold Elementary School during 2001 to 2005. There were a great many calls for police assistance made in the year before C.B. was assaulted, including incidents of vandalism, an assault, and a report of a suspicious person at Arnold Elementary School. And other, more sexually related crimes were reported in the neighborhood. But few of those incidents took place during the school day. And there was nothing that should have suggested to LPS that a sexual assault was likely in the school building.

The evidence in this case is far different from that presented in other cases, in which we have found a basis for determining that criminal activity was foreseeable. This is not, for instance, a case such as *Doe v. Gunny's Ltd. Partnership*,[59] in which the plaintiff had been sexually assaulted in a parking garage, and in which there was evidence of crimes reported in the same building or one of the businesses located in the building. This was not a case in which a substantial number of similar incidents had occurred on the premises.[60] Nor is this a case in which the defendant had been on notice of the behavior of a particular assailant.[61] In short, there was not sufficient evidence of prior criminal activity to necessarily make the intrusion of a sexual predator at this particular elementary school foreseeable. In order to make a risk of attack foreseeable, the circumstances

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[59] *Doe, supra* note 6. See, also, *Erichsen v. No-Frills Supermarkets*, 246 Neb. 238, 518 N.W.2d 116 (1994).

[60] See, *Knoll, supra* note 12 (fraternity hazing); *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999) (bar fight); *Hulett v. Ranch Bowl of Omaha*, 251 Neb. 189, 556 N.W.2d 23 (1996) (bar fight), *overruled, Knoll, supra* note 12.

[61] See, e.g., *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994).

to be considered must have a direct relationship to the harm incurred,[62] and that relationship is lacking here.

After Siems entered the building, however, reasonable minds could differ as to whether LPS' initial failure to note his presence, and response to his presence, satisfied its duty of reasonable care. The sequence of events presented by the evidence is essentially undisputed. Siems was spotted by a number of LPS employees, more than one of whom observed that Siems seemed out of place. While each of them responded to the threat that they recognized Siems represented, none of them effectively made sure that Siems did not make contact with a student. Specifically, they did not keep track of Siems' location and permitted him to evade them. Nor did they prevent C.B. from entering the restroom, alone, while Siems' whereabouts were unknown. And reasonable minds could differ as to whether Siems' assault of C.B. was a foreseeable result of those failures. These facts, taken in the light most favorable to A.W.,[63] establish a genuine issue of material fact as to whether LPS breached the duty of reasonable care it owed C.B. For that reason, A.W.'s first three assignments of error have merit and A.W. is entitled to a full trial to resolve these respective issues.

Safety and Security Procedures

Because we are remanding this cause for further proceedings, we will address one aspect of A.W.'s fourth assignment of error. In support of her fourth assignment of error, A.W. argues that the safety and security plan in place at the time of the assault did not comply with relevant state law. Under regulations promulgated by the Nebraska Department of Education, each school system is required to have "a safety and security plan for the schools in the system. The plan addresses the safety and security of students, staff, and visitors."[64] And that

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[62] *Gans v. Parkview Plaza Partnership*, 253 Neb. 373, 571 N.W.2d 261 (1997), *overruled, Knoll, supra* note 12.

[63] See *Erickson, supra* note 3.

[64] 92 Neb. Admin. Code, ch. 10, § 011.01B (2004).

plan is to be reviewed annually by a school safety and security committee and by outside parties.[65]

A.W. argues that the plan in place for LPS and Arnold Elementary School did not satisfy this regulation. But to begin with, it is not clear precisely how this argument helps establish A.W.'s claim for relief. A statute, for instance, may give rise to a tort duty to act in the manner required by the statute where the statute is enacted to protect a class of persons which includes the plaintiff, the statute is intended to prevent the particular injury that has been suffered, and the statute is intended by the Legislature to create a private liability as distinguished from one of a public character.[66] Although we have suggested that a regulation may be relevant as evidence of the standard of care,[67] we have never held that an administrative regulation can similarly expand the scope of tort liability beyond the general duty to exercise reasonable care.

In this case, the regulations at issue are promulgated as accreditation standards, not standards for tort liability,[68] and contain no explicit qualitative requirements. They plainly do not give rise to a tort duty beyond the duty of reasonable care that was discussed above. They could, however, serve as relevant evidence of the standard of care and whether the standard of care was breached. But at this juncture, it is neither necessary nor proper to determine in this appeal whether these statutes and regulations would be admissible evidence at trial. The admissibility will be determined by the context in which such evidence is offered (if offered) at trial.

CONCLUSION

Therefore, we find no merit to A.W.'s narrow argument that for purposes of the court's duty analysis, Arnold Elementary School's safety and security policy was legally inadequate.

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[65] *Id.*, § 011.01C.

[66] See *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001).

[67] See *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[68] See 92 Neb. Admin. Code, ch. 10, § 001 (2004).

But we do find a genuine issue of material fact with respect to A.W.'s allegation that LPS breached its duty of reasonable care to C.B. Specifically, we hold that pursuant to the principles articulated in the Restatement (Third) of Torts, foreseeability is not part of the duty analysis performed by the court, but is part of the breach analysis performed by the finder of fact. And while the evidence of prior criminal activity in the neighborhood of Arnold Elementary School was not sufficient to support a conclusion that a sexual assault on the premises was reasonably foreseeable, there was sufficient evidence for reasonable minds to differ as to whether Siems' assault of C.B. was a foreseeable consequence of LPS' failure to initially note Siems' entry into the school or to carefully monitor Siems, and C.B., after it was determined that Siems had entered the school.

Therefore, we reverse the district court's summary judgment and remand the cause for further proceedings with respect to LPS' allegedly negligent conduct after Siems entered Arnold Elementary School.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLEE, V. GILBANE BUILDING COMPANY, A RHODE ISLAND CORPORATION, APPELLANT.

786 N.W.2d 330

Filed July 16, 2010. No. S-09-879.

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. **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.
4. **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.
5. **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.
6. **Insurance: Words and Phrases.** An insurer is considered insolvent under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act if it is unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of any capital and surplus required by law to be maintained or the total par or stated value of its authorized and issued capital stock.
7. **Summary Judgment: Evidence: Affidavits.** Evidence that may be received on a motion for summary judgment includes affidavits.
8. **Debtors and Creditors: Time.** Retrojection is the inverse of projection. A retrojection analysis begins with a debtor's financial condition at a certain point in time and extrapolates back in time in an attempt to show that the debtor must have been insolvent at some earlier relevant time.
9. ____: ____. Retrojection is a widely used method for determining insolvency, and courts have concluded that if the retrojection period stretches too far back from the date on which the insolvency of the debtor is known, it is untenable.
10. **Debtors and Creditors: Time: Evidence.** Courts will only consider retrojection if the evidence of insolvency on the certain date is accompanied by evidence that the debtor's financial condition did not change during the pendency period between the time of the payment and the date of proven insolvency.
11. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert F. Craig and Anna M. Bednar, of Robert F. Craig, P.C., for appellant.

Michael S. Degan, of Husch, Blackwell & Sanders, L.L.P., and Robert L. Nefsky, of Rembolt Ludtke, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This case is on appeal to this court for the second time. See *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008) (*Gilbane I*). The case generally involves whether four payments made by Amwest Surety Insurance Company (Amwest) to appellant Gilbane Building Company (Gilbane), shortly before Amwest went into liquidation, were voidable preferential transfers under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act (NISRLA). In *Gilbane I*, we concluded that three of the four payments were preferential transfers. However, in *Gilbane I*, we also concluded that the record was not sufficient to reach a conclusion on the validity of the transfer on January 5, 2001 (January 2001 transfer), and that the district court had erred when it had determined that the January 2001 transfer was also preferential. This court affirmed in part and reversed in part, and remanded the cause for further proceedings. On remand, appellant, Gilbane, and appellee, the Nebraska Director of Insurance in his capacity as liquidator (liquidator), filed cross-motions for summary judgment. The district court for Lancaster County held a hearing on the motions and granted the liquidator's motion for summary judgment, concluding that the liquidator had established that Amwest was insolvent at the time of the transfer at issue. The district court denied Gilbane's motion for summary judgment. Gilbane appeals. We affirm.

STATEMENT OF FACTS

We recite the underlying facts, some of which were recited in *Gilbane I*. Gilbane entered into a subcontract with Crane Plumbing & Heating Co., Inc. (Crane), under which Crane was to perform plumbing work on a construction project. Crane obtained two bonds issued by Amwest on or about December 17, 1997, with Gilbane as the obligee on both bonds. In January 2000, Crane abandoned the project. Amwest then made four payments to Gilbane to cover Crane's contractual obligations. The first payment was made on January 5, 2001, in the amount of $357,779.69. The second payment was made on April 9, in the amount of $26,150.23. The third payment

was made on April 13, in the amount of $215,292.12. The final payment was made on May 21, in the amount of $4,222.04. Amwest obtained a replacement subcontractor for completion of the project.

A petition to place Amwest in liquidation was filed on June 6, 2001. Amwest was declared insolvent in an order issued the following day. The liquidator filed a complaint alleging that the four payments made by Amwest to Gilbane in 2001 were preferential transfers voidable under Neb. Rev. Stat. § 44-4828(1)(b)(ii) (Reissue 2004). The parties filed cross-motions for summary judgment. The district court granted the liquidator's motion for summary judgment, determining that the three payments made in April and May were made within 4 months before the filing of the petition for liquidation and were therefore voidable as preferences pursuant to § 44-4828(1)(b)(ii). The court further determined that there was no genuine issue of material fact as to the insolvency of Amwest at the time of the January 2001 transfer and, therefore, that that payment was a voidable preference pursuant to § 44-4828(1)(b)(i). Gilbane appealed that order.

In *Gilbane I*, this court determined, inter alia, that the April and May 2001 transfers were preferential as the district court had found but that there were genuine issues of material fact whether Amwest was insolvent at the time of the January 2001 transfer. In *Gilbane I*, we noted that the liquidator's expert opinion was not in affidavit form and could not be considered evidence at the summary judgment hearing. We affirmed in part and reversed in part, and remanded the cause for further proceedings. We also determined in *Gilbane I* that § 44-4828(9), a subsection generally involving setoffs, did not apply to the case.

Following our mandate, on remand, the district court entered a judgment on January 22, 2009, awarding to the liquidator the payment of the three transfers made in April and May 2001, totaling $245,644.39. On March 2, 2009, the liquidator filed a motion for summary judgment seeking to recover the January 2001 transfer as a voidable preferential transfer. Gilbane filed a cross-motion for summary judgment on May 12, 2009, asserting § 44-4828(9) as a total defense to the liquidator's recovery of

the January 2001 transfer. Gilbane also filed a motion requesting an order from the district court declaring that its order and judgment of January 22, 2009, was not a final order. The court held a hearing on the cross-motions for summary judgment on May 22. On July 29, the district court entered an order granting the liquidator's motion and denying Gilbane's motion.

In its July 29, 2009, order, the court concluded that Amwest had cured the deficiencies in its expert testimony that had resulted in remand by providing sworn expert testimony. The district court also determined that the liquidator had established Amwest was insolvent on January 5, 2001, and that the payment at issue was an impermissible preference. The court determined that Gilbane had failed to introduce into evidence any proper expert testimony refuting the expert testimony proffered by the liquidator and had otherwise failed to rebut the liquidator's expert testimony. The court concluded that Gilbane's defense of entitlement to the January 2001 transfer as a setoff under § 44-4828(9) had already been rejected by this court and that such rejection was the law of the case, and, in the alternative, that Gilbane had failed to establish that it had "furnish[ed] any goods or services to or for the benefit of Amwest." The district court entered a second order on July 29, 2009, denying Gilbane's motion in which it sought an order declaring that the district court's January 22 judgment and order was not final. Gilbane appeals from both orders.

ASSIGNMENTS OF ERROR

Gilbane claims, summarized and restated, that the district court erred in (1) granting the liquidator's motion for summary judgment and denying Gilbane's own motion for summary judgment; (2) rejecting Gilbane's defense under § 44-4828(9); and (3) denying Gilbane's motion for an order declaring that the judgment of January 22, 2009, was not a final ruling under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

STANDARDS 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. See *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010). 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. See *id.*

[3] 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. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

ANALYSIS

The District Court Did Not Err When It Granted Summary Judgment in Favor of the Liquidator.

In its first assignment of error, Gilbane claims that the district court erred in granting summary judgment in favor of the liquidator. Gilbane specifically claims that the methodology used by the liquidator's expert when he determined that Amwest was insolvent on January 5, 2001, was deficient. Gilbane further argues that because Gilbane presented sufficient evidence to rebut the liquidator's expert testimony, entry of summary judgment was improper. We reject Gilbane's assignment of error and conclude that the district court did not err when it granted summary judgment in favor of the liquidator.

[4,5] 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. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009). 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. *Id.*

In *Gilbane I*, we noted that unlike the three voided payments, the January 2001 transfer occurred outside the 4-month period before Amwest filed its petition, and that the liquidator was therefore required under § 44-4828(1)(b)(i) to prove that Amwest was insolvent at the time of the January 2001 transfer in order to void this transfer.

[6] We explained in *Gilbane I* that an insurer is considered "insolvent" under the NISRLA if it is

> "unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of: (i) Any capital and surplus required by law to be maintained; or (ii) The total par or stated value of its authorized and issued capital stock."

276 Neb. at 696-97, 757 N.W.2d at 203. Accord Neb. Rev. Stat. § 44-4803(14)(b) (Reissue 2004). We also noted that "[i]n preference cases arising under federal bankruptcy law, courts have held that the testimony of an accountant or other financial expert is generally necessary to prove insolvency at the time of a challenged transfer." *Gilbane I*, 276 Neb. at 697, 757 N.W.2d at 203.

In *Gilbane I*, we reviewed the evidence presented by the liquidator in support of its motion for summary judgment, which evidence included testimony from Michael James Fitzgibbons, an accountant who served as special deputy receiver for Amwest. Fitzgibbons testified that expert Joseph J. DeVito was retained to review certain financial records which Fitzgibbons and others under his supervision had prepared to show the financial condition of Amwest as of June 30, 2000, and to determine whether Amwest was insolvent as of that date. The record in *Gilbane I* included two reports purportedly authored by DeVito; one was dated February 28, 2006, and the second was dated June 28, 2006. Both reports were attached to the affidavit of an attorney representing the liquidator which indicated only that the reports were true and correct copies. The reports set forth DeVito's opinion regarding the insolvency of Amwest as of June 30, 2000, and the period subsequent to that date.

[7] After reviewing the record in *Gilbane I*, we agreed with Gilbane that the properly considered evidence was insufficient to establish Amwest's insolvency on January 5, 2001. Unlike the three other payments which were properly voided based on their being statutorily prohibited preferences, the January 2001 transfer was not impugned by sufficient evidence, and summary judgment as to this transfer was error. In making this determination, we noted that the "'evidence that may be received on a motion for summary judgment includes . . . affidavits.'" *Gilbane I*, 276 Neb. at 698, 757 N.W.2d at 204, quoting Neb. Rev. Stat. § 25-1332 (Reissue 2008).

> Such affidavits, however, "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Gilbane I, 276 Neb. at 698, 757 N.W.2d at 204. Because DeVito's reports were not part of an affidavit by DeVito and because the affidavit of counsel identifying the attached "'true and correct'" copies of DeVito's reports did not convert such reports into affidavits, we concluded that the reports themselves were not sworn and did not meet the statutory definition of an affidavit. *Id.* Accordingly, as unsworn summaries of facts or arguments, the DeVito reports were inadmissible as evidence. Because the admissible evidence in *Gilbane I* was insufficient to meet the liquidator's burden of establishing that Amwest was insolvent on January 5, we reversed the decision with respect to the transfer by Amwest in January 2001 and remanded the cause for further proceedings.

On remand, the liquidator again filed a motion for summary judgment. In support of the motion for summary judgment, the liquidator entered into evidence, inter alia, the affidavit of Fitzgibbons dated September 13, 2004, the affidavit of Fitzgibbons dated September 7, 2005, and the affidavit of DeVito dated February 27, 2009. Attached to DeVito's affidavit were the two reports of examinations conducted by DeVito which were discussed in *Gilbane I*. The district court

also admitted into evidence the transcripts of two depositions of DeVito. No claim is made on appeal that DeVito is not an expert.

In opposition to the liquidator's motion, Gilbane entered into evidence, inter alia, Amwest's annual statement for the year ending December 31, 2000, and the affidavit of an attorney for Gilbane dated February 23, 2007, attached to which was a "Statement of Actuarial Opinion Regarding Loss and Loss Adjustment Expense Reserves as of December 31, 2000" authored by someone associated with "the firm of KPMG LLC" (KPMG).

Based on the entirety of the record made on remand, the district court determined that Amwest was insolvent on January 5, 2001, and that the transfer to Gilbane on that date should be voided. On appeal, Gilbane contends that the liquidator has again failed to prove Amwest's insolvency at the time of the January 2001 transfer because although DeVito provided his expert testimony in a sworn affidavit, the methodology used by DeVito was improper, and therefore, his testimony does not establish Amwest's insolvency on January 5. Gilbane also argues that even if the liquidator's evidence tended to establish Amwest's insolvency as of the January 2001 transfer, in its evidence in opposition to the liquidator's motion, Gilbane raised genuine issues of material fact precluding entry of summary judgment. In particular, Gilbane asserts that its evidence puts the date of Amwest's insolvency in doubt.

After reviewing the record, we agree with the district court that the liquidator cured the deficiencies in its evidence which had occurred in *Gilbane I* and that the methodology used by DeVito was proper. Further, the liquidator met its burden of establishing that Amwest was insolvent on the date of the January 2001 transfer and Gilbane did not provide meaningful evidence to rebut this determination. Thus, it was not error to grant the liquidator's motion for summary judgment, thereby voiding the January 2001 transfer.

On appeal, we understand Gilbane's objections to the methodology used by DeVito to be twofold. First, Gilbane argues that DeVito's determination that Amwest was insolvent is in error because DeVito did not calculate Amwest's loss reserves

in accordance with Neb. Rev. Stat. § 44-401.01 (Reissue 2004). In this regard, Gilbane contends that because DeVito did not determine the loss reserves by looking at the present value of estimated future payments as of January 2001, but instead looked at the actual development of claims through December 31, 2004, his determination of insolvency was in error. Second, Gilbane contends that DeVito's use of "retrojection," a method used to prove insolvency indirectly, was flawed because the dates he used to establish insolvency on January 5, 2001, were unacceptably distant from the January 5 date of the transfer at issue. We explain retrojection further below.

We are not persuaded by either of Gilbane's arguments. With regard to the first argument, the record shows that DeVito's determination of insolvency complied with the statutory definition of insolvency under the NISRLA. As noted above, under the NISRLA, an insurer is considered insolvent if it is

> unable to pay its obligations when they are due or when its admitted assets do not exceed its liabilities plus the greater of:
>
> (i) Any capital and surplus required by law to be maintained; or
>
> (ii) The total par or stated value of its authorized and issued capital stock . . . .

§ 44-4803(14)(b).

DeVito testified that he used the Nebraska statutory definition of insolvency in making his determination that Amwest was insolvent. He explained that to determine whether Amwest was insolvent, he reviewed Amwest's statutory quarterly statement as of June 30, 2000; Amwest's restated financial statements as of June 30, 2000, as prepared by the liquidator; and documents supporting the adjusting entries made by the liquidator, including general ledger accounts, accounting schedules, journal entries, and accounting analyses through December 31, 2004. Upon reviewing these materials, DeVito concluded that Amwest was insolvent as of June 30, 2000. DeVito further concluded that Amwest remained insolvent on January 5, 2001, the date of the transfer at issue, and remained continuously insolvent through the date of DeVito's supplemental report dated June 28, 2006.

The district court accurately described DeVito's methodology in its order. In arriving at his determinations, DeVito examined the actual loss experience data as the information developed through December 31, 2004; he then compared this information to the estimated loss reserves set aside by Amwest as of June 30, 2000. Based on this information, DeVito determined that Amwest had substantially underreserved claims and was insolvent as of June 30, 2000. To determine that Amwest was insolvent at the time of the January 2001 transfer, DeVito used a retrojection analysis, which we review in more detail below. Based on Amwest's records from the year 2000 through December 31, 2004, DeVito determined that Amwest was actually insolvent as of June 30, 2000, and remained insolvent until the time of his report in 2006. Given the facts relied upon, this determination is in accordance with the definition of insolvency in the NISRLA. We do not find merit in Gilbane's argument that DeVito's methodology was flawed or inconsistent with § 44-401.01.

[8] Gilbane also objects to DeVito's retrojection analysis and his determination that Amwest was insolvent on January 5, 2001. Retrojection is a method used to prove insolvency indirectly. As noted in *In re Stanley*, 384 B.R. 788, 807 (S.D. Ohio 2008), "'[i]nsolvency is not always susceptible to direct proof and frequently must be determined by proof of other facts or factors from which the ultimate fact of insolvency on the transfer dates must be inferred or presumed.'" In *In re Stanley*, the bankruptcy court defined retrojection as the

> inverse of projection. A retrojection analysis begins with a debtor's financial condition at a certain point in time (typically the petition date) and extrapolates back in time in an attempt to show that the debtor must have been insolvent at some earlier relevant time (*e.g.,* the date of an alleged fraudulent transfer).

384 B.R. at 807.

[9,10] Retrojection is a widely used method for determining insolvency, and as Gilbane observes in its brief, courts have concluded that if the retrojection period stretches too far back from the date on which the insolvency of the debtor is known, it is untenable. See, e.g., *In re Stanley, supra*; *In re Laines*, 352

B.R. 397 (E.D. Va. 2005); *In re Washington Bancorporation*, 180 B.R. 330 (D.C. 1995); *In re War Eagle Floats, Inc.*, 104 B.R. 398 (E.D. Okla. 1989). The cases make clear that "courts will only consider retrojection if the evidence of insolvency on the certain date is accompanied by evidence that the debtors [sic] financial condition did not change during the pendency period between the time of the payment and the date of proven insolvency." *In re Washington Bancorporation*, 180 B.R. at 334. It has been observed that "[w]here a debtor is shown to be insolvent at a date subsequent to a particular transfer and the debtor's condition did not change during the interim period, it is logical and permissible to presume that the debtor was insolvent at the time of the transfer." *In re Damason Const. Corp.*, 101 B.R. 775, 778 (M.D. Fla. 1989). We agree with the foregoing authorities and conclude that retrojection is a permissible method by which to prove insolvency when accompanied by evidence that no substantial change occurred in the insolvent entity's condition during the look-back period.

We understand Gilbane's argument to be that DeVito's retrojection analysis is deficient because he uses a period so lengthy as to be inherently unreliable. We find no merit to this argument. In his deposition testimony in evidence, DeVito explained that in his retrojection analysis, he found two dates, June 2000 and June 2001, on which he determined Amwest was insolvent and then considered Amwest's condition on January 5, 2001. We note that DeVito used the date the court determined Amwest to be insolvent, which he believed was June 7, 2001. However, the parties concede that the court actually determined insolvency as of March 2001. DeVito further stated that based on the financial records he reviewed, Amwest was insolvent as of June 2000, and that he thus used June 2000 as the earliest insolvency date. DeVito stated in his affidavit that the financial records reflected there was no substantial change in Amwest's financial condition over the period from June 2000 to June 2001, which he reviewed, and that therefore, he determined the company was insolvent for the entire period between June 2000 and June 2001, which period included January 5, 2001, the date of the transfer at issue.

We note that the date the court determined Amwest was insolvent was March 2001 and that the date of the transfer was only 3 months earlier. This is an acceptable retrojection period. See, e.g., *Misty Management Corp. v. Lockwood*, 539 F.2d 1205 (9th Cir. 1976) (5-month retrojection period acceptable). Given the evidence that there was no substantial change in Amwest's condition during the retrojection period, DeVito's retrojection analysis is not flawed and his opinion that Amwest was insolvent on January 5, 2001, is supported by the record. We reject Gilbane's argument that DeVito's methodology was flawed.

On remand, the liquidator adequately cured the defects in its evidence by producing an expert witness whose opinion established that Amwest was insolvent at the time of the January 2001 transfer. The burden then shifted to Gilbane to rebut the evidence presented by the liquidator.

Gilbane argues it successfully carried its burden and directs us to the "Statement of Actuarial Opinion Regarding Loss and Loss Adjustment Expense Reserves as of December 31, 2000" prepared by someone associated with KPMG at or near the end of December 2000 which Gilbane presented as its evidence. Gilbane entered this document into evidence by attaching it to Gilbane's opposition to Amwest's motion for summary judgment. The report was accompanied by the affidavit of Gilbane's attorney dated February 23, 2007. The KPMG report was not accompanied by an affidavit of the author of the report. In *Gilbane I*, we specifically rejected this methodology for entering evidence at the summary judgment stage. Therefore, we cannot consider the KPMG report when reviewing whether Gilbane successfully rebutted DeVito's testimony so as to create a genuine issue of material fact for trial. Gilbane did not enter into evidence any other expert testimony challenging DeVito's conclusions or creating genuine issues of material fact as to Amwest's insolvency. Accordingly, the district court did not err in determining that Amwest was insolvent on January 5, 2001, thus voiding the transfer on this date. The district court did not err when it granted the liquidator's motion for summary judgment, and we affirm its decision.

The District Court Did Not Err When It Rejected Gilbane's § 44-4828(9) Setoff Defense.

Gilbane next claims that under the provisions of § 44-4828(9), it was entitled to a setoff because it allegedly advanced credit to Amwest, and that the district court erred when it rejected Gilbane's claim. Gilbane contends that given this purported credit, the January 2001 transfer was not a voidable preferential transfer. As Gilbane sees it, after the January 2001 transfer, it continued to provide goods and services to and for the benefit of Amwest, for which Amwest made payments on April 9 and 13 and May 21. The liquidator counters that Gilbane's argument is without merit because this court already addressed and rejected this claim in *Gilbane I*. Alternatively, the liquidator contends that there is no support in the record to substantiate Gilbane's argument.

The district court concluded that this argument was without merit and denied Gilbane's motion for summary judgment based on this argument. The district court concluded that the April 9 and 13 and May 21, 2001, payments, which this court affirmed were voidable preferential transfers in *Gilbane I*, were made to Gilbane based on an antecedent debt, not for goods and services provided by Gilbane to Amwest, and that therefore, they did not meet the definition of a setoff in § 44-4828(9).

Section 44-4828(9) provides:

> If a creditor has been preferred and afterward in good faith gives the insurer further credit without security of any kind for property which becomes a part of the insurer's estate, the amount of the new credit remaining unpaid at the time of the petition may be set off against the preference which would otherwise be recoverable from him or her.

In *Gilbane I*, we addressed Gilbane's claim that the district court erred in not applying § 44-4828(9). We concluded that Gilbane did not advance credit to Amwest, and there was no claim of setoff. Accordingly, we concluded that § 44-4828(9) did not apply. Indeed, as the liquidator points out in its brief, we observed in *Gilbane I* that what Gilbane is now claiming was a "'credit'" in favor of Amwest was instead payment for

Gilbane's benefit because the payment permitted completion of the project underlying this case. See brief for appellee at 29. We noted in *Gilbane I* that Gilbane's use of "the funds it received from Amwest to pay a replacement subcontractor demonstrates that the transfers were both to and for the benefit of Gilbane, in that they permitted the completion of Crane's original contractual obligation to Gilbane." 276 Neb. at 693-94, 757 N.W.2d at 201.

Our decision that Gilbane did not advance Amwest credit is the law of the case with respect to the alleged setoff. The money paid by Amwest and later deemed to be preferential payments does not alter this decision. See *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008). Therefore, we affirm the ruling of the district court in which it rejected Gilbane's setoff claim.

The District Court Did Not Err When It Rejected Gilbane's Request to Deem the January 22, 2009, Judgment and Order a Nonfinal Order.

Finally, Gilbane claims that the district court erred when it denied Gilbane's motion to declare the district court's January 22, 2009, judgment and order a nonfinal order. We find no merit to this assignment of error.

On January 22, 2009, the district court entered a judgment and order in accordance with this court's December 23, 2008, mandate issued pursuant to *Gilbane I*. The district court's order simply directed payment of the three voidable preferential transfers in accordance with this court's mandate.

[11] After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *Pennfield Oil Co., supra*. Upon remand of the cause in *Gilbane I*, the district court was authorized to take action on only the remaining issue regarding the January 2001 transfer. The January 22, 2009, order was final because no further action could be taken with respect to the issues surrounding the status of those three payments. Therefore, we affirm the district court's decision that its January 22 order was final and its denial of Gilbane's request to the contrary.

CONCLUSION

On remand, the liquidator cured the defects in its evidence identified in *Gilbane I* and established by its expert admissible evidence in support of its motion for summary judgment that Amwest was insolvent as of the date of the January 2001 transfer. Gilbane failed to rebut this showing; therefore, the district court's determination that Amwest was insolvent on January 5, 2001, was supported by the record and the grant of summary judgment in favor of the liquidator was not error. The district court did not err in denying Gilbane's motion for summary judgment based on Gilbane's defense pursuant to § 44-4828(9), because that issue was previously considered and rejected by this court and that decision is the law of the case. Finally, the district court did not err when it denied Gilbane's request to deem its January 22, 2009, order a nonfinal order. Finding no merit to Gilbane's assignments of error, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
LAURA LEBEAU, APPELLANT.
784 N.W.2d 921

Filed July 16, 2010. No. S-09-890.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
3. **Speedy Trial: Indictments and Informations: Pleadings.** Although Nebraska's speedy trial act, Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008), expressly refers to indictments and informations, the act also applies to prosecutions on complaint in the county court.
4. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the complaint was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) to determine the last day the defendant can be tried.
5. ____. Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.

6. ____. Ordinarily, in cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
7. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
9. **Statutes: Legislature: Intent.** When a statutory term is reasonably considered ambiguous, a court may examine the pertinent legislative history of the act in question to ascertain the intent of the Legislature.
10. ____: ____: ____. The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.
11. **Speedy Trial: Misdemeanors: Words and Phrases.** "[M]isdemeanor offense involving intimate partners," within the meaning of Neb. Rev. Stat. § 29-1207(2) (Reissue 2008), does not encompass any and all misdemeanors in which intimate partners may be engaged. Rather, the exception applies only to those misdemeanor offenses in which the involvement of an "intimate partner" is an element of the offense.
12. **Courts: Actions.** Under Neb. Rev. Stat. § 25-2701(1) (Reissue 2008), all provisions of the criminal and civil procedure code govern all actions in the county court.
13. **Speedy Trial: Ordinances.** The speedy trial provisions of Neb. Rev. Stat. § 29-1207 (Reissue 2008) apply to the prosecution of city ordinances.

Appeal from the District Court for Douglas County, GARY B. RANDALL, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

Thomas C. Riley, Douglas County Public Defender, and Sean M. Conway for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

GERRARD, J.

Laura Lebeau was charged with violating an Omaha city ordinance prohibiting telephone harassment. Lebeau filed two

motions to discharge on statutory speedy trial grounds. The county court denied both motions to discharge, and the district court affirmed. The primary issue in this case is whether the "intimate partner" exception of Neb. Rev. Stat. § 29-1207(2) (Reissue 2008) applies and, if so, whether the statute is constitutional. We conclude that the exception does not apply; therefore, we reverse the judgment of the district court and remand the cause with directions to dismiss the complaint against Lebeau.

BACKGROUND

Lebeau was charged by complaint on September 17, 2008, with violating Omaha Mun. Code, ch. 20, art. IV, § 20-62 (1996), prohibiting "[t]elephone harassment" of another person. Among other things, § 20-62 makes it unlawful for any person, by means of telephonic communication, to purposefully or knowingly threaten to inflict injury to any person or his or her property or to use indecent or obscene language against such person. And specifically, it was alleged that Lebeau left harassing messages on her ex-husband's answering machine. Lebeau, however, was not arraigned until March 3, 2009. The record before the district court indicates that her appearance on March 3 resulted from her arrest on March 2.

On March 20, 2009, relying on September 17, 2008, as the starting date for the 6-month speedy trial period, Lebeau filed a motion to discharge alleging that her case had not been brought to trial within 6 months of the filing of the complaint, as required by § 29-1207 and Neb. Rev. Stat. § 29-1208 (Reissue 2008). On March 23, 2009, Lebeau filed a second motion to discharge, which added a constitutional challenge. Section 29-1207(2) provides that the time for bringing a defendant to trial runs from the date the indictment is returned or the complaint is filed, "unless the offense is a misdemeanor offense involving intimate partners . . . in which case the six-month period shall commence from the date the defendant is arrested on a complaint filed as part of a warrant for arrest." Lebeau argued that the intimate partner exception of § 29-1207(2) did not apply and that even if it did, the exception was unconstitutional.

Following a hearing, the county court denied both motions, and on appeal, the district court affirmed. Lebeau appeals.

ASSIGNMENT OF ERROR

Lebeau assigns, consolidated and restated, that the district court erred in affirming the county court order which had denied her motions to discharge.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law.[1] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[2]

ANALYSIS

[3-5] Nebraska's speedy trial statutes[3] provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in [§ 29-1207]."[4] Although the speedy trial act expressly refers to indictments and informations, it is well settled that the act also applies to prosecutions on complaint in the county court.[5] To calculate the time for speedy trial purposes, a court must exclude the day the complaint was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.[6] And, under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.[7]

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[1] *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[2] *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[3] Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008).

[4] § 29-1207(1).

[5] See *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

[6] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[7] See *id.*

[6] In this case, there are no excludable periods under § 29-1207(4); the only issue is when the 6-month speedy trial period began. Ordinarily, in cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.[8] However, the recently amended § 29-1207(2)[9] essentially creates an intimate partner exception to the traditional speedy trial calculations, providing that the 6-month statutory speedy trial period

> shall commence to run from the date the indictment is returned or the information filed, *unless the offense is a misdemeanor offense involving intimate partners, as that term is defined in section 28-323, in which case the six-month period shall commence from the date the defendant is arrested on a complaint filed as part of a warrant for arrest.*

(Emphasis supplied.) And Neb. Rev. Stat. § 28-323 (Reissue 2008), the domestic assault statute, defines intimate partner as "a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship." We note that §§ 29-1207 and 29-1208 have been amended again, effective July 15, 2010,[10] but those changes are not relevant to our analysis.

In this case, the alleged victim was Lebeau's former spouse. And as a result, there is no question that the alleged victim and Lebeau are intimate partners for the purposes of our analysis. But Lebeau argues that she is entitled to absolute discharge of her case because the intimate partner exception of § 29-1207(2) does not toll the speedy trial clock. Specifically, Lebeau asserts that because § 29-1207(2) refers to the definition of "intimate partner" contained in § 28-323, the intimate partner exception must be narrowly construed to refer only to those offenses of which "intimate partner" is an element. And, Lebeau argues,

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[8] See *id.*

[9] See 2008 Neb. Laws, L.B. 623.

[10] See, 2010 Neb. Laws, L.B. 712; Neb. Const. art. III, § 27.

because the involvement of an intimate partner is not an element of telephone harassment under the Omaha Municipal Code, the intimate partner exception does not apply.

[7,8] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[11] But a statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[12] Here, the language of § 29-1207(2) is ambiguous because the phrase "misdemeanor offense involving intimate partners" could be read to refer only to offenses of which the involvement of an intimate partner is a statutory element or, more broadly, to any misdemeanor offense so long as intimate partners were involved in its commission. As a result, the exception could potentially apply to *any* misdemeanor offense that just happened to be committed by, or on, an intimate partner.

[9] When a statutory term is reasonably considered ambiguous, we often find it helpful to examine the pertinent legislative history of the act in question to ascertain the intent of the Legislature.[13] The legislative record establishes that the intimate partner exception sought "to discourage perpetrators from evading prosecution by starting the six month period from the point in time a perpetrator is arrested on a warrant rather than from the point in time a prosecutor files a complaint."[14] The Introducer's Statement of Intent describes the apparently common situation which L.B. 623 sought to address:

> Often, police arrive at the scene of a misdemeanor domestic violence crime only to learn that the perpetrator has fled. Unable to find and arrest the perpetrator at the time, law enforcement must resort to the issuance of an arrest warrant in order to have legal cause for the arrest.

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

[12] *Id.*

[13] See *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[14] Introducer's Statement of Intent, L.B. 623, Judiciary Committee, 100th Leg., 1st Sess. (Mar. 7, 2007).

> A criminal complaint is then filed by the prosecutor in support of the arrest warrant. Not surprisingly, perpetrators frequently take measures to avoid being located and arrested. If a perpetrator is able to avoid arrest for six months, he or she is rewarded because the charges must be permanently dismissed.[15]

And the testimony before the Judiciary Committee, and statements during the floor debate, certainly made clear that the intimate partner exception was necessary for domestic violence incidents, which, it was explained, were uniquely different from other misdemeanors.[16] And it was explained that L.B. 623 would "simply start" the 6-month speedy trial clock "at the point in time where the defendant is actually arrested for the domestic violence incident and not at the time that the law enforcement officer has the prosecutor file the complaint, at a point in time when the abuser has not been arrested or located."[17]

[10,11] The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.[18] And the legislative history of § 29-1207(2) clearly establishes that the Legislature's intent was to delay the start of the 6-month speedy trial clock when a "defendant is actually arrested for [a] *domestic violence incident*," and not for any misdemeanor that simply happened to involve intimate partners.[19] Based on the legislative history and, more important, on the fact that the statute refers specifically to the definition of intimate partners in the domestic assault statute, we hold that "misdemeanor offense involving intimate partners," within the meaning of § 29-1207(2), does not encompass any and all misdemeanors in which intimate partners may be engaged. Rather, the exception applies only to those misdemeanor

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[15] *Id.*

[16] See, Judiciary Committee Hearing, L.B. 623, 100th Leg., 1st Sess. (Mar. 7, 2007); Floor Debate, L.B. 623, 100th Leg., 2d Sess. (Feb. 6, 2008).

[17] Floor Debate, *supra* note 16 at 47.

[18] *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

[19] Floor Debate, *supra* note 16 at 47 (emphasis supplied).

offenses in which the involvement of an "intimate partner" is an element of the offense. To hold otherwise would expand the scope of the intimate partner exception well beyond the Legislature's intent.

And in this case, "intimate partner" is not an element of telephone harassment under § 20-62 of the Omaha Municipal Code. As briefly noted earlier, the elements of telephone harassment under § 20-62 are that a person:

> (a) Threaten to inflict injury to any person or to the property of any person;
>
> (b) Use indecent, lewd, lascivious, or obscene language;
>
> (c) Intentionally fail to disengage the connection;
>
> (d) Initiate a connection with the communication system of any recipient after expressed notice that the recipient excluded communication from that person; or
>
> (e) Annoy by anonymous engagement of a line followed by disengagement after answer.[20]

Because telephone harassment neither involves nor includes "intimate partner" as an element, the exception of § 29-1207(2) does not apply to toll the speedy trial clock. Lebeau was charged by complaint on September 17, 2008, and filed her motions for discharge on March 20 and 23, 2009. Because the intimate partner exception of § 29-1207(2) does not apply and there were no excludable periods under § 29-1207(4), the 6-month statutory speedy trial clock expired on March 17, 2009. We conclude that the State did not bring Lebeau to trial within the required time and that she is entitled to absolute discharge.

[12,13] We note briefly the State's argument that the speedy trial statute does not apply to the prosecution of city ordinances. The State contends that the statute does not apply to a city ordinance because § 29-1207 references only "offense[s]," which are defined by Neb. Rev. Stat. § 28-104 (Reissue 2008) as violations of statutes. Although the speedy trial act expressly refers to indictments and informations, it is well settled that the act also applies to prosecutions on complaint in the county

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[20] § 20-62.

court.[21] And Neb. Rev. Stat. § 25-2701 (Reissue 2008) extends the rules of criminal and civil procedure to the county court. As § 25-2701 makes clear, all provisions of the criminal and civil procedure code govern *all* actions in the county court. And, if it were not already clear from the occasions in which we considered § 29-1207 in the context of municipal ordinances,[22] we conclude today that § 29-1207 applies to the prosecution of city ordinances. The State's argument is without merit.

Our conclusion that the intimate partner exception of § 29-1207(2) does not apply is dispositive of this appeal. We need not, and do not, address Lebeau's argument regarding the constitutionality of § 29-1207(2).[23]

CONCLUSION

We conclude that the State did not bring Lebeau to trial within the required time and that the county court and district court erred in finding otherwise. We reverse the lower courts' orders denying Lebeau's motion for absolute discharge and remand the matter to the district court with directions to reverse the judgment of the county court and remand the cause with directions to dismiss the complaint against Lebeau.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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[21] *Karch, supra* note 5.

[22] *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980); *State v. Schneider*, 10 Neb. App. 789, 638 N.W.2d 536 (2002).

[23] See *State v. VanAckeren*, 263 Neb. 222, 639 N.W.2d 112 (2002).

STATE OF NEBRASKA, APPELLEE, V.
ERIC F. LEWIS, APPELLANT.
785 N.W.2d 834

Filed July 23, 2010. No. S-09-425.

1. **Courts: Trial: Mental Competency.** The question of competency to represent oneself at trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial

court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.

2. **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.
3. **Constitutional Law: Right to Counsel: Waiver.** Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense.
4. **Constitutional Law: Right to Counsel: Mental Competency.** The U.S. Constitution permits states to insist upon representation by counsel for those competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.
5. ____: ____: ____. Under Neb. Const. art. I, § 11, a criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel.
6. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Stuart B. Mills for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Eric F. Lewis appeals his conviction for second degree murder. Lewis claims that the district court for Lancaster County

deprived him of his constitutional right to self-representation when it found that he was not competent to represent himself at trial and appointed trial counsel. Lewis also claims that there was not sufficient evidence of the intent necessary to support his conviction for second degree murder. We affirm Lewis' conviction.

STATEMENT OF FACTS

In July 2007, Lewis had been committed to the Lincoln Regional Center (LRC) for observation in connection with criminal charges not related to the present case. Dr. Louis Martin was a forensic psychiatrist who worked at LRC. On July 16, Dr. Martin testified on behalf of the State at a hearing in Lewis' criminal case. The purpose of the hearing was to consider Dr. Martin's request for an order allowing him and his staff at LRC to force Lewis to take medication he had refused to take. Lewis appeared surprised and angry to see Dr. Martin at the hearing, and he yelled some comments at Dr. Martin to the effect that he would not have medication forced on him. Throughout Dr. Martin's testimony, Lewis interrupted and directed angry comments toward Dr. Martin. At the end of the hearing, the court stated its ruling that it would allow forced medication. Lewis became disruptive, yelled that he would not take the medication, and had to be escorted out of the courtroom.

On July 23, 2007, two doctors met with Lewis at LRC to inform him that pursuant to the court's order, they had been directed to administer medication to Lewis whether or not he was willing to take the medication. Lewis became angry, said he would not take the medication, and left the meeting room. After Lewis returned to the room, the doctors attempted to discuss the order with Lewis, and Lewis referred angrily to Dr. Martin's testimony at the July 16 hearing.

Lewis left the meeting and returned to his room. A short time later, he came out of his room with a box of his belongings. Lewis was still angry and said that they could not force medication on him and that he intended to return to prison. He sat down at a table near the main door of the area where his room was located. A few minutes later, Dr. Martin came through the

door, and Lewis walked toward him. When he got near Dr. Martin, Lewis lunged at him and said, "'I'm gonna get you, old man,'" and struck him twice in the face. Dr. Martin fell against a wall and slid to the ground; he was bleeding from the head and struggling to breathe. Security personnel restrained Lewis. Witnesses testified that after hitting Dr. Martin, Lewis said things such as, "'There. Now what you gonna do? I told you I'd get you'"; "I told him I would get him. . . . He shouldn't have testified"; and "'I hope that motherfucker dies.'"

Dr. Martin was taken to a hospital, where he died on August 2, 2007. An autopsy determined the cause of death to be severe blunt force trauma to the head with extensive cerebral cranial injuries.

The State charged Lewis with second degree murder in connection with Dr. Martin's death. These charges give rise to the present case. On November 7, 2007, the district court, on the State's motion, ordered a determination of Lewis' competency to stand trial. Lewis initially refused to participate in the evaluation, but after a psychiatric evaluation was completed, the court, on February 8, 2008, found Lewis to be competent to stand trial.

Lewis subsequently filed a waiver of his right to counsel and requested to be allowed to represent himself in this case pertaining to Dr. Martin's death. On June 2, 2008, the district court entered an order finding that Lewis was competent to waive his right to counsel, that he had exercised his right to waive counsel, and that his waiver, "although perhaps not prudent or in his best interest," was freely, voluntarily, knowingly, and intelligently made. The court therefore granted the waiver of counsel and appointed Lewis' prior counsel as standby counsel.

In its June 2, 2008, order, the court stated that in the psychiatric evaluation, the doctor had noted that Lewis had the "'potential to be disruptive, agitated and combative, including becoming assaultive.'" The court noted that its experience with Lewis during court proceedings was consistent with the doctor's notation. The record indicates that at various proceedings in this case, Lewis became disruptive, and the court ordered him removed from the courtroom.

On June 19, 2008, the U.S. Supreme Court decided the case of *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). The district court thereafter set a hearing to consider the applicability of *Edwards* and, specifically, whether the decision affected Lewis' right to continue representing himself. Following the hearing, the court entered an order dated October 10, 2008, in which it found that although Lewis was mentally competent to stand trial, he was not mentally competent to conduct trial proceedings by himself. The court noted Lewis' "conduct during prior proceedings, his assertions in pleadings and his '. . . uncertain mental state'" and cited *Edwards* to conclude that if Lewis were allowed to represent himself a "'spectacle . . . could well result'" and would undercut "'the most basic of the Constitutional criminal law objectives, providing a fair trial.'" The court vacated and set aside its prior order allowing Lewis to waive counsel and represent himself, and the court appointed counsel over Lewis' objection.

At trial, Lewis moved to dismiss at the close of the State's case based on the State's purported failure to establish a prima facie case. The court overruled the motion to dismiss. The jury found Lewis guilty of second degree murder. The court later found Lewis to be a habitual criminal and sentenced him to imprisonment for life.

Lewis appeals his conviction.

ASSIGNMENTS OF ERROR

Lewis claims that the district court erred when it found that he was not competent to represent himself at trial and therefore denied him his constitutional right of self-representation. He also claims that there was not sufficient evidence of the intent necessary to convict him of second degree murder.

STANDARD OF REVIEW

[1] We have held that the question of competency to stand trial is one of fact to be determined by the court, that the means employed in resolving the question are discretionary with the court, and that the trial court's determination of competency will not be disturbed unless there is insufficient evidence to

support the finding. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). We logically extend the standard in *Walker* to the issue of competency to represent oneself and hold that the question of competency to represent oneself at trial is one of fact to be determined by the court and that the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.

[2] 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. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

ANALYSIS

The Court Did Not Err When It Determined That Lewis Was Not Competent to Represent Himself at Trial.

Lewis first claims that the district court erred when it found that he was not competent to represent himself at trial, denying him his constitutional right of self-representation. Because there was sufficient evidence to support the district court's finding that although Lewis was competent to stand trial, he was not competent to represent himself, we conclude that Lewis was not denied his constitutional right to represent himself.

[3] We have recognized that under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a criminal defendant has the right to waive the assistance of counsel and conduct his or her own defense. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006). See, also, *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). In *Faretta*, the U.S. Supreme

Court recognized a constitutional right of self-representation in a criminal case and noted that it was a violation of the Sixth Amendment to "thrust counsel upon the accused, against his considered wish." 422 U.S. at 820. Because a defendant who chooses self-representation "relinquishes . . . many of the traditional benefits associated with the right to counsel," the Court held that a waiver of the right to counsel must be made "'knowingly and intelligently'" by the defendant. 422 U.S. at 835. The Court in *Faretta* recognized the right of self-representation was not absolute when it noted that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct" or that a court may appoint standby counsel to aid the defendant if and when the defendant so chooses. 422 U.S. at 834 n.46.

Recognizing that under *Faretta*, a defendant's right to self-representation is not absolute, in *Indiana v. Edwards*, 554 U.S. 164, 167, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), the Court considered whether "the Constitution prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself" where the defendant has been "found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself."

The Court noted in *Edwards* that the constitutional standard for mental competence to stand trial was set forth in *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). In *Dusky*, the Court held that the test for competency to stand trial is whether the defendant "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" 362 U.S. at 402.

In *Edwards*, the Court further noted the case of *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), which "considered mental competence and self-representation together." 554 U.S. at 171. In *Godinez*, the Court held that the presence of mental illness did not necessarily preclude a defendant's ability to waive his or her right

to counsel, so long as the defendant's waiver of the right to counsel was knowing and voluntary. The Court further held in *Godinez* that the standard to be applied for determining competency to stand trial under *Dusky* was the same standard to be applied for competency to waive the right to counsel. The Court noted, however, that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not [necessarily to be equated with] the competence to represent himself." 509 U.S. at 399 (emphasis in original). The contours of a defendant's competence to represent himself or herself left open in *Godinez* were addressed in *Edwards*.

[4] In addressing whether a different standard applied to determine whether a defendant was competent to represent himself or herself, the Court in *Edwards*, noted that the *Dusky* standard regarding competence to stand trial assumed the representation of counsel and therefore suggested that going to trial without counsel presented "a very different set of circumstances" and called for a different standard. 554 U.S. at 175. The Court rejected the use of a single mental competency standard for determining whether a defendant may stand trial when represented by counsel as distinguished from whether a defendant may represent himself or herself at trial. The Court noted in this respect that mental illness "is not a unitary concept" and may vary in degree and over time. *Id.* The Court therefore concluded in *Edwards* that

> the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

554 U.S. at 177-78.

Although urged to do so by the State of Indiana, the Court in *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), declined to adopt a more specific standard

to determine whether a defendant is competent to conduct trial proceedings. And although similarly urged to do so by the parties herein, because the present case falls within the standard set forth in *Edwards*, we also find it unnecessary to elaborate on the standard.

[5] Consistent with the Court's holding in *Edwards*, decided under the Sixth Amendment to the U.S. Constitution, we now hold that under Neb. Const. art. I, § 11, a criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel.

Having determined that it would not be a constitutional violation to insist on representation for a person who suffers from severe mental illness and is not competent to conduct trial proceedings without counsel, we must consider whether the district court erred in this case when it found that Lewis was not competent to conduct trial proceedings for himself. We conclude that the facts of the present case clearly fall within the standard articulated by the Court in *Edwards, supra*, and that the district court did not err when it found that Lewis was not competent to conduct trial proceedings in his own behalf.

The record shows that Lewis suffered from severe mental illness. The report resulting from a psychiatric evaluation conducted in this case to determine Lewis' mental competency to stand trial indicates that Lewis has been "diagnosed with a psychotic disorder, Schizophrenia, paranoid type." Although the psychiatrist concluded that Lewis was competent to stand trial, the psychiatrist warned that Lewis' "mood, anger and agitation may become an issue" and suggested that medication be considered to control "his disruptive behavior." The psychiatrist expressed concerns that Lewis' "agitation, periods of decreased attention and concentration will limit his ability to follow testimony reasonably well"; that Lewis "has the potential to be disruptive, agitated and combative, including becoming assaultive"; and that although Lewis could control his anger at times, it was doubtful that "he would be able to continue

this for a long time without getting very angry and agitated and perhaps disruptive." The psychiatrist further stated that "anytime [Lewis] feels like he is being forced to do something, he will retaliate with anger, agitation and disruptive behavior," and the psychiatrist expressed concern "about [Lewis'] ability to maintain his temper and anger consistently, to not become agitated whenever he is asked something he does not want to talk about."

In determining whether Lewis was competent to represent himself, the district court also considered Lewis' "conduct during prior proceedings" in this case. As the State notes, the record of proceedings in this case prior to the court's determination that Lewis was not competent to represent himself indicates that Lewis had a history of becoming disruptive during hearings to the point that the court ordered Lewis removed from the courtroom. At hearings held on December 21, 2007, and February 13, 2008, the court ordered Lewis removed from the courtroom for being disruptive by interrupting the court, refusing to follow courtroom procedure, and using abusive language. At a hearing held May 7, the court noted that Lewis was refusing to come into the courtroom and that the court had been informed by court staff that if the court required Lewis' presence in the courtroom "they would need to get another four or five officers to transport him into the courtroom."

We note with respect to such evidence of Lewis' past disruptive behavior that in *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), the U.S. Supreme Court stated that while the dignity and autonomy of the defendant underlies the right of self-representation, allowing a defendant who lacks the mental capacity to conduct his defense without assistance of counsel would not affirm the dignity of the defendant. Instead, the Court stated that "given [such] defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." 554 U.S. at 176. The Court also noted that "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing

a fair trial." 554 U.S. at 176-77. There is sufficient evidence of Lewis' past disruptive behavior that the district court could properly have found that his self-representation would create an unacceptable risk that a spectacle would result that would endanger a fair trial.

Based on the evidence that Lewis suffered severe mental illness and the evidence of past behavior by Lewis which indicated he would be disruptive and unable to conduct trial proceedings, we determine that this is a case that is clearly within the category the U.S. Supreme Court contemplated in *Edwards* where it would not be error for the trial court to insist on representation by counsel. We conclude that the district court did not err when it found that Lewis was not competent to represent himself and therefore required him to be represented by counsel.

Lewis' Conviction Was Supported by Sufficient Evidence of the Intent Required for Second Degree Murder.

Lewis next claims that there was not sufficient evidence to support his conviction for second degree murder. In particular, he asserts that there was not sufficient evidence of the necessary intent. Because we determine that there was sufficient evidence to support Lewis' conviction, we reject this assignment of error.

Lewis was convicted under Neb. Rev. Stat. § 28-304(1) (Reissue 2008), which provides, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Lewis notes that the distinction between second degree murder and manslaughter is the presence or absence of intent to kill. See *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). Although Lewis concedes that the evidence may have supported a conviction for manslaughter, he argues that there was not sufficient evidence of the intent necessary for a conviction for second degree murder. We find this argument to be without merit and reject this assignment of error.

[6] When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. Rather, the intent with which an act is committed

is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

In the present case, there was sufficient evidence from which the jury could properly have inferred that Lewis had the intent to kill Dr. Martin. We note that there was evidence that on the day he attacked Dr. Martin, Lewis was agitated that he was being forced to take medication and he was angry at Dr. Martin in particular because of Dr. Martin's testimony at a hearing held a week earlier in another case regarding a court order to medicate Lewis. Lewis struck Dr. Martin twice in the face with his fist. Before Lewis struck Dr. Martin, he said, "'I'm gonna get you, old man,'" and after Lewis struck Dr. Martin, he said things such as, "'There. Now what you gonna do? I told you I'd get you'"; "I told him I would get him. . . . He shouldn't have testified"; and "'I hope that motherfucker dies.'" The jury could properly have inferred that Lewis had the intent to kill Dr. Martin.

Because we conclude that there was sufficient evidence of intent to support Lewis' conviction for second degree murder, the court did not err when it denied his motion to dismiss made on this basis. We reject this assignment of error.

CONCLUSION

We conclude that it is not a constitutional violation for a court to insist on representation for a person who suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel. We further conclude that there was sufficient evidence to support the court's finding in this case that Lewis was not competent to represent himself and that the court did not deny Lewis his right to self-representation when it required that he be represented by counsel. We finally conclude that there was sufficient evidence of intent to support a conviction for second degree murder. We therefore affirm Lewis' conviction.

AFFIRMED.

HEAVICAN, C.J., and GERRARD, J., not participating.

ROBERT WAYNE DRUMMOND AND GAYLE DRUMMOND, APPELLANTS, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

785 N.W.2d 829

Filed July 23, 2010. No. S-09-931.

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. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.
3. **Words and Phrases.** As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Reversed and remanded for further proceedings.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellants.

Stephen S. Gealy and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Robert Wayne Drummond and Gayle Drummond made application to the district court for confirmation of an arbitration award under Neb. Rev. Stat. § 25-2612 (Reissue 2008). The Drummonds received the award after arbitration of their claims for underinsured motorist coverage. State Farm Mutual Automobile Insurance Company (State Farm) moved the district court to strike the Drummonds' application for confirmation on the grounds that State Farm had paid the arbitration award in full and that as such, confirmation of the award was moot. The Drummonds appeal from that order. We reverse the

decision of the district court and remand the cause for further proceedings.

BACKGROUND

On April 29, 2003, Robert was in San Diego, California, attending a professional conference. While loading his luggage into the back of a taxicab, the taxicab suddenly accelerated in reverse, running over Robert and trapping him beneath it. Robert suffered significant physical injuries as a result, including permanent impairment of his left arm, left shoulder, and right knee. Robert also suffers from chronic pain syndrome, depression, and posttraumatic stress disorder.

The Drummonds retained the services of an attorney in San Diego regarding their personal injury action. The liability insurer for the taxicab driver tendered $100,000, the limit of his liability coverage. The Drummonds then notified State Farm that they intended to make a claim for underinsured motorist benefits pursuant to their policy with State Farm. State Farm evaluated the claim and determined that damages were no more than $300,000, and so tendered payment of $200,000 as a full settlement of all claims. The Drummonds refused to completely settle all their claims, but accepted $200,000 as a payment for the undisputed amount.

State Farm and the Drummonds eventually agreed to submit the issue of the full extent of the Drummonds' damages to arbitration. The arbitration hearing was held on October 3, 2008, before a single arbitrator selected by State Farm. On October 21, the arbitrator issued an award finding that Robert's damages were $899,285.59 and that Gayle's loss of consortium damages were $115,000. The arbitrator gave State Farm credit for $300,000 paid.

State Farm paid the award set by the arbitrator. The Drummonds then requested that State Farm pay attorney fees expended in the arbitration action. State Farm refused. On April 16, 2009, the Drummonds applied to the Lancaster County District Court for confirmation of the arbitrator's award, citing § 25-2612. State Farm filed a motion to strike the Drummonds' application, arguing that its payment of the award rendered the matter moot. The district court agreed with

State Farm and granted the motion to strike. The Drummonds have appealed.

ASSIGNMENT OF ERROR

The Drummonds assign, consolidated and restated, that the district court erred in refusing to confirm the arbitration award upon the Drummonds' application because it concluded that the Drummonds' application for confirmation was moot.

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]

[2] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law.[2]

ANALYSIS

The Drummonds allege that the district court erred when it refused to confirm their arbitration award because it determined the issue was moot. The Drummonds argue that under § 25-2612, which is part of Nebraska's Uniform Arbitration Act, the district court had no choice but to confirm the arbitration award. In their request for confirmation, the Drummonds stated they sought confirmation in order to obtain attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 2004) and could only do so once a judgment was entered against State Farm. State Farm contended in its motion to strike that the district court was correct in deciding the issue was moot because it had paid the award in full. We note that the issue of attorney fees is not before us at this time.

Section 25-2612 states, "Within sixty days of the application of a party, the court shall confirm an award, unless within the

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[1] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[2] *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009).

time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614." Neb. Rev. Stat. § 25-2613 (Reissue 2008) provides the procedure for vacating an award, while Neb. Rev. Stat. § 25-2614 (Reissue 2008) provides the procedure for modifying or correcting an award.

Nebraska has not yet addressed this particular issue, but in its order, the district court cited three cases from other jurisdictions that have. In *Stewart Title Guar. Co. v. Tilden*,[3] a Wyoming case, a confirmation of an arbitration award was sought. The Wyoming court stated that the purpose of confirming an arbitration award is to provide a judgment that can then be enforced through court proceedings.[4] Although the language "'shall confirm'" was present in the Wyoming statute, the court held that because the award had been paid, the case was moot and the trial court had no jurisdiction over the matter.[5]

Keahey v. Plumlee[6] involved a dispute over a commission from a real estate sale. Real estate agents were awarded a commission, and when payment was not made, they sought to confirm the award. Appellant objected, citing a statute that prevented a real estate broker from suing on his or her own behalf. The Arkansas appellate court found that confirmation of an arbitration award could not be likened to filing suit and that confirmation was intended to be a means of enforcing an unsatisfied award.[7]

The facts in *Keahey* are clearly distinguishable from the present case, as *Keahey* did not involve seeking confirmation of a satisfied arbitration award.[8] *Murphy v. National Union Fire Ins. Co.*[9] involved a statute much the same as that of Nebraska

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[3] *Stewart Title Guar. Co. v. Tilden*, 64 P.3d 739 (Wyo. 2003).

[4] *Id.*

[5] *Id.* at 741.

[6] *Keahey v. Plumlee*, 94 Ark. App. 121, 226 S.W.3d 31 (2006).

[7] *Id.*

[8] *Id.*

[9] *Murphy v. National Union Fire Ins. Co.*, 438 Mass. 529, 781 N.E.2d 1232 (2003).

and Wyoming, and the court there held that satisfaction of an award rendered confirmation a moot issue.

The reasoning in *Tilden* and *Murphy* has been specifically rejected by some courts, however. These courts cite to the plain language of Nebraska's Uniform Arbitration Act requiring courts to confirm an arbitration award regardless of whether the award has been satisfied.[10] Quoting a federal district court case, the Hawaii Supreme Court stated:

> "But whether these awards have been satisfied—a fact disputed by plaintiff—has no bearing on whether the arbitration awards should be confirmed. . . . Indeed, as the defendants themselves have pointed out subsequent to the briefing, a court may confirm an arbitration award against a party even when the party has complied with that award. . . ."[11]

We find this reasoning persuasive.

[3] Section 25-2612 clearly states that unless a party moves for modification or vacation of an arbitration award within 60 days, "the court *shall* confirm an award." (Emphasis supplied.) We also note that as a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.[12] We find that § 25-2612 does not allow for the exercise of discretion by the court when a request of confirmation is made where there has been no application for vacation or modification. And because the award had not yet been confirmed under § 25-2612, the district court erred in determining that the case was moot.[13] Therefore, when a party applies for confirmation of an award under § 25-2612, a

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[10] *Mikelson v. United Services Auto Ass'n*, 122 Haw. 393, 227 P.3d 559 (2010); *Bernstein Family Ltd. Partnership v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 883 N.Y.S.2d 201 (2009); *Marchelletta v. Seay Construction Services, Inc.*, 265 Ga. App. 23, 593 S.E.2d 64 (2004); *Kutch v. State Farm Mutual Auto. Ins. Co.*, 960 P.2d 93 (Colo. 1998); *Wolfe v. Farm Bureau Ins. Co.*, 128 Idaho 398, 913 P.2d 1168 (1996).

[11] *Mikelson, supra* note 10, 122 Haw. at 396, 227 P.3d at 562 (quoting *District Council No. 9 v. APC Painting, Inc.*, 272 F. Supp. 2d 229 (S.D.N.Y. 2003)).

[12] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[13] See *Mikelson, supra* note 10.

district court shall confirm the award unless a party has moved for vacation, modification, or correction of the award.

CONCLUSION

The plain language of § 25-2612 requires that a court confirm an arbitration award upon application of a party. We therefore reverse the district court's decision granting State Farm's motion to strike and remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLANTS AND CROSS-APPELLEES.

786 N.W.2d 655

Filed July 23, 2010. No. S-09-985.

1. **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.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Pleadings: Notice.** Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
4. **Justiciable Issues.** The required showing of a case or controversy is made when the plaintiff shows the existence of a justiciable controversy and an interest in the subject matter of the action, i.e., that there is a controversy between persons whose interests are adverse and that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenge.
5. **Class Actions.** A class action cannot be employed to circumvent affirmative defenses or to revive claims which are no longer viable.

6. **Administrative Law: Time.** Litigants who fail to seek an administrative hearing within the time period set by applicable regulations are forever barred from recovering retroactive monetary relief under the Administrative Procedure Act.
7. **Actions: Parties: Time.** Even if a suit is against a private party, where retroactive relief would be paid from public funds, the suit is in essence an action against the State.
8. **Administrative Law.** Neb. Rev. Stat. § 84-911 (2008) provides for the right to challenge the validity of any rule or regulation directly to the district court without first requesting that the administrative agency pass upon the question.
9. **Administrative Law: Parties.** A regulation deemed invalid cannot be implemented against anyone, whether or not a party to the action to declare the regulation invalid.
10. **Administrative Law: Statutes: Legislature.** The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act.
11. **Administrative Law: Statutes.** An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
12. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
13. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
14. ____. To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general statute.
15. **Public Assistance: Contracts: Legislature: Medical Assistance.** Neb. Rev. Stat. § 68-1723 (Reissue 2009) provides that a family's cash assistance benefits shall be removed as a sanction for noncompliance with an Employment First self-sufficiency contract; the Legislature has not authorized the Department of Health and Human Services to remove Medicaid for failure to comply with such contract.

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

Matthew G. Dunning, Special Assistant Attorney General, for appellants.

James A. Goddard and Rebecca Gould, of Nebraska Appleseed Center for Law in the Public Interest, for appellee.

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

McCormack, J.

I. NATURE OF CASE

Jennifer Davio failed to comply with a self-sufficiency "Employment First" contract entered into between herself and the Department of Health and Human Services (DHHS). The contract was part of her application for assistance through the Aid to Dependent Children (ADC) program. As a result of her noncompliance, Davio lost both her family's ADC benefits and her Medicaid coverage pursuant to DHHS' administrative code (Regulation 2-020.09B2f),[1] which stated: "If the parent fails or refuses to participate in [Employment First] without good cause, all ADC cash assistance for the entire family must be closed as well as the medical assistance for the adult(s)." Davio alleges that Regulation 2-020.09B2f is an unconstitutional enlargement of the stated policy by the Legislature that the sanction for failure to comply with Employment First shall be only the removal of ADC benefits.[2] We agree that Regulation 2-020.09B2f is invalid insofar as it authorizes the removal of Medicaid benefits as a sanction for the failure to comply with Employment First.

II. BACKGROUND

Davio is an unemployed single mother. She suffers from a heart condition which necessitates monthly visits to a cardiologist, medication, and the drainage of fluid around the heart. Before receiving ADC benefits, Davio signed a self-sufficiency contract which required her to follow a case plan that included 30 hours of job search activities per week, with set check-in and checkout sessions at an employment education and training service. DHHS agreed to provide Davio with ADC cash assistance, childcare assistance, and a bus pass. She was also found eligible for Medicaid coverage without a separate application, pursuant to departmental regulations.

Davio chose a childcare provider she trusted, but who was located a substantial distance from her home and the employment service. As a result, she was eventually unable to meet

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[1] 468 Neb. Admin. Code, ch. 2, § 020.09B2f (2006).

[2] See Neb. Rev. Stat. § 68-1723(2) (Reissue 2009).

the job search attendance requirements, and DHHS sanctioned Davio for noncompliance. DHHS removed all her family's ADC cash assistance and Davio's Medicaid coverage. Since that time, Davio has not sought medical care for her heart condition.

Davio challenged the sanction in an administrative hearing before a hearing officer for DHHS. Davio argued that she had good cause for her noncompliance and that Regulation 2-020.09B2f violated separation of powers insofar as it authorized removal of Medicaid coverage. The hearing officer found against her on both points.

Davio next filed a class action in the district court for Lancaster County on behalf of herself and all Nebraska parents who have received ADC and whose Medicaid has been removed because of a sanction under Employment First. Davio's petition asked for reversal of the hearing officer's decision removing her Medicaid, a declaration that Regulation 2-020.09B2f violates separation of powers, an injunction from future implementation of that regulation, and reimbursement to all members of the class for any medical care paid which would have been covered by Medicaid but for the enforcement of the regulation. The action was brought against DHHS, as well as various individuals who work for DHHS and are in charge of implementing Employment First and Medicaid benefits. For simplicity, we will refer only to DHHS. In the statement of facts of her 12-page petition, she also stated: "Davio no longer contests the validity of the sanction issued in August 2007."

DHHS moved to dismiss the petition for lack of subject matter jurisdiction, and it objected to class certification. The district court denied the motion to dismiss. The court granted the motion for class certification as to the declaratory and injunctive relief, but denied it with respect to the appeal pursuant to the Administrative Procedure Act (APA) and request for damages. In support of the certification, Davio presented evidence that in the first 3 months of 2008, approximately 400 ADC participants had their Medicaid benefits taken away for failure to cooperate with Employment First. No further evidence was presented regarding the participants' challenges before DHHS or their specific expenses incurred because of the removal of Medicaid.

DHHS filed an answer generally denying the allegations against it and pleading sovereign immunity. For the sake of completeness, although noting that Davio no longer seemed to contest her noncompliance, the district court found that she had failed to be actively engaged in the activities outlined in her self-sufficiency contract and that she did not have good cause for her lack of cooperation. But the court agreed with Davio that the sanction she received should have been limited to the loss of her cash assistance. The court declared that Regulation 2-020.09B2f was invalid insofar as it removed Medicaid benefits for adults who fail to comply with their self-sufficiency contracts and that an injunction should be granted prohibiting the implementation of that aspect of the regulation. The parties stipulated that Davio had incurred no medical expenses during the period in question; therefore, no damages were granted. DHHS appeals, and Davio cross-appeals.

III. ASSIGNMENTS OF ERROR

DHHS assigns, consolidated and restated, that the district court erred in (1) finding that it had subject matter jurisdiction, (2) finding that class action status should be granted to Davio's challenge of the validity of Regulation 2-020.09B2f, and (3) finding that Regulation 2-020.09B2f is invalid and unconstitutional.

Davio's cross-appeal asserts that the district court erred in failing to permit the class members from seeking all the remedies available under Neb. Rev. Stat. § 84-917 (Reissue 2008).

IV. STANDARD OF REVIEW

[1] 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]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of

[3] *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[4]

V. ANALYSIS

1. Subject Matter Jurisdiction and Class Certification

DHHS presents several arguments pertaining to the jurisdiction of the lower court and the appropriateness of the class action. Although sovereign immunity is waived by the APA, DHHS argues that any issues relevant to an appeal under the APA became moot when Davio stated in her petition that she "no longer contests the validity of the sanction issued in August 2007." DHHS also asserts that the district court erred in certifying the class, because there was no evidence that the members of the class had exhausted their administrative remedies. Davio, for her part, appeals the district court's decision to limit the class action to declaratory and injunctive relief.

(a) Case or Controversy

DHHS' principal focus is on the single sentence from the statement of facts in Davio's petition quoted above. DHHS argues that Davio conceded she no longer had a present case or controversy and that she simply sought an abstract declaration of the validity of Regulation 2-020.09B2f, which would not directly affect her interests. This argument completely ignores Davio's request for relief and the theory upon which the case was tried, and it lacks any merit.

[3] Under the liberalized rules of notice pleading,[5] a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[6] The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[7] The rationale for this liberal notice pleading standard is that

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[4] *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010).

[5] See *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[6] *Id.*

[7] See *id.*

when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.[8]

Davio's petition clearly asked not only that the court declare Regulation 2-020.09B2f unconstitutional, but also that it reverse the hearing officer's order removing her Medicaid benefits. Read in context, we agree with Davio that her statement that she "no longer contests the validity of the sanction issued in August 2007" referred to the determination by the hearing officer that she did not have cause for her failure to perform her Employment First contract. Although Davio had originally challenged, in the proceedings before the hearing officer, the decision to sanction her at all, nowhere in her petition before the district court does she contest the fact of her noncompliance and the consequential removal of her family's ADC benefits. DHHS' attempt to read the sentence as a concession that Davio no longer contests the removal of her Medicaid benefits makes the petition nonsensical. More important, it places that sentence above the issues actually presented and argued by the parties.

[4] The required showing of a case or controversy is made when the plaintiff shows the existence of a justiciable controversy and an interest in the subject matter of the action, i.e., that there is a controversy between persons whose interests are adverse and that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenge.[9] Davio has made such a showing.

(b) Class Certification

Both parties dispute the certification of the class. Davio argues that the court erred in limiting the class action to declaratory and injunctive relief. DHHS argues, in contrast, that the court should not have allowed class certification at all. In

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[8] *Id.*

[9] See *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993).

determining whether a class action is properly brought, broad discretion is vested in the trial court.[10]

[5] Addressing Davio's cross-claim first, we conclude that the district court did not abuse its discretion in refusing to certify the class for any claims involving monetary relief. We note that DHHS does not argue that there can never be a class action under any provision of the APA. Rather, it argues that, in this case, there can be no showing that most of the alleged class members had first challenged the removal of their Medicaid benefits before a hearing officer in a timely manner—and that they had preserved that challenge by appealing to an appellate court. DHHS notes that the purported class in this case includes all participants who have had their Medicaid benefits removed pursuant to a regulation that is over 10 years old. We agree with DHHS that the absence of such a showing of exhaustion of administrative remedies was a proper consideration by the district court in denying certification of the class. A class action cannot be employed to circumvent affirmative defenses or to revive claims which are no longer viable.[11]

[6] In *Golden Five v. Department of Soc. Serv.*,[12] we explained that litigants who fail to seek an administrative hearing within the time period set by applicable regulations are forever barred from recovering retroactive monetary relief under the APA. In that case, eight medical care facilities that participated in a Medicaid reimbursement program contested a statutory provision that mandated a 3.75-percent cap on any increase in future payments to the facilities regardless of the costs actually incurred.[13] Rather than challenge the agency's action before a

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[10] See, *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008); *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982).

[11] See, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *Escott v. Barchris Construction Corporation*, 340 F.2d 731 (2d Cir. 1965); *Clayborne v. Omaha Public Power Dist.*, 211 F.R.D. 573 (D. Neb. 2002); *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

[12] *Golden Five v. Department of Soc. Serv.*, 229 Neb. 148, 425 N.W.2d 865 (1988).

[13] *Id.*

hearing officer, the facilities first brought an action in federal court against the director of the Department of Social Services, asking for a declaration that the 3.75-percent cap provision was in violation of a federal provision stating that reimbursement must meet the costs incurred by efficiently and economically operated facilities.[14] The Eighth Circuit Court of Appeals held in favor of the facilities and declared the regulation to be in violation of the Supremacy Clause.[15]

Afterward, the facilities filed under the APA for retroactive monetary relief through administrative appeal hearings. We affirmed the hearing officer's decision to deny retroactive relief because the facilities had failed to timely contest the case before the agency. We explained that the implementation of the statute was not an ongoing act and was thus governed by a regulation stating that the facility may request an appeal within 90 days of the decision or inaction.[16]

We stated that although it was true that the hearing officer would not have had the power to declare the statute unconstitutional, "[i]f appellants wanted something more than an injunction to be applied in the future, they were required to exercise their rights timely under state administrative procedures."[17] The constitutionality of the statute could, after all, have been decided on appeal from the hearing officer's decision.[18]

[7] But the facilities instead chose to contest the constitutionality of the statute in federal court.[19] And, we explained, sovereign immunity precluded federal courts from granting the facilities the monetary relief they sought.[20] Even if it was a suit against a private party, such retroactive relief would be paid from public funds and was, therefore, in essence, an action

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[14] *Id.*

[15] *Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291 (8th Cir. 1985).

[16] *Golden Five v. Department of Soc. Serv., supra* note 12.

[17] *Id.* at 155-56, 425 N.W.2d at 870.

[18] See *Golden Five v. Department of Soc. Serv., supra* note 12.

[19] *Id.*

[20] *Id.*

against the State.[21] We concluded that the facilities' decision to bring action in federal court "achieved the result of protection from any future application of the 3.75-percent limitation by the Department, but it did not preserve a remedy which can only be awarded by a state agency or court, insofar as retroactive relief is sought."[22]

While *Golden Five* was not a class action, it illustrates the necessity of filing a contested case before a hearing officer in order to preserve the right to retroactive monetary relief. The case of *Thiboutot v. State*[23] presents a class action very similar to the case at bar and further illustrates this point. The original plaintiffs in *Thiboutot* had fully pursued their administrative remedies to challenge a regulation governing Aid to Families with Dependent Children benefits. They sought to declare the regulation invalid and to obtain retroactive monetary relief.

However, while their appeal was pending before the district court, the plaintiffs amended their complaint to allege a class action seeking both monetary and injunctive relief for other beneficiaries of Aid to Families with Dependent Children. The district court ultimately decided to grant the injunction against the Maine Department of Human Services from enforcing the regulation, which the court determined to be invalid. But the court refused to consider claims for retroactive monetary benefits on behalf of the class,[24] and the plaintiffs appealed. The court of appeals held that the district court's limitation was proper because the waiver of sovereign immunity for administrative appeals referred only to individuals who have sought administrative review of an agency hearing.[25]

Similarly, here, the waiver of sovereign immunity for an action seeking monetary relief from a state agency is found

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[21] See *id.*

[22] *Id.* at 156, 425 N.W.2d at 870. See, also, *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[23] *Thiboutot v. State*, 405 A.2d 230 (Me. 1979).

[24] *Id.*

[25] *Id.*

in Neb. Rev. Stat. §§ 84-913 to 84-917 (Reissue 2008). Those provisions first require a hearing before the administrative agency contesting its action. We are unaware of any other means of redress applicable to Davio's claims which would waive sovereign immunity for an action for retroactive monetary relief. Because it appears that a large number of the members of the purported class did not first challenge before a hearing officer the removal of their Medicaid benefits, the district court's limitation of the class certification in this case was proper.

[8,9] As for DHHS' argument that the court erred in certifying the class even for the purpose of declaratory and injunctive relief, we find no harm and no reason to reverse the district court's decision. We note first that Neb. Rev. Stat. § 84-911 (Reissue 2008) provides for the right to challenge the validity of any rule or regulation directly to the district court without first requesting that the administrative agency pass upon the question. But regardless of whether this provision envisions class actions as such, the limited certification of the class in this case was harmless error. It is axiomatic that a regulation deemed invalid cannot be implemented against anyone, whether or not a party to this suit. In other words, even if the court had denied class certification, the declaratory and injunctive relief requested by Davio would have inured to the benefit of the purported class.[26] We therefore find no merit to DHHS' assignments of error pertaining to the district court's certification of the class, which was strictly for purposes of declaratory and injunctive relief.

2. Is Removal of Medicaid Benefits Authorized?

[10,11] We turn now to the underlying merits of the dispute. Before setting forth the labyrinth of pertinent federal and state welfare laws, we briefly discuss the relationship of the Legislature to DHHS and the principles of separation of

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[26] See, *United Farm. of Fla. H. Proj., Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); 7A Charles Alan Wright et al., Federal Practice and Procedure § 1771 (2005).

powers upon which Davio relies. Neb. Const. art II, § 1, states that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted." This provision prohibits the Legislature from improperly delegating its own duties and prerogatives.[27] The Legislature may enact statutes to set forth the law,[28] and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act.[29] Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.[30] And an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.[31]

[12-14] We also set forth the standards of statutory interpretation which are relevant to this case and which guide our analysis. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[32] If the language of a statute is clear, however, the words of such statute are the end of any judicial inquiry regarding its meaning.[33] To the extent there is a conflict

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[27] See *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

[28] *Id.*

[29] See *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995).

[30] *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[31] *Clemens v. Harvey, supra* note 27.

[32] See *Kosmicki v. State, supra* note 3. See, also, *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947).

[33] *State ex rel. Lanman v. Board of Cty. Commissioners*, 277 Neb. 492, 763 N.W.2d 392 (2009).

between two statutes on the same subject, the specific statute controls over the general statute.[34]

We turn now to the statutes. Broadly, two comprehensive acts, the Medical Assistance Act[35] and the Welfare Reform Act,[36] govern this case.

(a) Medical Assistance Act

Medicaid is provided for in the Medical Assistance Act. The Medical Assistance Act was enacted as a cooperative federal-state program to provide health care to needy individuals.[37] DHHS is assigned the responsibility of administering this program.[38] It was originally enacted in 1965, but it has been continuously revised, most extensively in 2006.[39] The current public policy statement for the Medical Assistance Act, contained in § 68-905, states:

> It is the public policy of the State of Nebraska to provide a program of medical assistance on behalf of eligible low-income Nebraska residents that (1) assists eligible recipients to access necessary and appropriate health care and related services, (2) emphasizes prevention, early intervention, and the provision of health care and related services in the least restrictive environment consistent with the health care and related needs of the recipients of such services, (3) emphasizes personal independence, self-sufficiency, and freedom of choice, (4) emphasizes personal responsibility and accountability for the payment of health care and related expenses and the appropriate utilization of health care and related services, (5) cooperates with public and private sector entities to promote the public health, (6) cooperates with providers, public

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[34] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

[35] Neb. Rev. Stat. §§ 68-901 to 68-967 (Reissue 2009).

[36] Neb. Rev. Stat. §§ 68-1708 to 68-1734 (Reissue 2009).

[37] *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007).

[38] §§ 68-907(2) and 68-908(1).

[39] See 2006 Neb. Laws, L.B. 1248.

> and private employers, and private sector insurers in providing access to health care and related services and encouraging and supporting the development and utilization of alternatives to publicly funded medical assistance for such services, (7) is appropriately managed and fiscally sustainable, and (8) qualifies for federal matching funds under federal law.

Eligibility for Medicaid is defined in § 68-915, which sets forth specific disability, income, or dependency prerequisites.

DHHS is authorized in § 68-912 to place "[l]imits on goods and services":

> (1) The department may establish (a) premiums, copayments, and deductibles for goods and services provided under the medical assistance program, (b) limits on the amount, duration, and scope of goods and services that recipients may receive under the medical assistance program, and (c) requirements for recipients of medical assistance as a necessary condition for the continued receipt of such assistance, including, but not limited to, active participation in care coordination and appropriate disease management programs and activities.
>
> (2) In establishing and limiting coverage for services under the medical assistance program, the department shall consider (a) the effect of such coverage and limitations on recipients of medical assistance and medical assistance expenditures, (b) the public policy in section 68-905, (c) the experience and outcomes of other states, (d) the nature and scope of benchmark or benchmark-equivalent health insurance coverage as recognized under federal law, and (e) other relevant factors as determined by the department.

Prior to the adoption and promulgation of proposed rules and regulations under § 68-912 or relating to the implementation of Medicaid state plan amendments or waivers, DHHS is required to report to the Governor, the Legislature, and the Medicaid Reform Council with a summary of the proposed rules and regulations and their projected impact.[40] Legislative

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[40] See § 68-909(2).

consideration includes, but is not limited to, the introduction of a legislative bill, a legislative resolution, or an amendment to pending legislation relating to such rules and regulations.[41]

Section 68-916 of the Medical Assistance Act mandates that the recipient assign to DHHS any medical care support available under court order or under rights to pursue or receive payments from any third party liable for the medical care. Section 68-917 is entitled "Applicant or recipient; failure to cooperate; effect." It is limited on its face to the failure to cooperate in obtaining reimbursement for medical care or services as mandated in § 68-916.

(b) Welfare Reform Act

The primary benefit described by the Welfare Reform Act is up to 60 months of cash assistance.[42] This benefit is derived from Neb. Rev. Stat. § 43-512 (Reissue 2008), which sets forth ADC benefits and which is incorporated into the Welfare Reform Act. In addition, the Welfare Reform Act provides qualifying participants assistance with transportation expenses, participation and work expense, parenting education, family planning, budgeting, and relocation.[43] When no longer eligible to receive cash assistance, the Welfare Reform Act provides for transitional supportive services for those who still require it. Such services include health care coverage available on a sliding-scale basis to individuals and families with incomes up to 185 percent of the federal poverty level if other health care coverage is not available.[44]

The primary innovation of the Welfare Reform Act is the self-sufficiency Employment First contract. In order to receive the benefits of the Act, the recipient must first undergo a comprehensive assessment and develop an Employment First contract with a case manager that provides for a means to achieve specified self-sufficiency goals.[45] The contract

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[41] § 68-912(4).

[42] See § 68-1724.

[43] § 68-1722.

[44] §§ 68-1709 to 68-1724.

[45] § 68-1718.

is to have a timeline of benchmarks to facilitate "forward momentum."[46]

According to the Welfare Reform Act, the self-sufficiency evaluation procedure is triggered when an individual or family applies for ADC assistance pursuant to § 43-512.[47] It is not triggered by a Medicaid application under § 68-915. However, DHHS has passed regulations making ADC beneficiaries automatically eligible for Medicaid without a separate § 68-915 application.[48]

We have explained that the intent of the Welfare Reform Act, at least in part, was to reform the welfare system to remove disincentives to employment, promote economic self-sufficiency, and provide individuals and families with the support needed to move from public assistance to economic self-sufficiency.[49] It was intended to be implemented in a manner consistent with federal law[50] and to change public assistance from entitlements to temporary, "contract-based" support, accomplished through individualized assessments of the personal and economic resources of the applicant and the use of individualized self-sufficiency contracts.[51] But we have never addressed whether such self-sufficiency, contract-based support applies to Medicaid.

Section 68-1723(1) states that "[c]ash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the self-sufficiency contract . . . ." Section 68-1723(2) further specifies that in recipient families with at least one adult with the capacity to work, "[i]f any such adult fails to cooperate in carrying out the terms of the contract, the family shall be ineligible for cash assistance."

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[46] § 68-1719.

[47] § 68-1718(1).

[48] 468 Neb. Admin. Code, ch. 4, § 001.01A (2002).

[49] § 68-1709; *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003); *Kosmicki v. State, supra* note 3.

[50] § 68-1710.

[51] See, § 68-1709; *Mason v. State, supra* note 49; *Kosmicki v. State, supra* note 3.

Section 43-512(5)(a), which has maintained the relevant language since its amendment in 1990, grants DHHS regulatory power:

> For the purpose of preventing dependency, the department shall adopt and promulgate rules and regulations providing for services to former and potential recipients of aid to dependent children and medical assistance benefits. The department shall adopt and promulgate rules and regulations establishing programs and cooperating with programs of work incentive, work experience, job training, and education. The provisions of this section with regard to determination of need, amount of payment, maximum payment, and method of payment shall not be applicable to families or children included in such programs.

The Welfare Reform Act grants DHHS the power and duty to "adopt and promulgate rules and regulations to carry out the Welfare Reform Act."[52]

In the preamble, the Welfare Reform Act sets forth 20 "policies" that DHHS "shall implement."[53] These policies range from the specific requirement that it exclude, for instance, the cash value of life insurance policies when calculating resources, to the general policy of encouraging minor parents to live with their parents. In this appeal, DHHS relies particularly on policy (d) of § 68-1713(1), which was added in 1995 and states in full: "Make Sanctions More Stringent to Emphasize Participant Obligations."

George Kahlandt, the administrator of the "Economic Assistance Unit" with DHHS, testified that this language was related to welfare reform committee recommendations in 1993. Kahlandt testified that prior to that time, if an individual refused to participate in Employment First, the only sanction was the removal of that individual's monthly $71 ADC cash assistance benefit, and even that was tempered by an increase in the family's food stamp allowance. It was Kahlandt's opinion that the language in policy (d) contemplated not only the

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[52] § 68-1715.

[53] § 68-1713(1).

increase in the removal of cash assistance from the individual to the entire family, an amount in excess of $400 for a family of four, but also the removal of Medicaid benefits. Prior to the passage of policy (d), DHHS did not remove Medicaid benefits for the failure to comply with self-sufficiency goals.

Kahlandt explained that the committee was formed in anticipation of the federal Personal Responsibility and Work Opportunity and Reconciliation Act, which was passed in 1996. That legislation created the Temporary Assistance for Needy Families program, which replaced the welfare programs known as Aid to Families with Dependent Children, the Job Opportunities and Basic Skills Training program, and the Emergency Assistance program. The law ended federal entitlement to assistance and instead created the Temporary Assistance for Needy Families program as a block grant that provides states, territories, and tribes federal funds each year. Under 42 U.S.C. § 1936u-1(3)(A) (2006) of the Social Security Act, participating states have the option, although they are not required, to terminate medical assistance for failure to meet the work requirement tied to cash assistance.

(c) No Authorization to Remove Medicaid

As is apparent from the above, there is nothing in any of the relevant statutes which expressly states DHHS may remove Medicaid benefits as a sanction for noncompliance with Employment First. DHHS relies instead on the fact that the law does not specifically *prohibit* the removal of Medicaid and that the Legislature has expressed a public policy of welfare as being temporary, contract-based support. DHHS also attempts to patch together the various provisions granting regulatory authority, the "[l]imits on goods and services" provision of § 68-912, and, especially, the statement in § 68-1713(1)(d) that it "Make Sanctions More Stringent to Emphasize Participant Obligations" to make an argument for a clear mandate by the Legislature. We do not find such a mandate.

As already discussed, it is the Legislature's stated public policy, at least in the Welfare Reform Act, that able-bodied recipients become self-sufficient as quickly as possible so

that their welfare benefits are merely temporary.[54] On the other hand, the acts also have beneficent purposes that go beyond simply pushing recipients toward the ultimate goal of self-sufficiency. We have said that in the absence of clearly expressed intent to the contrary, we must construe these laws so as to effectuate their beneficent purposes.[55]

It is particularly the policy of the Medical Assistance Act to provide medical care to persons in need.[56] And, unlike the Welfare Reform Act, which focuses on ADC and other transitional benefits, the Medical Assistance Act makes no reference to Employment First contracts. The lengthy set of policies set forth by the Medical Assistance Act does not indicate that Medicaid benefits should be tied to quasi-contractual obligations of "forward momentum." Section 68-912 of the Medical Assistance Act specifically sets forth the limits DHHS can place on benefits, and yet it focuses solely on the patient participation and responsibility concerns common to any health provider, such as copayments and limitations on what services are covered. It fails to make any reference to self-sufficiency contracts.

Section 43-512(5)(a) comes slightly closer inasmuch as it refers to both "medical assistance benefits" and "preventing dependency." However, it does so in the context of "providing for services" for the participant. It, again, makes absolutely no reference to sanctions. In fact, it seems from reading § 43-512 as a whole that the rules and regulations referred to in that section were meant to pertain to benefits supplemental to the basic welfare provisions—for which "need, amount of payment, maximum payment, and method of payment" *are* applicable.

Finally, we find, contrary to DHHS' assertion, that the provision that DHHS shall "Make Sanctions More Stringent to Emphasize Participant Obligations"[57] provides no particular

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[54] See, e.g., *Kosmicki v. State, supra* note 3.

[55] See *Mason v. State, supra* note 49.

[56] See § 68-905.

[57] § 68-1713(1)(d).

directive. It certainly does not and, indeed, cannot confer upon DHHS unlimited discretion in determining the measure and the means of sanctions for noncompliance. Instead, this provision must be read in conjunction with the limitations and standards expressly provided by the Legislature. In effect, these provisions define what rules and regulations DHHS may pass to "Make Sanctions More Stringent."

[15] What is most pertinent to this case is the fact that in § 68-1723 of the Welfare Reform Act, the Legislature has set forth specific provisions concerning the prescribed sanction for noncompliance with Employment First self-sufficiency contracts. That provision specifies only that the family's "cash assistance" shall be removed as a consequence of noncompliance. If the Legislature had intended Medicaid to be removed as a sanction for noncompliance, there was no reason not to have stated so in § 68-1723. We lack authority to add to this provision language that clearly is not there.[58]

DHHS asserts that if we do not construe "Make Sanctions More Stringent" to authorize the removal of Medicaid, then that provision is rendered meaningless. DHHS rests this assertion on the fact that policy (d) of § 68-1713(1) was finally adopted on June 13, 1995, while the sanction provision of § 68-1723 had already been adopted on April 20, 1994.[59] We find this argument unconvincing. The language of policy (d) is general and could mean nothing more than the stricter implementation of the sanctions outlined in § 68-1723. Or, as DHHS suggests, the language could have been contemplated in conjunction with other language that ultimately did not make it into the Welfare Reform Act. As Davio suggests, it could refer to the contemplated increase to removing the entire family's ADC benefits, even though the latter provision was ultimately adopted first. In other words, the reason and the timing of policy (d) are largely a matter of speculation. Such speculation is unnecessary when the statutes clearly define the appropriate sanctions for specified behavior.

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[58] See *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

[59] See, 1995 Neb. Laws, L.B. 455, § 10; 1994 Neb. Laws, L.B. 1224, § 23.

Nor are we convinced to stray from the clear language of the acts by DHHS' argument of legislative acquiescence. Where a statute has long been construed by administrative officials charged with its execution, and where the Legislature has several times been in session without amending or changing such statute—despite its full knowledge of the interpretation—we will not disregard that interpretation unless it is clearly erroneous.[60] But this seldom-used rule of legislative acquiescence to administrative interpretations is but a complement to the traditional rules of statutory construction already set forth. In *McQuiston v. Griffith*,[61] for instance, the plaintiff's proposed interpretation of a statute was already a stretch, and the fact that the Legislature had not acted to "correct" it was simply further evidence that our interpretation was correct.

We will not ignore the meaning of the statutes relevant to this case simply because DHHS has passed a regulation and the Legislature has since failed to amend its law to correct DHHS' error. In other words, DHHS' interpretation was clearly erroneous. Moreover, although DHHS points to provisions in the Medical Assistance Act which mandate that reports be sent to the Governor and the Legislature, there is no evidence in this case that the Legislature actually considered such a report or was specifically aware of Regulation 2-020.09B2f and its implementation.

VI. CONCLUSION

It is both consistent and logical that the Legislature chose to remove as a sanction only those benefits gained specifically as a result of entering into the self-sufficiency contract, and to not further penalize the recipient by taking away Medicaid. More to the point, we, like DHHS, are without the power to enlarge upon the expressed legislative purpose.[62] Finding specific provisions covering noncompliance, which do not authorize the removal of Medicaid, and finding no provision

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[60] See *McQuiston v. Griffith*, 128 Neb. 260, 258 N.W. 553 (1935).

[61] *Id.*

[62] See, e.g., *Boll v. Department of Revenue, supra* note 29; *Clemens v. Harvey, supra* note 27.

elsewhere that allows this as a sanction, we find the limitations of the Legislature's delegation clear. Therefore, in enacting Regulation 2-020.09B2f, DHHS unlawfully enlarged upon the authorizing statutes and violated the principles of separation of powers. The district court was correct in declaring Regulation 2-020.09B2f invalid.

AFFIRMED.

GERRARD, J., not participating.

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

785 N.W.2d 843

Filed July 23, 2010. No. S-09-1261.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
5. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Juvenile Courts: Parental Rights: Adoption.** Where a juvenile has been adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and a permanency objective of adoption has been established, a juvenile court has authority under the Nebraska Juvenile Code to order the Nebraska Department of Health and Human Services to accept a tendered relinquishment of parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

Carla Heathershaw Risko, Special Assistant Attorney General, for appellant.

Donald W. Kleine, Douglas County Attorney, and Lindsey Grove for appellee.

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

STEPHAN, J.

This appeal requires an examination of the interplay between Nebraska's adoption statutes[1] and the Nebraska Juvenile Code.[2] The specific question presented is whether a juvenile court may order the Nebraska Department of Health and Human Services (DHHS) to accept a voluntary relinquishment of parental rights when a child has been adjudicated pursuant to § 43-247(3)(a) and adoption is the permanency objective. We conclude that a juvenile court has authority to issue such an order.

BACKGROUND

Gabriela H. was born in September 1997. On or about November 7, 2008, Gabriela's biological mother left Gabriela at an Omaha hospital. On November 7, the State filed a petition in the separate juvenile court of Douglas County alleging that Gabriela was a child under § 43-247(3)(a) because her mother was "refusing to provide [her] with appropriate care, support and/or supervision." The petition alleged that Gabriela was then in the custody of DHHS.

On February 23, 2009, the juvenile court adjudicated Gabriela under § 43-247(3)(a) and ordered that she remain in the temporary custody of DHHS. The court also ordered Gabriela's mother to pay child support.[3] The record indicates that a supplemental petition was also filed against Gabriela's natural father, which also resulted in an adjudication and a child support order. At a permanency planning hearing held on March 30, the court found that reunification efforts were not required

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[1] Neb. Rev. Stat. §§ 43-101 to 43-165 (Reissue 2008).

[2] Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008).

[3] See § 43-290.

because Gabriela's parents did not wish to have a relationship with her and were contemplating relinquishment.

At a subsequent permanency planning hearing held on November 10, 2009, a representative of the State Foster Care Review Board recommended adoption as the permanency objective, noting that there had been no contact between Gabriela and her biological parents during the 11 months that she had been in foster care. The deputy county attorney and the guardian ad litem agreed that the permanency objective should be adoption, noting that both parents were willing to relinquish parental rights but that DHHS was refusing to accept relinquishment. Counsel for Gabriela's mother confirmed that he had informed DHHS of the mother's decision to relinquish her parental rights, but that DHHS was unwilling to accept relinquishment. Counsel for Gabriela's father also indicated that he had informed DHHS that the father was willing to relinquish his parental rights. But counsel for DHHS told the court that DHHS "doesn't like to accept relinquishments when [it doesn't] have a permanent home for the child yet" and expressed concern over accepting relinquishment when a parent was paying a "substantial amount" of child support. DHHS requested that the court defer any action on the relinquishment for 3 months while DHHS attempted to find an adoptive home for Gabriela.

In an order entered on November 12, 2009, the juvenile court found as follows:

> . . . [N]o further reasonable efforts are required toward reunification due to the lack of parental participation or desire to parent [Gabriela], and the parents' desire to relinquish their rights.
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> . . . There is nothing in the law that prevents [DHHS] from accepting relinquishment by the parents;
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> . . . The permanency objective is Adoption. Negative reasonable efforts are being made to finalize the permanency objective, but [Gabriela] is in a foster/adoptive placement.
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> . . . [I]t is in the best interests and welfare of [Gabriela] to remain as placed, in the custody of [DHHS], for appropriate care and placement.

Based upon these findings, the court ordered that Gabriela remain in the custody of DHHS for appropriate care and placement and that DHHS "shall accept relinquishment by the parents." DHHS perfected an appeal from this order, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

ASSIGNMENT OF ERROR

DHHS assigns, restated, that the juvenile court erred in ordering it to accept the relinquishments of parental rights.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[5] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[6]

ANALYSIS

Nebraska's statutory procedures for adoption include the following provision:

> When a child shall have been relinquished by written instrument . . . to [DHHS] or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child. Nothing contained in this section shall impair the right of such child to inherit.[7]

DHHS contends that the decision to accept a relinquishment of parental rights is within its sole discretion and that it cannot be compelled by a juvenile court to do so.

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[5] *In re Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009); *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[6] *In re Interest of Dustin S., supra* note 5; *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

[7] § 43-106.01.

Statutory Authority

[3-5] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.[8] But the Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.[9] This includes promoting "adoption, guardianship, or other permanent arrangements for children in the custody of [DHHS] who are unable to return home."[10] And juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.[11]

Although the juvenile code gives DHHS a certain degree of discretion with respect to children placed in its custody, that discretion is subject to the superior right of the juvenile court to determine what is in the child's best interests. For example, § 43-284 authorizes various placement options for adjudicated children, including "some association willing to receive the juvenile" or DHHS. This language indicates that while other child placement agencies have a choice as to whether to take placement, DHHS can be ordered by the court to accept the juvenile's placement. Additionally, if a juvenile is voluntarily relinquished by his or her parents, § 43-284.01 requires that the juvenile shall remain in the custody of DHHS or another authorized placement agency unless the court finds by clear and convincing evidence that such placement is not in the child's best interests. And the juvenile court is not bound by a placement plan created by DHHS. Section 43-285(2) expressly authorizes the court to reject a placement plan created by DHHS

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[8] *In re Interest of Dustin S., supra* note 5.

[9] *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). See, also, *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

[10] § 43-246(6).

[11] *In re Interest of Veronica H., supra* note 9. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

and implement an alternative plan based on the juvenile's best interests. These statutes clearly demonstrate that the juvenile court has the authority to determine placement of a juvenile under its jurisdiction even if such determination is contrary to DHHS' position.

Furthermore, pursuant to § 43-285(1), DHHS is expressly limited in its authority over juveniles placed in its custody; § 43-285(1) provides that DHHS has "authority, *by and with the assent of the court*, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it." (Emphasis supplied.) We have recognized the authority of a juvenile court to order the removal and replacement of a DHHS case manager, noting that juvenile courts have been given the power by the Legislature to assent and, by implication, to dissent from the placement and other decisions of DHHS.[12]

DHHS argues that § 43-285(1) does not apply to Gabriela's case because the juvenile court did not award DHHS care of Gabriela, but, rather, care was voluntarily relinquished by the parents. This argument ignores the fact that the juvenile court awarded DHHS temporary custody of Gabriela prior to the November 2009 permanency hearing. DHHS also argues that § 43-285(1) does not apply to Gabriela's case because § 43-106.01, which authorizes DHHS to accept a voluntary relinquishment of parental rights, is not included in the juvenile code. However, as Gabriela was adjudicated under § 43-247(3)(a), she is under the juvenile court's jurisdiction, and in determining its disposition, the court is guided by the juvenile code.

[6] Finally, we note that the juvenile code also contains the following provision:

> If the return of the child to his or her parents is not likely based upon facts developed as a result of the investigation, [DHHS] *shall recommend termination of parental rights* and referral for adoption, guardianship, placement

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[12] *In re Interest of Veronica H., supra* note 9. See, also, *In re Interest of Crystal T. et al.*, 7 Neb. App. 921, 586 N.W.2d 479 (1998).

> with a relative, or, as a last resort, another planned permanent living arrangement.[13]

Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[14] It would violate the principle of § 43-1312 to conclude that DHHS is required to recommend termination of parental rights in the case of an abandoned child but, at the same time, has the authority to prevent such termination by refusing to accept a tendered relinquishment of parental rights.

Separation of Powers

We also reject DHHS' argument that permitting a juvenile court to order DHHS to accept a parent's relinquishment would be an infringement on the separation of powers between the judicial and executive branches in violation of art. II, § 1, of the Nebraska Constitution. DHHS argues that the court's authority to enter an order relieving a parent of his or her rights comes only *after* DHHS or another child placement agency has accepted the relinquishment pursuant to § 43-106.01. In support of its argument, DHHS relies upon its own regulations as published in the Nebraska Administrative Code. These regulations specify the process by which DHHS accepts a relinquishment, including a determination by DHHS as to whether relinquishment is in the best interests of the child and family.[15] But in the context of a juvenile proceeding such as this, it is the court which must determine what is in the best interests of the child, and we will not construe an administrative regulation as a limitation upon that judicial authority, because to do so would indeed be contrary to separation of powers principles.

Resolution

It is clear from the record that DHHS declined to accept the relinquishment of parental rights because one of the

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[13] Neb. Rev. Stat. § 43-1312(2) (Reissue 2008) (emphasis supplied).

[14] *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006); *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[15] See 390 Neb Admin. Code, ch. 8, § 004.02 (1998).

parents was paying a "pretty substantial amount" of child support which partially offset DHHS' cost with respect to Gabriela's care.[16] While conservation of public resources is a worthy objective, it cannot justify the legal perpetuation of a parental relationship which no longer exists in fact, thereby permitting an abandoned child to linger indefinitely in foster care. We agree with the observation of the juvenile court that the position taken by DHHS has made Gabriela a "de facto orphan."

[7] Accordingly, for the reasons discussed, we hold that where a juvenile has been adjudicated pursuant to § 43-247(3)(a) and a permanency objective of adoption has been established, a juvenile court has authority under the juvenile code to order DHHS to accept a tendered relinquishment of parental rights. Here, the juvenile court did not err in exercising that authority.

CONCLUSION

For the reasons discussed, we affirm the judgment of the separate juvenile court.

AFFIRMED.

[16] See § 43-290.

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

785 N.W.2d 849

Filed July 23, 2010. No. S-09-1166.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

3. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.

Appeal from the Separate Juvenile Court of Douglas County: PATRICK R. MCDERMOTT, County Judge. Affirmed as modified, and cause remanded for further proceedings.

Carla Heathershaw Risko for appellant.

Debra Tighe-Dolan, of White, Wulff & Jorgensen, for appellee Laura K.

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

STEPHAN, J.

Cornelius K. was adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by the separate juvenile court of Douglas County. The adjudication was based in part upon his adoptive mother's relinquishment of parental rights to the Nebraska Department of Health and Human Services (DHHS), which relinquishment was accepted by the court. DHHS appeals, arguing that the juvenile court did not have the statutory authority to accept the relinquishment.

BACKGROUND

Cornelius, born in May 1993, was adopted by Laura K. in 2003 after the termination of his biological mother's parental rights. In August 2008, Laura moved to Texas and left Cornelius in Omaha with a relative. On August 19, 2009, a petition was filed in the juvenile court alleging that Cornelius had been abandoned by Laura. Cornelius was placed in the temporary custody of DHHS.

An adjudication hearing was scheduled for October 23, 2009. Appearing at the hearing were a deputy Douglas County Attorney on behalf of the State, Laura and her counsel, and the guardian ad litem appointed for Cornelius. The record indicates that two representatives of DHHS were present in

the courtroom, but that no appearance was made on behalf of DHHS.

On the day prior to the hearing, the court was advised that Laura intended to relinquish her parental rights. At the beginning of the hearing, Laura's counsel confirmed that this was the case. At that point, Laura's counsel offered several exhibits, including a "Relinquishment of Child by Adoptive Parent" that had been signed by Laura in the presence of a notary public. The relinquishment provided in part:

> I Laura . . . do hereby voluntarily relinquish to [DHHS] all right to and custody of and power and control over Cornelius . . . and all claims and interest in and to his services and wages, to the end that [DHHS] may become the legal guardian of said child and do hereby authorize [DHHS] to place said child in a suitable family home and to consent to and procure the adoption of said child.

After questioning Laura, the court found that she executed the relinquishment and related documents freely, voluntarily, and knowingly. The court then accepted the relinquishment, dismissed Laura from the proceeding, and granted the State leave to file an amended petition "alleging the current circumstances of Cornelius."

After a brief recess, during which the State filed an amended petition alleging that Cornelius was a child within the meaning of § 43-247(3)(a) in that he was homeless and destitute because of Laura's relinquishment, the court conducted an adjudication hearing at which the guardian ad litem admitted the allegations of the amended petition. Based upon this, the court found the allegations of the amended petition to be true and ordered DHHS to prepare a permanency plan for Cornelius. The court made a specific finding that reasonable efforts to reunify Cornelius and Laura were not required pursuant to Neb. Rev. Stat. § 43-283.01(4) (Supp. 2009) because "before the law, Cornelius stands as an abandoned child." The court ordered Cornelius to remain in the temporary custody of DHHS pending disposition and further ordered both DHHS and the guardian ad litem to prepare and submit predispositional reports prior to a permanency planning hearing scheduled for December 7, 2009. The court also dismissed

Laura from the proceeding, based upon her execution of the relinquishment.

After counsel for DHHS perfected an appeal from the adjudication order, the juvenile court postponed the permanency planning hearing pending disposition of the appeal. We moved this appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

DHHS assigns, restated and consolidated, that the juvenile court erred in (1) accepting Laura's relinquishment of her parental rights and (2) finding that relinquishment of Laura's parental rights was in Cornelius' best interests.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

ANALYSIS

The initial question we must address is whether Laura's relinquishment of her parental rights was legally accepted. Nebraska's statutory procedures for adoption include the following provision:

> When a child shall have been relinquished by written instrument . . . to [DHHS] or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *In re Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009); *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[3] *In re Interest of Dustin S., supra* note 2; *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

> such child. Nothing contained in this section shall impair the right of such child to inherit.[4]

In *In re Interest of Gabriela H.*,[5] we held that a juvenile court may order DHHS to accept a relinquishment of parental rights in the circumstance where a child has been adjudicated pursuant to § 43-247(3)(a) and a permanency objective of adoption has been determined. But that is not what occurred here. Although the relinquishment was directed to DHHS, it was accepted by the court prior to any adjudication or permanency plan. We conclude that this procedure is not authorized by either the adoption statutes[6] or the Nebraska Juvenile Code.[7] The relinquishment has not been legally accepted, and therefore, Laura's parental rights have not been terminated.

[3] But this does not invalidate the adjudication. The purpose of the adjudication phase is to protect the interests of the child. At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence,[8] and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.[9]

One of the statutory grounds for adjudication is that the juvenile is "homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian."[10] In its amended petition, the State alleged that this ground for adjudication was met because Cornelius had no parent or legal guardian to care for him. The record fully supports this allegation. The fact that the relinquishment has not been accepted by DHHS means that Laura's parental rights have not been legally extinguished pursuant to § 43-106.01. But it does not diminish

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[4] Neb. Rev. Stat. § 43-106.01 (Reissue 2008).

[5] *In re Interest of Gabriela H., ante* p. 284, 785 N.W.2d 843 (2010).

[6] Neb. Rev. Stat. §§ 43-101 to 43-165 (Reissue 2008).

[7] Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008 & Supp. 2009).

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

[9] *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[10] § 43-247(3)(a).

the fact that Cornelius is a homeless and destitute child at risk of harm because currently there is no parent or legal guardian providing care for him. Cornelius is thus properly subject to the jurisdiction of the juvenile court under § 43-247(3)(a).

CONCLUSION

We conclude that because the relinquishment was not properly accepted, Laura's parental rights have not been terminated and the district court erred in dismissing her from the proceedings. We vacate that portion of the adjudication order, but affirm the order in all other respects and remand the cause to the juvenile court for further proceedings consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

ARLEEN M. WEBER, APPELLANT AND CROSS-APPELLEE, V. GAS 'N SHOP, INC., AND EMPLOYERS MUTUAL COMPANIES, APPELLEES AND CROSS-APPELLANTS.

786 N.W.2d 671

Filed July 23, 2010. No. S-09-1300.

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. **Workers' Compensation: Garnishment.** A garnishment action is an appropriate proceeding to enforce an award of the Workers' Compensation Court.
3. **Garnishment: Notice.** In a garnishment proceeding, the issue is whether the garnishee is indebted to the garnishor or had property or credits of the garnishor in its possession or under its control at the time it was served with notice of the garnishment.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

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

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

This case involves a garnishment proceeding to collect money allegedly due pursuant to a workers' compensation award. The case was previously before this court in *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009) (*Weber I*). In 2008, appellant, Arleen M. Weber, filed her 1993 workers' compensation award with the district court for Douglas County and commenced garnishment proceedings. She alleged that $184,875 was owed by appellees, Employers Mutual Companies (EMC) and Gas 'N Shop, Inc., representing temporary total disability payments since 1994. The district court granted appellees' motion to dismiss the garnishment proceedings, and Weber appealed. This dismissal was reversed in *Weber I*, in which we concluded, contrary to the ruling in district court, that Weber's workers' compensation award was not a conditional judgment and was not dormant. This court remanded the cause to the district court with directions to consider appellees' remaining affirmative defenses. On remand, in an order filed December 2, 2009, the district court dismissed Weber's action as being barred by the statute of limitations found at Neb. Rev. Stat. § 48-137 (Reissue 2008). Weber appeals. Appellees cross-appeal. For reasons others than those articulated by the district court, we affirm the dismissal of Weber's action.

II. STATEMENT OF FACTS

The underlying facts relevant to the current appeal were previously reported in *Weber I* and are as follows: In March 1991, Weber filed a workers' compensation action alleging that she sustained a compensable injury to her right knee while employed at Gas 'N Shop. On September 22, 1993, the Workers' Compensation Court entered an award (the 1993 award), which was affirmed by a review panel on February 25, 1994. The court awarded Weber 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 [Weber] remains temporarily totally disabled." The award provided that "[w]hen [Weber] reaches maximum medical improvement, she shall be entitled to the statutory amounts for any residual disability." The award further stated that "[i]f, after [Weber] reaches maximum medical improvement, the parties are unable to agree on the extent, if any, of permanent disability or on [Weber's] entitlement to vocational rehabilitation services, either party may file a further petition herein for the determination of such issues."

On May 16, 2008, Weber filed the compensation award with the district court for Douglas County and commenced garnishment proceedings on June 10. The garnishment proceedings were brought against UMB Bank. Weber alleged that UMB Bank held funds belonging to 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 she was owed $184,875, representing temporary total disability since 1994.

In response to the garnishment complaint, appellees filed a motion to dismiss. In their motion, they asserted seven affirmative defenses: (1) The compensation award was a conditional judgment and wholly void; (2) the compensation award was dormant; (3) appellees had complied with all 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 appellees' rights to due process.

An evidentiary hearing was held on the motion. Evidence was presented to establish that EMC received from Weber's treating physician a letter dated March 9, 1994, stating that Weber had reached maximum medical improvement as of 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 at the rate of $255 per week for an additional 11½ weeks based upon the 10-percent disability rating.

EMC received from Weber's treating physician a second report dated March 31, 1995. The physician revised Weber's disability rating to 20 percent based on ongoing problems with her knee. Upon receipt of this report, EMC sent Weber's attorney a second letter detailing the payments it would make based on this report. Appellees' evidence showed that 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.

Weber did not dispute the amount paid to her until January 2008, at which time Weber's attorney advised EMC that Weber was claiming additional disability benefits, penalties, interest and attorney fees pursuant to the 1993 award.

After the hearing, the district court entered an order granting appellees' motion to dismiss the garnishment proceeding. The district court based its decision primarily on the conclusion that in April 2000, the award became dormant pursuant to Neb. Rev. Stat. § 25-1515 (Reissue 2008).

On appeal, in *Weber I*, this court reversed the district court's order and remanded the cause with directions. We initially concluded that the award was sufficiently definite to be enforceable and was therefore not a conditional judgment. We further concluded that the award was not dormant. In *Weber I*, we did not address the remaining affirmative defenses raised by appellees because the district court had not ruled on these defenses. Instead, we reversed, and remanded to the district court to rule on the remaining defenses on the existing record unless the parties agreed to expand the record.

On remand, the court held a hearing on August 27, 2009. In an order filed December 2, the district court granted appellees'

motion to dismiss. The December 2 order is the subject of the current appeal. In its order, the district court concluded that appellees should have sought a modification of the 1993 award under Neb. Rev. Stat. § 48-141 (Supp. 2009) before converting from temporary to permanent benefits. The court also made numerous findings, including that EMC had paid the amounts recited earlier in this opinion pursuant to the 1993 award. Notwithstanding these findings, the district court concluded that the garnishment proceedings were barred by the 2-year statute of limitations found at § 48-137 and granted the motion to dismiss on this basis.

In connection with its statute of limitations analysis, the court reasoned that between July 9, 1997, and December 17, 1999, a period of 2 years 5 months, appellees did not make any payments for medical services on Weber's behalf. On December 17, appellees resumed making payments for medical services on Weber's behalf and continued to make such payments through August 3, 2006. The court concluded "from the applicable statute and the cases cited" in its order, that Weber "would have 2 years from the date of the last payment she received from [appellees]," which date "would approximately have been July 9, 1999," and that "[a]ny claim filed after July 9 . . . would be barred." Weber appeals, and appellees cross-appeal.

III. ASSIGNMENTS OF ERROR

1. Assignment of Error on Appeal

Weber claims that the district court erred as a matter of law when it concluded that § 48-137 barred a claim made more than 2 years after the last payment of compensation where the compensation was paid pursuant to an award from the Workers' Compensation Court.

2. Assignments of Error on Cross-Appeal

Appellees claim that the district court erred (1) in ruling that appellees were required to seek modification of the award pursuant to § 48-141 before converting from temporary to permanent disability benefits and (2) in failing to grant appellees'

motion to dismiss on the ground that they had complied with all of the terms of the 1993 award.

IV. 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. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

V. ANALYSIS

1. Appeal

(a) The District Court Erred When It Concluded That Weber's Claim Asserted in the Garnishment Proceeding Was Barred by the 2-Year Limitation in § 48-137

Weber claims that the district court erred as a matter of law when it concluded that her claim for further workers' compensation benefits and execution of garnishment was barred by the 2-year limitation in § 48-137. We agree with Weber that the district court erred in this conclusion and erred in dismissing her garnishment proceeding on this basis.

Section 48-137 provides as follows:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. In case of death, all claims for compensation shall be forever barred unless, within two years after the death, the parties shall have agreed upon the compensation under the Nebraska Workers' Compensation Act, or unless, within two years after the death, one of the parties shall have filed a petition as provided in section 48-173. When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last

> payment. In the event of legal disability of an injured employee or his or her dependent such limitation shall not take effect until the expiration of two years from the time of removal of such legal disability.

The district court reasoned that under § 48-137, Weber had 2 years from the last payment made by appellees on July 3, 1997, to assert a claim for the compensation she sought in this garnishment proceeding. The district court's reasoning is contrary to our decision in *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). In *Foote*, we considered a claim for medical expenses asserted greater than 2 years after the last payment made pursuant to an award previously entered on a worker's petition. We concluded that given the statutory language and the continuing jurisdiction of the compensation court with respect to its order awarding compensation, the 2-year limitation in § 48-137 was not applicable. Although the 2-year limitation is applicable in the case of voluntary payments made in the absence of a petition, we concluded that the 2-year limitation was not a bar where the worker had previously filed a timely petition.

We agree with Weber that the district court erred when it concluded that Weber's garnishment proceeding should be dismissed based on a purported failure to seek further compensation within 2 years after appellees made the last payment. However, notwithstanding this error in reasoning, because we conclude that dismissal was warranted on another basis, this error does not result in a reversal.

2. Cross-Appeal

(a) The District Court Erred in Ruling That EMC and Gas 'N Shop Were Required to Seek a Modification Under § 48-141

On cross-appeal, appellees claim that the district court erred when it ruled that appellees were required under § 48-141 to obtain an order modifying the 1993 award prior to converting payment of benefits from temporary total disability to permanent partial disability. In response, Weber asserts that the district court was correct and that, in the absence of a modification, she is entitled to a continuation of temporary

benefits since 1993 which she sought by way of this garnishment proceeding filed in 2008 in the amount of $184,875. We conclude that given the language of the 1993 award, appellees' payment of permanent partial disability benefits upon receipt of the 1994 letter from Weber's physician—stating Weber's maximum medical improvement and disability rating—was a performance of the obligations imposed by the 1993 award rather than a modification of the 1993 award, and that therefore, no modification proceeding under § 48-141 was required. We agree with appellees that the district court's ruling to the contrary was error.

Section 48-141, which is relevant to our resolution of appellees' first assignment of error, provides as follows:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments pursuant to section 48-139 shall be final and not subject to readjustment if the lump-sum settlement is in conformity with the Nebraska Workers' Compensation Act, unless the settlement is procured by fraud, but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage or by reason of the death of the dependent. In such case, the same procedure shall be followed as in sections 48-173 to 48-185 in case of disputed claim for compensation.

This case involves an award payable periodically. Weber asserts, and the district court concluded, that because converting from a temporary amount to a permanent amount was a change in "the amount of any . . . award" under the language of § 48-141, a modification was necessary under that statute before appellees could properly change periodic payment

amounts. 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. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010). As a matter of law, we conclude that the amount of the award as understood under § 48-141 did not change and that no modification proceeding was necessary. We note further that both Weber and the district court relied on certain cases referred to later in this opinion; however, we conclude that the cases relied on are factually distinguishable and that reliance thereon was misplaced.

The district court and Weber characterize the change in benefits in this case from temporary total to permanent partial as an improper unilateral cessation of temporary total benefits. To the contrary, the change in disability payments was not a unilateral act by appellees, but instead was both required and outlined under the 1993 award. The 1993 award provided in relevant part:

> IX.
>
> . . . .
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. [Weber] have and recover of [Gas 'N Shop] and [EMC] the sum of $255.00 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 [Weber] remains temporarily totally disabled as a result of said accident and injury. When [Weber] reaches maximum medical improvement, she shall be entitled to the statutory amounts for any residual disability.
>
> 2. [Gas 'N Shop] and [EMC] pay the medical and hospital reimbursement sums set forth in Paragraph V above.
>
> 3. A further hearing may be had herein as set forth in Paragraph VIII above.
>
> 4. The amended petition of [Weber] as against the defendant Milwaukee Insurance Company be and is hereby dismissed.

Paragraph VIII, to which reference is made in paragraph IX (3), provided that "[i]f, after [Weber] reaches maximum medical improvement, the parties are unable to agree on the extent, if any, of permanent disability or on [Weber's] entitlement to vocational rehabilitation services, either party may file a further petition herein for the determination of such issues."

By its terms, the 1993 award directed appellees to pay temporary total disability until such time as Weber reached maximum medical improvement and to thereafter pay "statutory amounts" for "residual disability." "Residual disability" undisputedly refers herein to permanent partial disability, and the right knee injury involves a scheduled member. The award provided a roadmap, and upon receipt of the disability rating supplied by Weber's physician, the dollar amounts could be objectively determined by reference to the workers' compensation statute which was incorporated by reference. The award was sufficiently definite, as we concluded in *Weber I*.

Taken as a whole, the award directed the dollar amounts of temporary total disability to be paid, and upon maximum medical improvement and receipt of a permanent disability rating, appellees were directed to apply the statutes to determine the dollar amounts to be paid for the right knee as permanent partial benefits thereafter. Because Weber supplied the maximum medical improvement information and the permanent disability rating, and given that the right knee injury is a scheduled member injury, appellees had only to do the math, which they did, and pay the resultant permanent partial disability amounts as directed in the award. No disagreement was occasioned or further petition filed when appellees converted from temporary total to permanent partial benefits in 1994, as they were directed to do in the 1993 award. This conversion was not a modification of an "amount of any award" under § 48-141, but, to the contrary, was in compliance and in obedience to the amounts inherent in the 1993 award. Because no modification of the 1993 award was implicated when appellees converted from paying temporary total to permanent partial disability, appellees were not required to seek a modification under § 48-141.

Our conclusion that, under the terms of the 1993 award, no modification proceeding was necessary under § 48-141 is consistent with *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007). In *Davis*, the rehearing award stated that when the employee's

> "total disability ceases, he shall be entitled to the statutory amounts of compensation for any residual permanent partial disability due to this accident and injury" [and that when the employee's] "total disability ceases if thereafter the parties cannot agree on the extent of [employee's] disability, if any, then a further hearing may be had herein on the application of either party."

274 Neb. at 372, 740 N.W.2d at 606. Later, the parties in *Davis* presented a stipulation which was ordered under which the employer paid the employee's temporary total benefits while the employee underwent vocational rehabilitation. Because the employee's physician later stated that the employee had reached maximum medical improvement and the employee had completed vocational rehabilitation, the employer ceased paying temporary total disability and paid permanent partial disability for the remainder of the statutory timeframe. We concluded upon these facts that no modification was necessary to terminate the employee's temporary total benefits and to begin payment of his permanent partial disability benefits.

In reaching our conclusion in *Davis*, we distinguished *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998), and *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). In the present case, Weber and the district court relied on *Starks* and *Hagelstein*. We again distinguish *Starks* and *Hagelstein*. Both *Starks* and *Hagelstein* involved the unilateral termination of benefits by an employer, without court direction and without first seeking a modification. We disapproved of the practice. In *Davis*, we noted that, unlike *Starks* and *Hagelstein*, the compensation court in *Davis*, as in the present case, had directed the cessation of temporary benefits and conversion to permanent benefits upon the happening of an identified event, and further provided that a dissatisfied party could seek further clarification from the compensation court. The cessation of temporary benefits herein, as in *Davis*,

and the further payment of permanent benefits were done with compensation court approval pursuant to existing awards and orders. Reliance on *Starks* and *Hagelstein* by Weber and the district court was misplaced.

Because appellees were following the 1993 award when converting from temporary total to permanent partial benefits, there was no change in the amount of the award under § 48-141. Appellees were not required to seek a modification of that award. Had Weber objected to such conversion, under paragraph VIII of the 1993 award, she was entitled to—but failed to—dispute that conversion by filing a "further petition" in the Workers' Compensation Court. We agree with appellees that they were not obliged to seek a purported modification under § 48-141 and that the district court erred when it ruled to the contrary.

(b) The District Court Erred When It Failed to Dismiss on the Ground That Appellees Had Complied With All Terms of the Award

On cross-appeal, appellees claim that the district court erred when it failed to grant appellees' motion to dismiss the garnishment proceeding on the ground appellees had complied with all terms of the 1993 award and that therefore, UMB Bank did not hold funds belonging to EMC to which Weber was entitled. We find merit to this assignment of error and conclude that, for reasons other than those given by the district court, Weber's garnishment proceeding should be dismissed on this basis.

[2,3] We have held that a garnishment action is an appropriate proceeding to enforce an award of the Workers' Compensation Court. See *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996). In a garnishment proceeding, the issue is whether the garnishee is indebted to the garnishor or had property or credits of the garnishor in its possession or under its control at the time it was served with notice of the garnishment. See Neb. Rev. Stat. § 25-1030.02 (Reissue 2008).

In *Weber I*, we reversed, and remanded for further proceedings and directed the district court to consider appellees' remaining defenses on the existing record unless the parties

agreed to reopen and expand the record. Upon remand, the record was not expanded and the district court in its order filed on December 2, 2009, now on appeal, made findings on the existing record.

In its findings, the district court relied on the affidavit of a senior claims representative of EMC detailing the disability amounts EMC had paid to Weber. The district court found that EMC had paid temporary total disability benefits followed by permanent partial disability benefits for the time periods set forth earlier in this opinion and that the permanent partial disability amount was based on the impairment rating supplied by Weber's physician. Notwithstanding its factual finding that EMC had paid the amounts directed in the 1993 award, the district court concluded that EMC was required to seek a modification of the award under § 48-141 prior to converting benefits from temporary total disability to permanent partial disability, and in view of this erroneous conclusion, it could not find that EMC had complied with the 1993 award. As discussed earlier in this opinion, no modification of the award was required in this case before EMC ceased paying temporary total disability and began paying permanent partial disability, and the district court therefore erred when it failed to find merit to the defense that EMC had complied with the terms of the 1993 award.

Because the factual findings of the district court indicate that EMC has in fact complied with the 1993 award, nothing is owed to Weber by EMC and UMB Bank does not hold funds of EMC to which Weber is entitled. As urged in appellees' cross-appeal, the district court erred when it failed to grant appellees' motion to dismiss based on the ground that appellees had complied with the terms of the award.

VI. CONCLUSION

As asserted in Weber's appeal, the district court erred when it concluded that her claim asserted in this garnishment proceeding was barred by the 2-year limitation in § 48-137. As asserted in appellees' cross-appeal, given the language of the 1993 award, the district court erred when it concluded that appellees were required by § 48-141 to seek a modification

before converting disability benefit payments from temporary total disability to permanent partial disability. As asserted in appellees' cross-appeal, the district court erred when it failed to grant appellees' motion to dismiss on the ground that appellees had complied with all the terms of the 1993 award. Although our reasoning differs from that of the district court, we affirm its order dismissing Weber's summons and order of garnishment and interrogatories with prejudice.

AFFIRMED.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSE SANDOVAL, APPELLANT.
788 N.W.2d 172

Filed July 30, 2010. No. S-05-142.

1. **Criminal Law: Aggravating and Mitigating Circumstances.** Aggravating circumstances are not to be considered elements of the underlying crimes.
2. **Trial: Jury Instructions.** The giving of a cautionary instruction generally rests within the judicial discretion of the trial court.
3. **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.
4. **Trial: Juries: Appeal and Error.** A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard.
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. **Juries: Words and Phrases.** Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves.
7. **Juries: Appeal and Error.** To reduce the dangers associated with anonymous or numbers juries, a court should not impanel such a jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. Within the scope of this two-part test, the decision is left to the discretion of the lower court and is subject to a review for abuse of discretion.

8. **Constitutional Law: Juries.** The impaneling of an anonymous jury and its potential impact on the constitutionality of a trial must receive close judicial scrutiny and be evaluated in the light of reason, principle, and common sense.
9. **Effectiveness of Counsel: Words and Phrases.** Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
10. **Juries.** Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.
11. **Juror Qualifications: Parties: Appeal and Error.** The extent to which the 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 resulted.
12. **Juror Qualifications: Death Penalty.** It is well established that Neb. Rev. Stat. § 29-2006(3) (Reissue 2008) allows courts to question jurors about their beliefs regarding the death penalty.
13. **Statutes: Legislature: Intent.** Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
14. **Trial: Witnesses: Indictments and Informations.** Whether to permit the names of additional witnesses to be endorsed upon an information after the information has been filed is within the discretion of the trial court.
15. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
16. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
17. **Trial: Proof: Appeal and 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.
18. **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.
19. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial.
20. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
21. **Motions for Mistrial: Appeal and Error.** In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence.

22. **Prosecuting Attorneys: Appeal and Error.** Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case.
23. **Right to Counsel: Conflict of Interest: Appeal and Error.** Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision.
24. **Constitutional Law: Right to Counsel: Conflict of Interest.** A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel.
25. **Effectiveness of Counsel: Conflict of Interest.** In Nebraska, the right to effective assistance of counsel has been interpreted to entitle the accused to the undivided loyalty of an attorney, free from any conflict of interest.
26. ____: ____. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
27. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
28. **Jury Instructions.** Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error.
29. **Constitutional Law: Jury Instructions.** The proper inquiry is not whether a jury instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury applied it in that manner.
30. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the district court for a new sentencing hearing.
31. **Constitutional Law: Convictions: Appeal and Error.** Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction.
32. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof: Appeal and Error.** Harmless error review in a capital sentencing case looks to whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on an invalid aggravator.
33. **Criminal Law: Jury Instructions: Words and Phrases.** "Mental anguish," although included in Nebraska's pattern jury instructions, defined as a victim's uncertainty as to his or her ultimate fate, does not have any basis in Nebraska

law. Neither the courts nor the Legislature has used the term "mental anguish" as a part of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).

34. **Jury Instructions.** A jury instruction should correctly state the Nebraska law applicable to the issues in the case.
35. **Sentences: Death Penalty.** Whenever a State seeks to impose the death penalty, the discretion of the sentencing body must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.
36. ____: ____. A sentencing authority's discretion must be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty.
37. **Homicide: Aggravating and Mitigating Circumstances: Proof.** "Exceptional depravity" pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
38. **Death Penalty: Aggravating and Mitigating Circumstances.** The balancing of aggravating circumstances against mitigating circumstances in deciding whether to impose the death penalty is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors.
39. **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.
40. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
41. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by the evidence in the record.
42. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
43. **Judges: Evidence: Presumptions.** It is presumed that judges disregard evidence which should not have been admitted.
44. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief.
45. **Trial: Rebuttal Evidence: Appeal and Error.** The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony.
46. **Courts: Sentences.** A sentencing panel has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed.
47. **Courts: Sentences: Evidence.** Neb. Rev. Stat. § 29-2521 (Reissue 2008) permits a sentencing panel to receive any evidence which the presiding judge deems to have probative value.
48. **Death Penalty.** Execution by electrocution is cruel and unusual punishment.

49. **Constitutional Law: Death Penalty.** The death penalty, when properly imposed by a State, does not violate either the 8th or the 14th Amendment to the U.S. Constitution or Neb. Const. art. I, § 9.
50. **Criminal Law: Prosecuting Attorneys.** The State retains broad discretion as to whom to prosecute and what charges to file. This discretion is limited only to constitutional constraints, that is, a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.
51. **Criminal Law: Courts: Prosecuting Attorneys: Presumptions: Evidence.** The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary.
52. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
53. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
54. **Sentences: Death Penalty: Appeal and Error.** Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), the Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. This review requires the court to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of this review is to ensure that the sentences imposed in a case are no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

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

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

WRIGHT, J.

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I. NATURE OF CASE

Jose Sandoval was convicted in Madison County District Court of five counts of first degree murder and five counts of use of a deadly weapon to commit a felony. He was sentenced to death for each count of murder, 48 to 50 years' imprisonment on three of the weapon counts, and 50 to 50 years' imprisonment on the remaining two weapon counts. Sandoval appeals.

II. BACKGROUND

1. Crimes

On the morning of September 26, 2002, Sandoval, Erick Vela, and Jorge Galindo entered a bank located in Norfolk, Nebraska. In less than a minute, they shot and fatally wounded four bank employees and one customer: Lola Elwood, Samuel Sun, Lisa Bryant, Jo Mausbach, and Evonne Tuttle.

Before the shootings occurred, witnesses observed three Hispanic males dressed in dark, baggy clothing on the streets near the bank and in the alley behind the bank. One of the males was identified as Vela, and another was identified as Sandoval.

At 8:44 a.m., the bank's surveillance video shows Sandoval, Vela, and Galindo entering the bank wearing dark clothing. Galindo turns to his left and enters Elwood's office, and Vela turns to his right and enters Bryant's office. Sandoval, wearing a backpack, walks up to the teller counter and stands next to Tuttle. He points a semiautomatic gun at the employees behind the teller counter and begins shooting. He then turns and shoots Tuttle. The video shows Sandoval jumping over the teller counter and then jumping back to the lobby. In doing so, he left a footprint on the counter, which matched the shoe he was wearing when he was apprehended.

A customer waiting at the drive-through window closest to the bank observed Sandoval approach the teller counter with a gun. She saw him point the gun at Sun and then motion for Mausbach to come around the corner. She saw Sandoval shoot to the right and to the left.

Meanwhile, customer Micki Koepke heard two shots as she approached the bank on foot from the parking lot. Upon entering, she saw Sandoval behind the teller counter, holding a gun and smiling at her. Realizing a robbery was in progress, she turned to run out of the bank. She heard two more shots on her way out, one of which shattered the glass window around her. Another bullet impacted the drive-through window of a fast-food restaurant across the street.

When the robbery began, Elwood was meeting with bank employees Susan Staehr and Cheryl Cahoy. Staehr and Cahoy watched Galindo enter the doorway of Elwood's office, pull out a gun, and shoot Elwood several times in the chest. At the same time, Vela entered Bryant's office and shot her in the leg and in the neck, while Sandoval shot Mausbach in the head, Sun in the face and neck, and Tuttle in the back of the head. All five victims died from injuries sustained from the gunshot wounds.

After the robbery, several witnesses saw Sandoval, Vela, and Galindo run from the bank and down the alley. One man was wearing a backpack. Noticing the men and believing their behavior to be suspicious, one witness followed them in her car for several blocks and watched them enter a house.

Inside the house, Galindo woke one of the residents. He pointed a gun at her and demanded her car keys, which she gave him. He took the keys, and the three men stole her car. When the police arrived, they recovered a backpack lying in the next-door neighbor's yard. The backpack contained spray paint, gun ammunition, and some "smoke distraction devices." Police also discovered Sandoval's fingerprint on a doorframe of the house.

Using the car's OnStar navigation feature, the Nebraska State Patrol found the vehicle abandoned in a wet, marshy area along a minimum maintenance road near Meadow Grove, Nebraska. Nearby, a green and brown Ford pickup with Madison County plates and a golf cart in the back was stolen from a residence.

At 11:29 a.m., the O'Neill, Nebraska, police chief received a call about a suspicious vehicle driving westbound on Highway 275 near O'Neill. The chief located the vehicle, which was the stolen pickup. Three Hispanic males were slouched low in the seat. The pickup turned into a parking lot, and the chief saw Sandoval get out of the pickup and walk into a discount store.

After the pickup reentered Highway 275, the chief pulled it over. The two remaining occupants were identified as Vela and Galindo and were arrested. Both men's pants were wet up to the knees and had mud on the bottom cuffs. Sandoval was apprehended at a fast-food restaurant next to the discount store a short time later. He also had mud on the cuffs of his pants.

After his arrest, Galindo guided officers to the location of the weapons used in the murders. Officers recovered a Glock model 17, a Ruger model P89, and a Heckler & Koch USP several miles from Ewing, Nebraska, on Highway 275. The bullet casings recovered from the scene established these guns were used in the murders. The Ruger pistol was sold to Sandoval in January or February 2002. The Glock and Heckler & Koch pistols were stolen from a sporting goods store in Norfolk on September 5, 2002. Galindo's girlfriend testified that Galindo told her he and Sandoval had robbed a gunshop.

2. Trial and Aggravation

On November 24, 2003, a jury convicted Sandoval of five counts of first degree murder and five counts of use of a deadly weapon to commit a felony. Following the guilty verdicts, the district court conducted the aggravation phase of the trial in which the jury was asked to determine the existence of any aggravating circumstances. The State alleged five aggravators: (1) that Sandoval has a substantial prior history of serious assaultive or terrorizing criminal activity; (2) that Sandoval committed the murder in an effort to conceal the identity of the perpetrator of such crime other than the murder of that particular victim; (3) that the murder committed by Sandoval (a) was especially heinous, atrocious, cruel, or (b) manifested exceptional depravity by ordinary standards of morality and intelligence; (4) that at the time the murder was committed, Sandoval also committed another murder; and (5) that Sandoval, at the time this murder was committed, knowingly created a great risk of death to at least several persons.

On December 2, 2003, the jury returned a verdict concluding that aggravators (2), (3), (4), and (5) existed with respect to each of the five murders. The judge ordered a presentence investigation report.

3. Mitigation and Sentencing

After the jury determined the existence of four aggravating factors, the court proceeded with the mitigation and sentencing phase of the trial. Hearings began on December 13, 2004. The three-judge panel received evidence of mitigation and sentence excessiveness or disproportionality. It concluded that none of the statutory mitigating circumstances existed, but found that one nonstatutory mitigating circumstance existed—that Sandoval suffered from a bad childhood as a result of a dysfunctional family setting. On January 14, 2005, the three-judge panel sentenced Sandoval to death for each of the five counts of first degree murder. Sandoval received 48 to 50 years' imprisonment for three counts of use of a deadly weapon and 50 to 50 years' imprisonment for two counts of use of a deadly weapon. All sentences were to be served consecutively.

III. ASSIGNMENTS OF ERROR

Sandoval alleges, consolidated and restated, that the trial court erred in

(1) failing to find 2002 Neb. Laws, L.B. 1, was unconstitutional, ex post facto legislation, and in violation of the Due Process Clause of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution;

(2) failing to conduct a preliminary examination as to the aggravating circumstances;

(3) failing to give the jurors a cautionary instruction as to why they were transported from Grand Island, Nebraska, to Aurora, Nebraska, and in failing to give a curative instruction regarding the potential jurors' discussion of the case during voir dire;

(4) impaneling an anonymous jury and failing to give a curative instruction;

(5) permitting the jury to believe that the responsibility for determining the appropriateness of the death penalty belonged to the three-judge sentencing panel;

(6) disclosing the notice of aggravation to the jury before the verdict was rendered on the issue of Sandoval's guilt;

(7) permitting the State to endorse over 500 witnesses;

(8) permitting improper statements by the prosecutor and improperly commenting on the evidence;

(9) failing to require the jury to determine whether Sandoval was a major participant in the crime and exhibited reckless disregard for human life;

(10) overruling trial counsel's motions to withdraw and Sandoval's motion for substitute counsel, and failing to discharge trial counsel;

(11) failing to give a limiting instruction regarding what constituted "the murder" in four of the five aggravators;

(12) instructing the jury on aggravator (1)(d);

(13) instructing the jury on aggravator (1)(f);

(14) overruling Sandoval's motions for acquittal;

(15) receiving evidence, denying rebuttal, and denying a jury at the mitigation and sentencing phase of the trial; and

(16) not finding that the death penalty is unconstitutional.

Sandoval alleges ineffective assistance of counsel with respect to many of the assignments of error listed above.

(17) He also claims his trial counsel provided ineffective assistance by allowing a court-appointed psychiatrist to examine Sandoval, eliciting speculative testimony from a witness, failing to call a forensic pathologist as a rebuttal witness, and failing to adduce evidence of prior consistent statements regarding his drug use.

IV. ANALYSIS

1. L.B. 1

Three of Sandoval's assignments of error relate to the retroactive application of L.B. 1. He claims that L.B. 1 is unconstitutional because it discourages a capital defendant from exercising his right to a jury trial as to the aggravating circumstances, that L.B. 1 is ex post facto legislation, and that L.B. 1 violates his right to due process.

Prior to the passage of L.B. 1, Nebraska law provided that after a defendant was found guilty of first degree murder, a trial judge or a three-judge panel determined whether statutory aggravating circumstances existed. Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1995). If aggravators applied, the defendant faced a maximum penalty of death. Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2002) and 28-303 (Reissue 1995). If aggravators did not exist, the defendant faced a maximum penalty of life imprisonment. This procedure was invalidated by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

In *Ring*, the U.S. Supreme Court held that capital defendants are entitled to a jury determination of any fact that would increase the possible maximum punishment. Because defendants convicted of first degree murder in Nebraska face an increased maximum punishment if aggravating circumstances exist, *Ring* entitles defendants to have a jury determine the existence of the aggravating circumstances. To bring Nebraska statutes in compliance with *Ring*, the Nebraska Legislature enacted L.B. 1 on November 22, 2002, effective the following day.

Based on the fact that *Ring* invalidated Nebraska's procedure for imposing the death penalty before Sandoval committed the crimes and that L.B. 1 did not become law until after he committed the crimes, Sandoval claims several errors relating to the application of L.B. 1 to his case. First, he claims that L.B. 1 is ex post facto legislation and in violation of article I, § 10, of the U.S. Constitution and article I, § 16, of the Nebraska Constitution. Second, he alleges that L.B. 1 is unconstitutional facially and as applied to the extent that it discourages a capital defendant from exercising his or her right to a jury trial as to the aggravating circumstances. Finally, he claims that the application of L.B. 1 violates the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. We recently addressed all of these issues in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). In accordance with our opinion in *Galindo*, we find that these assignments of error do not have merit.

2. Preliminary Examination as to Aggravating Circumstances

Sandoval argues that the trial court erred by not conducting a second preliminary examination regarding the aggravating circumstances alleged in the second amended information. Nebraska law requires that a criminal defendant receive a preliminary hearing before an information is filed against the defendant for any offense. Neb. Rev. Stat. § 29-1607 (Reissue 2008). This requirement does not extend to amended informations that do not change the nature or identity of the offense charged and do not include additional elements. See *State v. Ferree*, 207 Neb. 593, 299 N.W.2d 777 (1980).

[1] Further, Neb. Rev. Stat. § 29-2519(2)(d) (Reissue 2008), enacted to comply with *Ring*, specifies that aggravating circumstances are not to be considered elements of the underlying crimes. Construing § 29-2519 in *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008), we stated that the Sixth Amendment to the U.S. Constitution requires only that defendants have notice such that they can defend against charges made against them.

Aggravating circumstances are not essential elements of first degree murder. *Mata, supra.*

It is undisputed that Sandoval received a preliminary examination as to the five charges of first degree murder and five charges of use of a deadly weapon to commit a felony. After the preliminary hearing, the State filed an information on November 1, 2002. It filed an amended information on December 5, which included a notice of aggravation, and a second amended information on March 3, 2003. The amended informations did not include elements different than those alleged at the preliminary hearing. As such, this assignment of error is without merit. Because Sandoval was not entitled to a second preliminary hearing on the amended information, his argument that his counsel provided ineffective assistance of counsel by failing to demand a hearing is without merit as well.

3. Cautionary Instructions

Sandoval alleges that the trial court erred in not giving the jurors a cautionary instruction explaining why they were transported from Grand Island to Aurora and in not giving a curative instruction regarding the potential jurors' discussion of the case during voir dire. He also claims his counsel was ineffective for failing to conduct voir dire of the entire jury panel.

(a) Standard of Review

[2] The giving of a cautionary instruction generally rests within the judicial discretion of the trial court. *Johnson v. Nathan*, 161 Neb. 399, 73 N.W.2d 398 (1955).

(b) Analysis

Sandoval's trial took place in Aurora in Hamilton County; however, the jurors were summoned from Grand Island in Hall County. To alleviate parking concerns, the trial court made arrangements for the jurors to be transported as a group, accompanied by a bailiff, from Grand Island to Aurora and back each day. Sandoval's counsel asked the court to give a cautionary instruction to the jurors advising them that the reason for the group transportation was based on parking and

mileage concerns so that they would not think it was for safety. The court agreed, but did not ultimately give the instruction when informing the jury of the transportation arrangements. Sandoval's counsel did not object at that time.

Sandoval claims that the trial court's failure to advise the jurors of the reason they were transported from Grand Island to Aurora adversely affected his right to a presumption of innocence. There is nothing in the record suggesting to jurors that this practice was for any reason besides logistics. We will not presume prejudice based on mere speculation. See *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

Sandoval also alleges that his attorney provided ineffective assistance of counsel by failing to request voir dire of the entire jury panel after the trial court received information that potential jurors had been discussing the case in the jury room. Potential jurors were sharing information they had read or heard in the news media about the bank robbery, but none had any knowledge of the case outside what was in the news.

At Sandoval's counsel's request, the trial court agreed to give a curative instruction that the jurors disregard any information they heard in the jury room as well as any other information they received. In the court's opening remarks to the jury, it advised the jurors that they were to rely solely on the evidence presented in the trial and disregard anything else they knew about the case, that anything they saw or heard outside of the courtroom was not evidence, and that they were not to discuss the case with anyone before deliberation.

[3] Although Sandoval claims that the trial court did not give a curative instruction, it is clear that the court sufficiently emphasized that the jurors were to set aside any information they heard from sources outside of the courtroom. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). As there is no evidence that the jurors disregarded the court's instructions, this assignment of error is without merit. Because there is no prejudice, Sandoval's ineffective assistance of counsel claim is also without merit.

4. Jury

Sandoval alleges the trial court erred in impaneling an anonymous jury and in failing to give a curative instruction. He claims this action violated his Sixth Amendment right to a public trial by an impartial jury. Sandoval's trial counsel did not object to this procedure at the time it was imposed, and Sandoval argues that the failure to do so was ineffective assistance of counsel.

(a) Standard of Review

[4] A district court's decision regarding impaneling an anonymous jury is reviewed under the deferential abuse-of-discretion standard. See *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995).

[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).

(b) Analysis

In a preliminary hearing, the trial court announced that it intended to identify jurors by number rather than by name. The court ordered Sandoval's counsel not to disclose the names of the potential jurors to anyone, including Sandoval. After the change of venue, the court reiterated that it would be using numbers to identify jurors during individual voir dire. As each juror entered the courtroom for voir dire, the court informed the juror that the court and attorneys would be referring to the juror by his or her juror number. No other acknowledgment or explanation of the action was given. We conclude that the court's procedure does not amount to an abuse of discretion under the circumstances of this case.

(i) Types of Anonymous Juries

[6] Although Sandoval characterizes the trial court's actions as impaneling an "anonymous" jury, there is a distinction that must be noted. The term "anonymous jury" encompasses the withholding of a broad spectrum of information. See, *U.S. v. Peoples*, 250 F.3d 630 (8th Cir. 2001); *U.S. v. Honken*, 378 F.

Supp. 2d 880 (N.D. Iowa 2004). Generally, an "anonymous jury" describes a situation where juror identification information is withheld from the public and the parties themselves. See, *State v. Brown*, 280 Kan. 65, 118 P.3d 1273 (2005); *State v. Tucker*, 259 Wis. 2d 484, 657 N.W.2d 374 (2003).

The least secretive form of an anonymous jury is where only the jurors' names are withheld from the parties. *Honken, supra*. This procedure may also be called an innominate jury or, if jurors are referred to by number rather than name, a numbers jury. *Honken, supra*; *Brown, supra*; *Tucker, supra.* For example, in *Tucker*, counsel for both parties had the names of all jurors; however, the court instructed the parties to refer to the jurors by number in court.

In other cases, names and other identification information are withheld, but limited biographical information is made available. In *U.S. v. Edwards*, 303 F.3d 606 (5th Cir. 2002), the court withheld the names and places of employment of the jurors but released their ZIP codes and parishes. Going a step further, the courts in *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), and *U.S. v. Sanchez*, 74 F.3d 562 (5th Cir. 1996), ordered that the names, addresses, and places of employment of the jurors and their family members not be disclosed when it impaneled an anonymous jury. As other courts have noted, "[a]nonymity has long been an important element of our jury system. Jurors are randomly summoned from the community at large to decide the single case before them and, once done, to 'inconspicuously fade back into the community.'" *U.S. v. Branch*, 91 F.3d 699, 723 (5th Cir. 1996) (quoting *U.S. v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988)).

The propriety of withholding personal information or names of potential jurors from the defendant is an issue of first impression for this court; however, other federal and state courts have addressed the issue. See, *Ochoa-Vasquez, supra*; *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *U.S. v. Thornton*, 1 F.3d 149 (3d Cir. 1993); *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992); *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *Brown, supra*; *Tucker, supra*. Generally, impaneling an anonymous jury is a drastic measure that should only be undertaken in limited

circumstances, see *Ochoa-Vasquez, supra*, and *Krout, supra*, and there is a danger that the practice could prejudice jurors against the defendants, see *Darden, supra*.

Juror anonymity is most disadvantageous to the defendant during jury selection and with regard to the defendant's presumption of innocence. *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002). During jury selection, a lack of information could prevent the defense from making intelligent decisions regarding peremptory strikes. *Id.* Additionally, there is a risk that potential jurors will interpret the anonymity as an indication that the court believes the defendant is dangerous. *Id.*

(ii) Two-Part Test

[7] To reduce the dangers associated with anonymous or numbers juries, a court should not impanel such a jury unless it (1) concludes that there is a strong reason to believe the jury needs protection and (2) takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his or her fundamental rights are protected. *Ochoa-Vasquez, supra*; *Darden, supra*; *U.S. v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995); *U.S. v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *Paccione, supra*. See, also, *State v. Samonte*, 83 Haw. 507, 928 P.2d 1 (1996); *Major v. State*, 873 N.E.2d 1120 (Ind. App. 2007); *State v. Brown*, 280 Kan. 65, 118 P.3d 1273 (2005); *People v. Williams*, 241 Mich. App. 519, 616 N.W.2d 710 (2000); *State v. Ford*, 539 N.W.2d 214 (Minn. 1995); *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006); *State v. Ross*, 174 P.3d 628 (Utah 2007); *State v. Tucker*, 259 Wis. 2d 484, 657 N.W.2d 374 (2003). Within the scope of this two-part test, the decision is left to the discretion of the lower court and is subject to a review for abuse of discretion. *Darden, supra*; *Brown, supra*.

The impaneling of an anonymous jury is a relatively recent phenomenon, *Tucker, supra*, and, as noted earlier, is an issue of first impression for this court. There is no statute or rule requiring a trial court to make specific findings of fact regarding its determination to use an anonymous or numbers jury. In *Tucker*, the trial court informed counsel that its practice was to use juror numbers rather than names in drug cases, and the Supreme Court of Wisconsin determined that the trial court

erred by failing to make an individualized determination that the jury needed protection. Such a determination is needed for a proper appellate review. Henceforth, if the court decides to impanel an anonymous or numbers jury, we direct the court to follow the two-part test set forth herein and to articulate its specific findings of fact in support of such decision.

a. Compelling Reason to Believe Jury Needs Protection

The first prong is determining whether the jury needs protection. Courts regularly consider several factors, including (1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. See, *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005); *Mansoori, supra*; *U.S. v. Sanchez*, 74 F.3d 562 (5th Cir. 1996); *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995); *Edmond, supra*; *Ross, supra*; *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *Samonte, supra*; *Major, supra*; *Ivy, supra*; *Tucker, supra*.

Many cases in which the court utilized anonymous juries were trials of individuals associated with gangs, Mafia families, or organizations involved with drug dealing. See, *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002); *U.S. v. Darden*, 70 F.3d 1507 (8th Cir. 1995); *Krout, supra*; *U.S. v. Thornton*, 1 F.3d 149 (3d Cir. 1993); *Paccione, supra.* For example, in *Paccione*, the defendants were charged with racketeering and mail fraud in connection with operating an illegal landfill and illegally transporting medical waste. Angelo Paccione was believed to be a member of the "Gambino Crime Family," had been associated with several "'"mob-style" killings,'" had a history of interfering with the judicial process, and had threatened a witness. 949 F.2d at 1192. Furthermore, there was significant publicity surrounding the trial. Taking into account the defendants' Mafia connections and the other surrounding

circumstances, the court ordered that jurors' names, addresses, and places of employment not be disclosed. The U.S. Court of Appeals for the Second Circuit determined that the district court did not abuse its discretion in keeping the jurors' identification information confidential. *Id.*

Involvement in organized crime, however, is not enough to justify juror anonymity; "'something more'" is required. *Mansoori*, 304 F.3d at 651.

> "'[S]omething more' can be a **demonstrable history** or likelihood of obstruction of justice on the part of the defendant or others acting on his behalf or a showing that trial evidence will depict a pattern of violence by the defendant [] and his associates such as would cause a juror to reasonably fear for his own safety."

Id. (emphasis supplied) (quoting *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992)). See, also, *U.S. v. Vario*, 943 F.2d 236 (2d Cir. 1991). There must be some evidence indicating that intimidation of the jurors is likely, such as a history of threatening witnesses or otherwise obstructing justice. *Mansoori, supra.*

Extensive publicity can also warrant the use of an anonymous jury. *U.S. v. Edwards*, 303 F.3d 606 (5th Cir. 2002); *U.S. v. Branch*, 91 F.3d 699 (5th Cir. 1996). In *Branch*, the defendants were members of the "Branch Davidians" sect and faced murder and weapons charges stemming from the standoff between sect members and law enforcement at Mount Carmel near Waco, Texas. 91 F.3d at 709. At trial, the district court elected to withhold the jurors' names and addresses due to the extensive media attention that the case received. Noting that the potential jurors had answered numerous questions and were subject to voir dire regarding bias, the U.S. Court of Appeals for the Fifth Circuit concluded that withholding the names and addresses of the jurors did not violate the defendants' right to a trial before an impartial jury. *Branch, supra.* See, also, *Edwards, supra*. In *U.S. v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995), the Eighth Circuit concluded an anonymous jury was warranted because "[t]he case was so highly publicized . . . that some defendants filed motions for a change of venue."

The fact that a defendant faces a lengthy prison sentence if convicted is also a consideration. The *Edwards* court noted that one of the defendants faced a maximum of 375 years in prison and a fine of over $7.5 million and found that the district court did not abuse its discretion in impaneling an anonymous jury.

Sandoval, Vela, Galindo, and Rodriguez were members of the Latin Kings gang. For instance, Sandoval commanded a riot while in prison and preyed on other inmates at the Lincoln Correctional Center. However, Sandoval's association with the Latin Kings is not enough to merit an anonymous jury without satisfying the "something more" requirement.

The murders and attempted robbery of the bank in Norfolk generated significant media attention in Nebraska. Venue was changed, the jurors were summoned from Hall County, and the trial occurred in Hamilton County. Also, if convicted of five counts of first degree murder, Sandoval faced life imprisonment or the death penalty. This combination of factors is sufficient evidence for the trial court to conclude that the jury needed protection.

b. Precautions to Prevent Prejudice

Once a court decides to impanel an anonymous jury, it must take reasonable precautions to ensure the defendant will not be prejudiced. A defendant could be prejudiced during voir dire if he or she is unable to conduct a meaningful examination of the jury. See *U.S. v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995). A defendant could also be prejudiced if jurors interpret anonymity to mean that the defendant is guilty or dangerous. *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002).

i. Prejudice During Voir Dire

Prejudice that a defendant may suffer from not having complete juror biographical information during voir dire can be overcome with extensive questioning. Other courts have recognized that a "'defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of "'a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself.'"'" *U.S. v. Crockett*, 979 F.2d 1204, 1216

(7th Cir. 1992) (quoting *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991)). The concern of prejudice can also arise when parties are making peremptory challenges. As the *Mansoori* court noted: "Juror anonymity also deprives the defendant of information that might help him to make appropriate challenges—in particular, peremptory challenges—during jury selection." 304 F.3d at 650.

Similar to the practice employed in this case, the court in *People v. Hanks*, 276 Mich. App. 91, 740 N.W.2d 530 (2007), identified the jurors by number, but still provided the parties with all of the jurors' biographical information and gave the parties the opportunity to conduct extensive voir dire. The Michigan Court of Appeals concluded that the jury in the case was "anonymous only in a literal sense, so none of the dangers of an 'anonymous jury' was implicated." *Id.* at 94, 740 N.W.2d at 533 (citing *People v. Williams*, 241 Mich. App. 519, 616 N.W.2d 710 (2000)). Accord *U.S. v. Branch*, 91 F.3d 699 (5th Cir. 1996).

We conclude that the district court took reasonable precautions to protect Sandoval from prejudice during voir dire. The names of the potential jurors were withheld from Sandoval, but not from his attorney. The trial court permitted extensive individual voir dire of every juror. The scope of voir dire eliminated any prejudice that might have resulted from the numbers procedure used to impanel the jury.

ii. Prejudice to Presumption of Innocence

[8] Sandoval claims that the impaneling of a numbers jury violated his right to a presumption of innocence because the trial court did not provide the jurors with an explanation for their anonymity. Such an instruction might have been beneficial, but the absence of such an instruction does not automatically indicate prejudice. See *Mansoori, supra*. Rather, "the empaneling of an anonymous jury and its potential impact on the constitutionality of a trial must 'receive close judicial scrutiny and be evaluated in the light of reason, principle and common sense.'" *U.S. v. Vario*, 943 F.2d 236, 239 (2d Cir. 1991).

The trial court did not draw attention to the fact that juror numbers were used instead of names, and there is no indication that the jurors understood the practice to be unusual. The trial court did not make any announcement to the panel informing them that their names or information would be confidential. As voir dire was conducted individually, each potential juror was informed by the court that he or she would be referred to by his or her juror number. Aside from this initial notification to the juror, the parties generally referred to the jurors as "Sir" or "Ma'am." Furthermore, once the court impaneled the jury, it instructed the jurors that Sandoval was presumed innocent and that the State must prove the charges beyond a reasonable doubt before the jury could find Sandoval guilty. See, *U.S. v. Mansoori*, 304 F.3d 635 (7th Cir. 2002); *U.S. v. Crockett*, 979 F.2d 1204 (7th Cir. 1992); *Vario, supra.* Every juror stated that he or she could be fair and impartial and that he or she was not biased or prejudiced. There is no evidence that Sandoval's presumption of innocence was compromised by the use of a numbers jury.

Because there was evidence that the jury needed protection and the district court took steps to prevent prejudice to Sandoval, the court did not abuse its discretion by impaneling a numbers jury and withholding the jurors' names from Sandoval.

(iii) Ineffective Assistance of Counsel

[9] Sandoval also claims that he received ineffective assistance of counsel due to his trial counsel's failure to object to the numbers jury and failure to request a curative instruction. 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). Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

As noted, the court did not abuse its discretion in impaneling a numbers jury; therefore, we conclude that Sandoval's failure

to object to the trial court's use of a numbers jury and failure to request a curative instruction were not ineffective assistance of counsel. This assignment of error is without merit.

5. Permitting Jurors to Believe Three-Judge Panel Determined Appropriateness of Death Sentence

Sandoval claims that the trial court erred in permitting the jury to believe that the responsibility for determining the appropriateness of a death penalty belonged to the three-judge panel. He also alleges that his trial counsel's failure to correct this error during the trial was ineffective assistance of counsel.

(a) Standard of Review

[10] Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

(b) Analysis

Sandoval argues that statements made and questions asked of the 12 members of his jury minimized the jurors' roles in determining whether Sandoval should receive the death penalty. The trial court advised each juror that "[u]nder Nebraska law if a person is found guilty of first degree murder by a jury the possible penalties that can be imposed by a three-judge panel are either death or life in prison." We find no error in this statement. Similarly, during voir dire, Sandoval's attorney asked several of the jurors whether the fact that a panel of judges made the ultimate decision about the death penalty would make it easier for them to serve on the jury. Sandoval likens these statements and questions to statements found to be unconstitutional in *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). We disagree.

We recently addressed this issue in *Galindo* and explained that unlike the sentencing procedure in *Caldwell*, the responsibility for determining the appropriateness of a death sentence *does* reside with the three-judge panel and not with the jury. We decline to revisit this issue and find that this assignment of error is without merit for the reasons discussed in *Galindo*.

6. Disclosure of Aggravating Circumstances to Jury

Sandoval claims that the trial court erred in disclosing the existence and/or contents of the aggravators to the jury before the verdict was rendered on the issue of Sandoval's guilt. He argues that trial counsel was ineffective in failing to object.

(a) Standard of Review

[11] The extent to which the 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 resulted. See *Galindo, supra*.

(b) Analysis

During voir dire, the trial court advised potential jurors that Sandoval was charged with first degree murder and that death was a possible penalty that could be imposed by a three-judge panel. The court did not identify the specific aggravators alleged or provide any details of those aggravators. Sandoval claims this advisement was in violation of Neb. Rev. Stat. § 29-1603(2)(c) (Reissue 2008) because it informed the jury of the fact that the State was seeking the death penalty. Section 29-1603(2)(c) states that "[t]he existence or contents of a notice of aggravation shall not be disclosed to the jury until after the verdict is rendered in the trial of guilt."

[12] However, Neb. Rev. Stat. § 29-2006(3) (Reissue 2008) specifically provides that "in indictments for an offense the punishment whereof is capital, [a juror's statement] that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death" constitutes good cause to challenge the juror. See, also, *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). It is well established that § 29-2006(3) allows courts to question jurors about their beliefs regarding the death penalty. See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[13] Under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain

subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). Accordingly, §§ 29-2006 and 29-1603 operate in conjunction with one another. Section 29-2006 ensures that each member of the jury can perform his or her neutral fact-finding function in determining guilt, and § 29-1603 provides that the particular details of the case that are relevant only to the aggravation portion of the trial do not unduly influence jurors' initial finding of guilt.

In this case, the trial court exercised its discretion in questioning potential jurors about whether their opinions of the death penalty would prevent them from following instructions and making a decision based on the evidence. Jurors who stated they would not be able to set aside their feelings on the death penalty were dismissed for cause. Although the jurors were aware that death was a possible penalty if they convicted Sandoval, the jurors were not given details of the aggravating circumstances or any other information that was prejudicial to the guilt phase of the trial. Courts cannot determine whether a juror should be challenged for cause in accordance with § 29-2006(3) without advising the juror of the possible punishments and asking a juror his or her opinion on capital punishment. We find that this assignment of error is without merit. Because Sandoval was not prejudiced by the court's actions in questioning potential jurors about their opinions of the death penalty, Sandoval's claim that his attorney provided ineffective assistance of counsel is also without merit.

7. Excessive Endorsement of Witnesses

Sandoval claims that the trial court erred in permitting the State to endorse over 500 witnesses and that his trial counsel provided ineffective assistance of counsel for failing to object to the number of witnesses.

(a) Standard of Review

[14] Whether to permit the names of additional witnesses to be endorsed upon an information after the information has

been filed is within the discretion of the trial court. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

(b) Analysis

Nebraska law requires a prosecuting attorney to endorse the names of known witnesses at the time the information is filed. Neb. Rev. Stat. § 29-1602 (Reissue 2008). The purpose of this requirement is to give the defendant notice as to witnesses who may testify against him or her and give the defendant an opportunity to investigate them. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). The State filed several motions to endorse witnesses after it filed the second amended information, and Sandoval did not object to the endorsements. There is no evidence that the trial court abused its discretion in permitting the State's endorsement of witnesses.

As for Sandoval's claim that his trial counsel provided ineffective assistance of counsel, he must show that his trial counsel's performance was deficient and that his trial counsel's performance prejudiced him and the outcome of the case. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, Sandoval has not shown that he was prejudiced by the number of witnesses endorsed by the State. The witnesses were endorsed months ahead of trial, and there is no indication in the record that his counsel was surprised or overwhelmed by the witness list. There is nothing in the record that suggests Sandoval's counsel was unprepared for cross-examination of any witness or that a more extensive investigation of the witnesses would have helped Sandoval's defense in any way. Because there is no evidence that Sandoval suffered prejudice by his trial counsel's failure to object to the number of witnesses endorsed by the State, this assignment of error is without merit.

8. Improper Statements by Prosecutor and Court

Sandoval claims that the trial court erred in allowing prosecutorial misconduct and that the court improperly commented on the evidence.

(a) Standard of Review

[15,16] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *Id*.

[17] Trial courts are to refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. However, 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. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

(b) Analysis

(i) Prosecutorial Misconduct

[18-20] 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). Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). Furthermore, when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Robinson, supra*.

[21,22] In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence. *State v. Valdez*, 239 Neb. 453, 476 N.W.2d 814 (1991). Whether a prosecutor's inflammatory remarks are sufficiently prejudicial to constitute error must be determined upon the facts of each particular case. *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). Therefore, Sandoval must show that the prosecutor's remarks at the guilt and aggravation phases of trial were sufficiently misleading, influential, or prejudicial such that neither retraction nor rebuke from the court could correct it and that a substantial miscarriage of justice actually occurred.

Sandoval identifies 27 statements made by the prosecutor during the guilt and aggravation phases that he alleges amounted to prosecutorial misconduct. The statements can be categorized as follows: opinions of a witness' character, opinions regarding the veracity of witnesses, misstatements of fact, veracity and guilt of Sandoval and veracity of his counsel, and general improper statements. None of these statements necessitate a mistrial.

The objectionable statements regarding a witness' character include occasions where the prosecutor referred to a witness or witnesses as a "nice fellow," "nice guy," "very strong witness," "extremely bright fellow," "wonderfully experienced officers," "very good officer," "bright," "a bunch of very good people," "good fellow," "pro," "Doc," "good guy," and "good people." The prosecutor referenced the work done by law enforcement officers as "good police work" and stated that an arresting officer "really did a hell of a good job."

We considered the propriety of similar positive comments regarding witnesses in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). We stated that "[t]he prosecutor's laudatory remarks about the quality of the investigational work done by the Lincoln Police Department were quite irrelevant, but hardly rise to the level of inflammatory remarks tending to prejudice the jury." *Id.* at 398, 303 N.W.2d at 753. Likewise, in this case, the prosecutor's reference to "wonderfully experienced officers" or "good police work" did not have any effect on the jury's perception of a witness or prejudice the jury. These statements do not reach the threshold necessary to establish a substantial miscarriage of justice as required by this court.

Sandoval also objects to statements made by the prosecutor that he claims improperly referred to the veracity of the

witnesses, including statements that the witnesses were not "mistaken about what they saw," that a witness was a "terribly honest woman" and "terribly sincere," and that the jurors "probably won't see anybody more sincere in [their] entire life." These statements are similar to a statement the defendant objected to in *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981). The prosecutor in *Dandridge* reminded the jury in his closing argument that "[the witness] was not immune from prosecution for perjury." 209 Neb. at 895, 312 N.W.2d at 293. We concluded that a prosecuting attorney's argument based on the evidence and inferences drawn from the evidence do not ordinarily constitute misconduct. Noting that the jury could infer that the witness was telling the truth because she was an eyewitness, we held that the trial court did not err in refusing to grant a new trial on this ground. *Dandridge, supra.* Likewise, the statements Sandoval complains of do not rise to the level of prosecutorial misconduct such that he is entitled to a new trial.

The next category of allegedly objectionable statements involves instances where the prosecutor allegedly misstated the facts during his closing argument of the guilt phase of the trial. After each misstatement, Sandoval's counsel objected and the court corrected the misstatement, or the prosecutor realized his misstatement and corrected himself. It is apparent that the misstatements were not so misleading as to create a substantial miscarriage of justice. Furthermore, in the necessary instances, the trial court clearly instructed the jurors to disregard the misstatements of fact or instructed them to rely on their recollections of the evidence. Curative measures by the court can prevent prejudice. *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986). If any of these statements were misleading, they were sufficiently corrected by the admonitions of the court. One of the prosecutor's alleged misstatements involved stating that if Koepke had been killed, there would have been eight victims. However, the prosecutor clarified in the next sentence that he was referring to killing all of the witnesses, which would have resulted in eight victims. These statements do not rise to the level of prosecutorial misconduct.

Sandoval next claims that the prosecutor made statements during the aggravation phase of the trial regarding Sandoval's veracity. Four of these statements related to the State's evidence that Sandoval participated in the murder of Travis Lundell, which was offered in support of the first aggravating circumstance—that Sandoval had a history of violence. Because the jury ultimately found that this aggravator did not exist, the prosecutor's statements were harmless.

Another statement referenced the fact that Sandoval, Vela, and Galindo had killed five times. This statement was made in the aggravation phase of the trial, after the jury had found Sandoval guilty of five counts of first degree murder. Accordingly, this statement was also harmless. Another statement Sandoval identifies as objectionable is a comment by the prosecutor regarding whether witness Koepke saw Sandoval smiling during the robbery. Sandoval attempts to characterize the prosecutor's statements as a suggestion that Sandoval's counsel was untruthful; however, when read in context with the surrounding statements, it is clear that the prosecutor was referring to the statements of various witnesses that they observed Sandoval smiling during and after the killings. The statement was simply a summary of the testimony that the jury heard suggesting that Sandoval was smiling at different points during the crimes and investigation. These statements were not sufficiently misleading, influential, or prejudicial such that a substantial miscarriage of justice actually occurred.

The final allegedly objectionable statements involve the prosecutor's invitation to the jurors, during deliberation, to examine the weapons used in the crimes, noting that they would not shoot each other because they knew it was wrong, and a statement that a lot of people would like to have the opportunity to be on Sandoval's jury. Again, these statements are not prejudicial to the extent that they necessitate a mistrial.

Sandoval's counsel did not make a motion for mistrial based on prosecutorial misconduct at the close of arguments and is precluded from raising the issue at this point. See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010). Nonetheless, the allegations of prosecutorial

misconduct are without merit. To the extent that Sandoval's trial counsel did not object to the prosecutor's statements complained of above and did not move for a mistrial, Sandoval alleges ineffective assistance of counsel. An appellate court reviews ineffective assistance of counsel claims under the two-prong inquiry pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). Given that the complained-of statements do not constitute prosecutorial misconduct, Sandoval did not establish that counsel was deficient in failing to move for a mistrial based on those statements.

(ii) Improper Comment on Evidence

Sandoval also alleges that the trial court improperly commented to the jury during the closing statements of both the guilt and aggravation stages of the trial. Both of these statements were included in the previous assignment of error. In the first instance, the prosecutor reversed the names of two of the victims during his closing argument at the guilt stage of the trial. The court corrected the prosecutor's statement by clarifying that Sandoval did not shoot a fourth person inside the bank. In the second instance, in response to an objection by Sandoval's attorney, the court clarified the evidence regarding Galindo's involvement in Lundell's death. These remarks by the court did not prejudice or otherwise adversely affect any of Sandoval's substantial rights as required for a mistrial. All of these assignments of error are without merit.

9. *Enmund-Tison*

Sandoval alleges that the court erred in overruling his March 21, 2003, motion to quash. In the motion, Sandoval claimed that the five first degree murder charges in the second amended information were unconstitutionally vague because they alleged premeditated murder, or felony murder in the alternative, and did not require the jury to determine whether Sandoval was a principal or an aider and abettor. The second amended information alleged that Sandoval "did purposely and with deliberate and premeditated malice, or in the perpetration of or attempt to perpetrate any robbery and/or kidnapping, did kill [each victim]."

Sandoval maintains that the separation of the theories was necessary, because if the jury concluded that he was guilty under the theory of felony murder, it would then be necessary for the jury to determine if Sandoval was a major participant in the murders of Bryant and Elwood—the two victims shot by Vela and Galindo—and exhibited a reckless indifference to human life. Sandoval argues that the determination is necessary pursuant to *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which held that a defendant who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend a killing take place or that lethal force will be employed" cannot be sentenced to death pursuant to the 8th and 14th Amendments.

The Court clarified that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement" in *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). We thoroughly addressed this issue with respect to these crimes in the case of one of Sandoval's accomplices in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), and conclude that the same analysis is applicable to Sandoval.

Furthermore, the evidence established that Sandoval planned the bank robbery, recruited participants, obtained weapons, and carried out the plan. Within a minute of entering the bank, Sandoval fatally shot three of the five victims. All of the evidence clearly establishes that Sandoval was a major participant in these murders and not an aider and abettor. Therefore, *Enmund-Tison* considerations were entirely unnecessary and these assignments of error are without merit.

10. Removal of Counsel

Sandoval alleges that the trial court erred in overruling his counsel's motions to withdraw, failing to discharge his counsel, and overruling his motion for substitute counsel.

(a) Standard of Review

[23] Whether a defendant's lawyer's representation violates a defendant's right to representation free from conflicts of

interest is a mixed question of law and fact that an appellate court reviews independently of the lower court's decision. *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

(b) Analysis

The issue is whether the trial court should have replaced Sandoval's trial counsel at several points during the trial. Madison County public defender Harry Moore was appointed to represent Sandoval and did so at each stage of the case. Sandoval identifies several potential conflicts of interest regarding Moore's handling of his case that were disclosed during the course of the trial. The court carefully evaluated each potential conflict as it arose and ultimately concluded that none of the issues rendered Moore incompetent to represent Sandoval. We agree.

[24-26] A conflict of interest which adversely affects a lawyer's performance violates the client's Sixth Amendment right to effective assistance of counsel. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). In Nebraska, this right has been interpreted to entitle the accused to "the undivided loyalty of an attorney, free from any conflict of interest." See *State v. Marchese*, 245 Neb. 975, 977, 515 N.W.2d 670, 672 (1994). A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

(i) Acquaintance With Victims

Sandoval first claims conflict because his attorney conducted business at the bank involved in the crime and therefore knew two of the victims from his bank transactions. Moore disclosed this acquaintance and stated that he did not know them personally and that it would not affect his professional representation of Sandoval. The trial court agreed and found that there was no basis for mandatory withdrawal. We considered a similar potential conflict of interest in *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). In *Hubbard*, the two victims were both attorneys whom the defendant's counsel knew professionally. Counsel had also represented a person whom the defendant

had testified against 12 years earlier. The attorney disclosed both circumstances to the court, and the court did not allow counsel to withdraw. We affirmed the decision, stating that the defendant was not denied effective assistance of counsel when the issues were properly brought before the court.

Likewise, Moore disclosed his association with the bank and the fact that he was acquainted with the victims. He stated that he did not believe the contact rose to a level of conflict of interest. The court properly determined that these contacts did not require mandatory withdrawal.

(ii) External Distractions

Several of the potential conflicts Sandoval identifies involved an ongoing budget dispute between the public defender's office and the Madison County Board of Commissioners (Board). Moore claimed that this conflict with the Board prevented him from being able to retain necessary experts for the mitigation portion of the trial; caused his deputy public defender, Todd Lancaster, to resign when the Board threatened to reduce Lancaster's salary; and caused Moore to delay paying bills. The court concluded that the political dispute with the Board was outside the realm of Sandoval's case and did not permit Moore to withdraw. The court did, however, provide additional time for Moore to prepare, and it appointed Lancaster as outside counsel.

Sandoval also moved for substitute counsel, claiming that Moore's ongoing conflict with the Board rose to a level of a violation of his Sixth Amendment right to effective assistance of counsel. Sandoval asserted he was entitled to two experienced attorneys from two separate offices who worked exclusively on his case. He also challenged Moore's handling of the case at earlier stages, claiming he was denied a psychiatric evaluation, felt threatened by Moore when deciding whether to consolidate burglary cases, and thought Moore should have hired a doctor to refute testimony that being shot was a gruesome way to die.

Later, Sandoval clarified that he did receive a psychological evaluation and that the consolidation of cases issue worked out the way he wanted. The trial court rejected Sandoval's request,

finding that Moore appropriately, professionally, and vigorously represented Sandoval in all proceedings to date and that there was no evidence indicating that Moore had not devoted proper attention to Sandoval's defense.

[27] Appointed counsel must remain with an indigent accused unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). At no point did Sandoval request to retain private counsel. Sandoval requested to proceed pro se on February 20, 2003, and was permitted to do so; however, he elected to have Moore reappointed a month later. He did not request to proceed pro se after that time.

Therefore, Moore was required to remain with Sandoval unless Moore was incompetent, that is, unless potential conflicts of interest rendered him incompetent to represent Sandoval. See *id*. Moore may have had problems with the Board and its attitude toward the representation of indigent defendants, but there is no indication that these problems affected the quality of representation Moore provided. He moved to continue the trial when he felt he needed more time to prepare, and the trial court granted these motions. Moore and the public defender's office ceased taking cases for a period of 3 months when Moore determined the caseload was unmanageable. Moore testified that he ultimately received assurances that all of his office's bills would be paid. In fact, all bills he presented to the Board were paid. Additionally, the court appointed Lancaster to assist with the mitigation phase. Moore's ongoing problems with the Board did not render him incompetent to represent Sandoval.

Regarding the issue of a capital defense attorney's workload, the Georgia Supreme Court specifically addressed the question in *Whatley v. Terry*, 284 Ga. 555, 668 S.E.2d 651 (2008). The defendant claimed that during the 2-year period his attorney was representing him on capital murder charges, his attorney also represented approximately 1,000 felony defendants, including

four death penalty defendants. The court determined that the attorney's caseload was irrelevant in an evaluation of his representation, stating that "it is the amount of time *actually* spent by [the attorney] on [the defendant's] case that matters, not the number of other cases he might have had that *potentially* could have taken his time." *Id.* at 562, 668 S.E.2d at 657.

Similar to *Whatley*, Sandoval complains that he did not have the undivided focus of Moore's attention at all times. This is not what is required. The question to consider is whether Moore's caseload at the public defender's office, its financial situation, and distractions with the Board had an adverse effect on Moore's representation of Sandoval. This is not a situation where prejudice would be difficult to prove. Neglect of Sandoval's case would be evident from the record. The deficiencies Sandoval cites include Moore's failure to hire a psychiatrist early in the trial, disagreements regarding plea agreements that were ultimately resolved to Sandoval's satisfaction, and failure to hire a pathologist to testify that the victims did not suffer to the extent alleged by the State's witness. The record is replete with examples of how each of these decisions was part of a valid trial strategy.

It should also be noted that the jury trial was held approximately 14 months after Sandoval was charged with the murders. The mitigation phase of the trial was held a full year after the guilt and aggravation phase. It was continued many times, a few times at the request of Moore. Counsel had ample time to prepare. At no point does the record indicate that Moore was not prepared to proceed. Based on these considerations, Sandoval's claim that the court should have dismissed Moore for conflict of interest is without merit.

(iii) Jen Birmingham

Lastly, Sandoval asserts a conflict of interest regarding attorney Jen Birmingham, who was contracted to handle misdemeanor cases at the public defender's office after Lancaster's departure. Birmingham had served as cocounsel in Gabriel Rodriguez' case, which also arose from the bank shootings; however, the trial court noted that she maintained a separate office and was not involved in the public defender's office's

representation of Sandoval. Further, there was evidence that Moore had discussed the conflict of interest situation with Sandoval. The court ultimately concluded that the contractual arrangement between the public defender's office and Birmingham was not prejudicial to Sandoval. There was no evidence that the arrangement affected Moore's performance in the representation of Sandoval. The arrangement did not create an actual conflict of interest.

In support of his argument, Sandoval cites *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). The court in *Agosto* stated that conflicts of interest involving the successive representation of codefendants could cause problems, because an attorney might be tempted to use confidential information to impeach the former client, or because counsel may fail to rigorously cross-examine for fear of misusing the confidential information. Neither of these concerns is present in the case at bar.

We addressed a situation similar to Sandoval's claim in *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007). In *Harris*, the county attorney's office hired an attorney who had an office-sharing relationship with the defendant's trial counsel. The attorney did not have any confidential information regarding the case, worked in the juvenile division of the county attorney's office, and had no direct contact with the criminal division. We affirmed the postconviction court's determination that the attorney was effectively screened and that there was no actual conflict of interest.

Similarly, Birmingham began taking cases from the public defender's office on a contractual basis nearly a year after the conclusion of the guilt and aggravation portions of the trial. Rodriguez was not a witness in any phase of Sandoval's trial. Furthermore, Birmingham maintained her own personal office in Bloomfield, Nebraska, and worked on her cases at that location. She had no contact, input, or function in the public defender's office's representation of Sandoval.

There is no evidence that Birmingham's arrangement with the public defender's office generated anything more than a speculative or hypothetical conflict of interest or that it affected

Moore's performance in the representation of Sandoval. The arrangement did not rise to the level of an actual conflict of interest, as required by *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

11. Limiting Instruction as to "the murder" in Aggravators

Sandoval next claims the trial court erred during the aggravation phase by failing to give the jury a limiting instruction clarifying that "the murder" referred to the five murders inside the bank and not the murder of Lundell. He claims that this omission created a reasonable probability that the jury improperly used the evidence presented with respect to Lundell's murder to find the existence of aggravators. This argument is without merit.

[28,29] Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Fische*r, 272 Neb. 963, 726 N.W.2d 176 (2007). The proper inquiry is not whether the instruction "'could have'" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury applied it in that manner. See *State v. Molina*, 271 Neb. 488, 525, 713 N.W.2d 412, 444 (2006).

At the aggravation phase of Sandoval's case, the jury completed a separate verdict form for each of the five victims. Each verdict form identified the count and the victim's name in bold letters in the first sentence and instructed that for each of the five counts of murder, the jury must determine whether any of the five alleged aggravating circumstances were present. This language clearly indicates to the jury that it was to determine whether each aggravating circumstance applied to the victim named at the top of the page.

The jury was also instructed that in order for it to find the existence of the "substantial prior history of serious assaultive or terrorizing criminal activity" aggravator, it must find that the State proved beyond a reasonable doubt that Sandoval murdered Lundell. For each of the five counts of murder, the jury concluded that this aggravator did not exist. It is not logical to assume that after finding that Sandoval did not murder Lundell,

the jury then applied the remaining aggravators to Lundell's murder five times and found the aggravators to exist.

Sandoval also argues that statements made by the prosecutor during closing arguments of the aggravation phase of the trial were confusing as to which event "the murder" referred. When reviewed in context with the surrounding statements, the prosecutor clearly distinguishes between Lundell's murder and the murders inside the bank. The jury was not misled by these statements as evidenced by its determination that Sandoval did not kill Lundell.

Considering all of the jury instructions as a whole, they clearly directed the jury to determine whether each aggravating circumstance was true or not true with respect to each of the five victims of the bank murders. It is not reasonably likely that the jury applied the aggravating circumstances to Lundell's murder.

Because the trial court clearly and properly instructed the jury regarding the aggravators, Sandoval's counsel did not render ineffective assistance of counsel in failing to request a clarifying instruction. This assignment of error is without merit.

12. "Especially Heinous, Atrocious or Cruel"

(a) Constitutionality

Sandoval claims that the trial court erred in overruling his objection to the "especially heinous, atrocious or cruel" jury instruction because it was unconstitutional as applied to him and that the court erred when it instructed the jury that it could consider that the victims suffered "mental anguish." We conclude the court erred in so instructing the jury. However, the error was harmless.

(i) Standard of Review

[30] When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the

district court for a new sentencing hearing. See, *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995) (*Ryan II*), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991) (*Reeves III*), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000) (*Reeves IV*).

In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

[31] Even a constitutional error which was harmless beyond a reasonable doubt does not warrant the reversal of a criminal conviction. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra*.

[32] Harmless error review in a capital sentencing case looks to whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on an invalid aggravator. See *Ryan II*.

(ii) Analysis

The jury instruction at issue stated the State must prove beyond a reasonable doubt:

> On the especially heinous, atrocious or cruel prong:
>
> 1. The defendant inflicted serious mental anguish or serious physical abuse—meaning torture, sadism, or sexual abuse—on the victim before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.
>
> Or
>
> On the exceptional depravity prong:
>
> 1. The defendant apparently relished the murder.
>
> When this aggravating circumstance is alleged, it may be based on either proof on the especially heinous, atrocious or cruel prong elements, or proof on the exceptional depravity prong elements. It matters not if some jurors believe that this aggravating circumstance has been proven based on proof that the defendant inflicted serious mental anguish or serious physical abuse, meaning torture,

> sadism or sexual abuse on the victim before the victim's death; mental anguish includes a victim's uncertainty as to his or her ultimate fate and some jurors believe that this aggravating circumstance has been proven based on proof that the defendant apparently relished the murder. Each juror need only be convinced beyond a reasonable doubt that this aggravating circumstance has been proven in one of the above ways as defined in these instructions.

This instruction is identical to pattern jury instruction NJI2d Crim. 10.4, adopted by Nebraska after the Legislature enacted § 29-2520 (Reissue 2008) in 2002.

Aggravator (1)(d) is divided into two prongs. See, *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996) (*Moore I*), *disapproved on other grounds, Reeves IV*; *Ryan II*; *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). The first prong is whether the murder was heinous, atrocious, or cruel, and the second prong is whether the murder manifested exceptional depravity. During the aggravation phase in the case at bar, the trial court instructed the jury as to both prongs of this aggravator and included mental anguish as part of the first prong. Sandoval objected to this instruction on the basis that it was unconstitutional because the aggravating circumstance was not suitably directed, limited, and defined in a constitutional fashion, as required by *Ryan II*.

a. Mental Anguish

[33] "Mental anguish," although included in Nebraska's pattern jury instructions, defined as a victim's uncertainty as to his or her ultimate fate, does not have any basis in Nebraska law. Neither the courts nor the Legislature has used the term "mental anguish" as a part of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008). Accordingly, we disapprove the "mental anguish" portion of the instruction. However, because we conclude that the error was harmless, a new sentencing is not necessary.

[34] A jury instruction should correctly state the Nebraska law applicable to the issues in the case. Neb. Ct. R. § 6-801. Beginning with *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), we have held that "especially heinous, atrocious,

or cruel" includes murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering, or where the murder was preceded by acts "performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time." *State v. Hunt*, 220 Neb. 707, 725, 371 N.W.2d 708, 721 (1985), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). "'[H]einous, atrocious, or cruel'" was to be directed to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Simants*, 197 Neb. 549, 566, 250 N.W.2d 881, 891 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990) (*Reeves II*).

In the three decades since *Rust*, this court has not strayed from this definition. See, *State v. Gales*, 269 Neb. 443, 481, 694 N.W.2d 124, 159 (2005) (*Gales II*) (murder was "especially heinous, atrocious, or cruel" based on evidence that defendant sexually assaulted his victim before killing her); *State v. Victor*, 235 Neb. 770, 778, 457 N.W.2d 431, 438 (1990) (murder was "'especially heinous, atrocious and cruel'" due to imposition of extreme suffering when evidence was that defendant had severely beaten and stabbed elderly victim to death while she struggled and screamed); *State v. Ryan*, 233 Neb. 74, 142, 444 N.W.2d 610, 652 (1989) (*Ryan I*) ("'especially heinous, atrocious, or cruel'" aggravator applied when facts showed torture, sadism, sexual abuse, and infliction of extreme suffering for prolonged period of time); *State v. Otey*, 205 Neb. 90, 96, 287 N.W.2d 36, 41 (1979) (murder was "'especially heinous, atrocious, [or] cruel'" when defendant sexually assaulted victim).

Before the U.S. Supreme Court issued *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), Nebraska did not have pattern jury instructions for aggravating circumstances because the court, rather than juries, determined the existence of aggravators. Pattern jury instructions were drafted in 2002 when the Nebraska Legislature enacted L.B. 1, which entitled defendants convicted of capital crimes to a jury determination of the aggravating circumstances.

In addition to the traditional definition of "especially heinous, atrocious, or cruel," pattern jury instruction NJI2d Crim.

10.4 added "mental anguish" to the first prong of aggravator (1)(d). The comment to this instruction cites *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring, supra*, as the source of this language. However, neither the Nebraska Legislature nor Nebraska courts have adopted "mental anguish" as a part of aggravator (1)(d). Although we acknowledged the addition of "mental anguish" to the definition of the aggravator in *Gales II*, its inclusion was not raised in that appeal and we did not consider its propriety. Now, given the opportunity to review the issue, we conclude that the inclusion of "mental anguish" was improper. Mental anguish is not a component of aggravator (1)(d), and it was error to include it in the instruction.

[35,36] Even if the inclusion of "mental anguish" was supported by Nebraska law, we conclude that mental anguish defined as "a victim's uncertainty as to his or her ultimate fate" is not sufficiently narrow such that it would apply only to a subclass of defendants. See *Moore I* (reconsidered *State v. Moore*, 273 Neb. 495, 730 N.W.2d 563 (2007)). Whenever a State seeks to impose the death penalty, the discretion of the sentencing body "'must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Ryan II*, 248 Neb. at 445, 534 N.W.2d at 792 (quoting *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). The sentencing authority's discretion must be "'guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty.'" See *Ryan II*, 248 Neb. at 445, 534 N.W.2d at 792 (quoting *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976)).

Although the U.S. Supreme Court upheld "'a victim's uncertainty as to his [or her] ultimate fate'" as a constitutional definition in *Walton*, 497 U.S. at 646, most, if not all, victims who are conscious before their death would suffer mental anguish as to the uncertainty of their ultimate fate. All victims threatened by a deadly weapon would have uncertainty as to their ultimate fate. Accordingly, we conclude that "a victim's uncertainty as to his or her ultimate fate" is not a meaningful distinction between cases that warrant the death penalty and those that do

not. Mental anguish as defined is an improper ground for finding the existence of aggravator (1)(d).

b. Exceptional Depravity

[37] The second prong of aggravator (1)(d) focuses on Sandoval's state of mind and considers whether he "manifested exceptional depravity by ordinary standards of morality and intelligence." "Exceptional depravity" pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense. See *Moore I*. This court has identified specific narrowing factors that support a finding of exceptional depravity. These five factors are: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim. *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *Moore I*; *Ryan II*. In Sandoval's case, the jury was instructed on only the first factor—that Sandoval apparently relished the murder. The U.S. Supreme Court recognized this factor as sufficiently narrow in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990).

In support of this factor, the State presented evidence that Sandoval was smiling during the murders and after being apprehended. Witness Koepke, who unknowingly interrupted the robbery and murders in progress, testified that Sandoval smiled at her from behind the counter as he stood amid the bodies of his victims. Later that day, when an investigator photographed Sandoval as he was booked into jail for the murders, Sandoval smiled broadly for the photograph. We question whether this evidence is sufficient to support the jury's finding of this aggravator; however, we do not need to further consider the issue, because we conclude that the jury's finding of aggravator (1)(d) is harmless error.

c. Harmless Error Analysis

In the case at bar, the jury found three valid aggravators in addition to aggravator (1)(d). Therefore, Sandoval's case would

have proceeded to the three-judge panel for consideration of the death penalty regardless of whether the jury had been properly instructed as to aggravator (1)(d). The question is whether the three-judge panel would have imposed the death penalty absent the consideration of aggravator (1)(d). See, *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); *Ryan II*.

We explained the procedure for handling errors in the sentencing phase of capital cases in *Reeves III*. Because *Reeves III* controls this case, we set forth its history below. All of the *Reeves* opinions were issued before *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); therefore, a three-judge panel determined the existence of aggravating and mitigating factors and then weighed them to determine a sentence. Although the task of finding aggravating circumstances now lies with a jury, our procedure for review remains the same.

In 1981, a jury convicted Randolph K. Reeves of two counts of felony murder in the commission or attempted commission of a first degree sexual assault for the rape and stabbing death of one woman and the stabbing death of a second woman. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984) (*Reeves I*). With respect to both murders, a three-judge panel found two statutory aggravators to exist: aggravator (1)(d), the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity, and aggravator (1)(e), at the time the murder was committed, the offender also committed another murder. The panel found a third aggravator with respect to the second victim—(1)(b), that the murder was committed in an apparent effort to conceal the commission of a crime or to conceal the identity of the perpetrator of the crime. Despite evidence that Reeves had consumed a large quantity of alcohol and ingested peyote before the murders, the panel determined that no mitigating circumstances existed.

On appeal, we concluded in *Reeves I* that the panel improperly considered aggravator (1)(d) with respect to the second victim, as her death appeared to have occurred swiftly when she walked in on Reeves' attack on the first victim. We also found that the panel failed to consider the statutory mitigator

of intoxication. Nonetheless, we determined that Reeves' sentences of death were not disproportionate to the sentences in previous first degree murder cases and affirmed the sentences of the district court.

Reeves sought postconviction relief, and we affirmed the district court's order dismissing the motion in *Reeves II*. Reeves petitioned for certiorari, which the U.S. Supreme Court granted. The Court vacated the decision and remanded the cause for reconsideration in light of *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), which addressed appellate review of death sentences based in part on an invalid or improperly defined aggravator. *Reeves v. Nebraska*, 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

On remand, in *Reeves III*, we reconsidered Reeves' postconviction motion. Citing *Clemons*, we noted that in a weighing state, when an appellate court invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that was not considered by the sentencing panel in its balancing, the appellate court may, consistent with the U.S. Constitution, reweigh the remaining circumstances or conduct a harmless error review. *Reeves III*.

We then outlined the process for review for Nebraska appellate courts in death penalty cases where there has been an error concerning the trial court's finding of aggravating and/or mitigating circumstances. First, we determine if the sentencing panel's actions constituted an error harmless beyond a reasonable doubt. *Id*. If the error is harmless, we must affirm the sentence. See *Ryan II*. If the error is not harmless, we must vacate the sentence and remand the cause for resentencing. *Reeves III*.

Evaluating the sentencing panel's failure to consider the mitigator of intoxication, we determined that the error was not harmless beyond a reasonable doubt and concluded that we must independently reweigh all the aggravators and mitigators to determine if the death penalty was an appropriate sentence. We made findings as to the existence of aggravating circumstances, concluded that the aggravating circumstances

outweighed any statutory or nonstatutory mitigators in the case, and affirmed Reeves' sentences of death. *Id.*

After our decision in *Reeves III*, Reeves sought a writ of habeas corpus in the U.S. District Court for the District of Nebraska, challenging this court's action in resentencing him. *Reeves v. Hopkins*, 871 F. Supp. 1182 (D. Neb. 1994). The federal district court granted relief on the ground that Nebraska law did not authorize appellate reweighing and resentencing. It noted that the reweighing procedure

> arbitrarily deprived Reeves of two important state-created rights: (a) the right to have a sentencing panel including his trial judge make the initial determination of the appropriateness of the death penalty by *properly* applying aggravating and mitigating factors and thereafter impose the death sentence, and (b) the right to have the decision of the sentencing panel "reviewed" but not supplanted by appellate resentencing.

Id. at 1194. On appeal, the U.S. Court of Appeals for the Eighth Circuit determined the federal district court exceeded its authority when it reviewed our interpretation of Nebraska state law. *Reeves v. Hopkins*, 76 F.3d 1424 (8th Cir. 1996). The Eighth Circuit reversed, and remanded. The federal district court again granted Reeves relief, *Reeves v. Hopkins*, 928 F. Supp. 941 (D. Neb. 1996), and the Eighth Circuit again reversed the ruling, but granted Reeves' petition on other grounds related to jury instructions, *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996). The U.S. Supreme Court granted certiorari and reversed the decision of the Eighth Circuit on the jury instruction issue. See *Hopkins v. Reeves*, 521 U.S. 1151, 118 S. Ct. 30, 138 L. Ed. 2d 1059 (1997), and *Hopkins v. Reeves*, 524 U.S. 88, 118 S. Ct. 1895, 141 L. Ed. 2d 76 (1998).

Following his run in federal court, Reeves filed a second motion for postconviction relief in Lancaster County challenging this court's reweighing and resentencing in *Reeves III*. The district court denied Reeves' request, and he appealed. *Reeves IV*. Although *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), found it constitutionally permissible for a state appellate court to reweigh aggravating and mitigating circumstances or undertake a harmless error

analysis when an aggravating circumstance had been found invalid, there must be authority under state law for an appellate court to do so. *Reeves IV*. We concluded that in *Reeves III*, this court had denied Reeves his right to due process, because we lacked statutory authority to resentence Reeves and acted as an unreviewable sentencing panel in violation of Nebraska law after finding the error was not harmless. *Reeves IV*. We reversed the order of the district court, vacated the death sentences for both counts, and remanded the cause to the trial court for resentencing in accordance with Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 1989). *Reeves IV*.

In light of this procedure, we must first review Sandoval's case for harmless error. If the error is harmless beyond a reasonable doubt, we affirm the sentence of the district court. *Ryan II*; *Reeves III*. If the error is not harmless, we cannot reweigh the aggravators and mitigators and resentence Sandoval; rather, we must remand the matter to the district court for resentencing. *Reeves IV*; *Ryan II*.

Harmless error review in a capital sentencing case considers whether it is clear beyond a reasonable doubt that the sentencing court's decision would have been the same absent any reliance on the invalid aggravator. *Ryan II*. See, also, *Stringer v. Black*, 503 U.S. 222, 230-31, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) ("[o]therwise, the defendant is deprived of the precision that individualized consideration demands"). Therefore, in reviewing Sandoval's sentence for harmless error, we consider whether, beyond a reasonable doubt, the death penalty would have been imposed absent the sentencing panel's consideration of aggravator (1)(d).

[38] Section 29-2522 (Reissue 2008) instructs the three-judge sentencing panel to consider (1) whether the aggravating circumstances as determined to exist justify imposition of a sentence of death; (2) whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The balancing of aggravating circumstances against mitigating circumstances in deciding whether to impose the death

penalty is not merely a matter of number counting, but, rather, requires a careful weighing and examination of the various factors. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

In its sentencing order, the three-judge sentencing panel recounted the facts of the case. Sandoval, Vela, and Galindo entered the bank located in Norfolk on the morning of September 26, 2002, for the purpose of committing a robbery. All three carried loaded 9-mm semiautomatic handguns.

Upon entering the bank, Galindo turned to the left and entered the office occupied by Elwood, Staehr, and Cahoy. Vela turned to the right and entered the office occupied by Bryant. Sandoval approached the teller counter at the center of the bank and demanded money. Sun was working behind the teller counter, Mausbach was working at the drive-through window located behind the teller counter, and Tuttle was transacting business in front of the teller counter.

Elwood, Sun, Bryant, Mausbach, and Tuttle were shot and fatally wounded nearly simultaneously. Sandoval shot Sun in the chin and in the chest, then shot Tuttle in the head, jumped across the counter, and shot Mausbach in the head. Vela shot Bryant in the leg and then in the head. Galindo fired three shots into Elwood. There is no evidence of any resistance by any of the victims prior to being shot. After the shootings, Koepke entered the bank and saw Sandoval behind the teller counter. Galindo fired at least two shots at Koepke through a window as she fled the building, injuring her with the shattering glass. Another of Galindo's bullets impacted the drive-through window of the fast-food restaurant across the street. Sandoval, Vela, and Galindo then fled the bank. In less than a minute, no money had been taken, but five victims were either dead or dying.

The sentencing court also noted that the jury determined that four aggravating circumstances existed with regard to each murder: (1) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime; (2) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence; (3) at the

time the murder was committed, the offender also committed another murder; and (4) the offender knowingly created a great risk of death to at least several persons. Regarding the four aggravators, the sentencing panel stated that "[e]ach factor is significant and substantial."

Pursuant to § 29-2522, the sentencing panel next considered whether sufficient mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances. The seven statutory mitigating circumstances, as laid out in § 29-2523(2) (Reissue 2008) are as follows: (a) The offender has no significant history of prior criminal activity; (b) the offender acted under unusual pressures or influences or under the domination of another person; (c) the crime was committed while the offender was under the influence of extreme mental or emotional disturbance; (d) the age of the defendant at the time of the crime; (e) the offender was an accomplice in the crime committed by another person and his or her participation was relatively minor; (f) the victim was a participant in the defendant's conduct or consented to the act; or (g) at the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

The panel determined that none of the statutory mitigators existed. Rather, the panel noted that in addition to the murders, Sandoval had a substantial criminal record dating back to when he was a juvenile. In considering mitigator (2)(g), the panel separated it into two parts—whether Sandoval's capacity to appreciate wrongfulness was impaired due to mental illness or mental defect and whether his capacity to appreciate wrongfulness was impaired by intoxication.

Although a psychiatric diagnostic evaluation of Sandoval indicated that he had a personality disorder with antisocial and schizotypal traits, the panel found that there was no evidence that this diagnosis indicated a mental disorder affecting Sandoval's volitional abilities in any way. In fact, the evidence showed that Sandoval had been planning the bank robbery for at least a month. He purchased and stole the guns which were used for the robbery, and he met with Vela and Galindo

to go over the plan. Sandoval testified that he knew that if he was apprehended, he would spend time in the penitentiary. There was no evidence that Sandoval's diagnosis in any way diminished his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The panel next considered Sandoval's claim that he was intoxicated due to his alleged use of LSD before the murders. Sandoval reported that he ingested approximately four "normal" doses of LSD in the morning before the murders. He testified that the LSD caused hallucinations, including fire appearing in the mirror at his apartment, bright colors from the movement of his hand, rain that turned to blood when it hit his skin, and flashes of lights and shadows as he entered the bank. Sandoval claimed that the black shadows in the bank were saying bad things and "mouthing off" to him and that he saw a blue "Smurf" with glasses behind the counter, whom he shot. Sandoval claims he next remembers being in a car or a house, falling asleep, and being arrested in O'Neill. An expert in the area of substance abuse evaluation testified that based on his review of documents and his interview with Sandoval, Sandoval was intoxicated at the time of the murders due to his ingestion of LSD.

However, the panel noted that there was extensive convincing evidence that Sandoval did not use LSD on the day of the murders. Sandoval did not have any prior history of using drugs other than marijuana, the street gang he belonged to prohibited the use of hard drugs, he repeatedly denied using any illicit drugs, and the police investigator did not find drugs or drug paraphernalia in his search of Sandoval's bedroom after the murders.

His actions also refute claims that he was intoxicated at the time of the murders. On the day of the murders, Sandoval prepared for the attempted robbery with a backpack full of extra ammunition, plastic bags, smoke bombs, and spray paint. The bank's surveillance video showed Sandoval, Vela, and Galindo calmly entering the bank. It shows Sandoval directly approaching the teller counter, motioning Mausbach to come closer to him, and easily jumping over the counter.

The panel noted that Sandoval appears calm in the video; he does not wave his gun in a wild manner. The shootings were very fast paced, and he precisely shot each of his victims in the head. After the murders, Sandoval appeared to calmly hide his gun in the waistband of his pants and walk out of the bank to escape.

The officers who came in contact with Sandoval after he was apprehended indicated that he was calm and cooperative. An expert in drug intoxication recognition gave an opinion that based on all of the facts, he did not believe Sandoval was intoxicated from the ingestion of LSD at the time of the murders. Sandoval did not show signs of withdrawal after he was arrested, and the deputy who booked Sandoval into the Madison County jail following his arrest on the day of the murders also indicated that Sandoval denied using drugs. Accordingly, the sentencing panel concluded that there was nothing in Sandoval's behavior supporting the conclusion that at the time of the crimes, he was intoxicated by the ingestion of LSD and lacked the ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The panel determined that the evidence did not support the existence of the mitigating circumstance of intoxication by drug use and concluded that it did not apply.

Despite its finding that none of the statutory mitigating circumstances existed, the sentencing panel concluded that one nonstatutory mitigating factor existed—that Sandoval suffered from a bad childhood resulting from being raised in a dysfunctional family setting. However, the sentencing panel noted that despite his family problems, it was clear that Sandoval had at least an average, if not above average, IQ; had what was described as a charismatic personality; and had leadership abilities. The panel stated that it gave this nonstatutory mitigating factor little weight in determining the sentences to be imposed.

It is of particular importance that § 29-2522 instructs the sentencing panel to consider whether sufficient mitigating circumstances exist which *approach or exceed* the weight given to the aggravating circumstances. In *Reeves III*, 239 Neb. at 428, 476 N.W.2d at 837, we could not conclude that the district

court's error of failing to consider the statutory mitigator of intoxication was harmless, because "[w]e [did] not know what weight the judges may have given this circumstance if they had found it to exist." Had it considered the mitigator of intoxication, the *Reeves III* court could have determined that the weight of that mitigator approached or exceeded the weight the court gave to the aggravators. Therefore, failure to consider the mitigator was not harmless error.

Unlike *Reeves III*, we know the weight the sentencing panel attributed to the aggravators and mitigators. It stated that each aggravator was "significant and substantial" and that "there are no statutory mitigating circumstances to weigh against the four aggravating circumstances and only one nonstatutory mitigating circumstance to which the panel gives little weight."

Absent consideration of aggravator (1)(d) with respect to each of the five counts of murder, the sentencing panel would have been left with three "significant and substantial" aggravators establishing that Sandoval killed five victims to conceal his identity in the commission of a carefully planned bank robbery and, in doing so, placed three other people at great risk of death. The panel would have weighed these three "significant and substantial" aggravators against no statutory mitigators and only one nonstatutory mitigator—that Sandoval suffered from a bad childhood—to which the panel gave little weight.

Knowing that the sentencing panel gave little weight to the lone nonstatutory mitigator it weighed against the aggravators, we are convinced beyond a reasonable doubt that the sentencing panel would have imposed sentences of death even in the absence of a finding that the murders were exceptionally heinous, atrocious, cruel, or manifested exceptional depravity. Accordingly, the consideration of aggravator (1)(d) was harmless error. It would be futile to vacate the sentences of death and require the sentencing panel to reweigh three "significant and substantial" aggravators against the lone nonstatutory mitigator, to which the panel gave little weight. Because the error is harmless, it is not necessary to vacate the sentences of death and remand the cause, as was required in *Reeves IV*.

We conclude beyond a reasonable doubt that the sentencing panel would have imposed five sentences of death even in the absence of consideration of aggravator (1)(d). Although Sandoval's argument had merit, we conclude the error was harmless.

(b) "Apparently Relished"

Sandoval next claims that the use of the word "apparently" in the "exceptional depravity" instruction during the aggravation phase of the trial was vague, imprecise, and incapable of reasoned and rational application in violation of the 8th and 14th Amendments. As discussed above, we find that the consideration of this entire aggravating circumstance was harmless error; therefore, we do not reach this issue.

13. "Great Risk of Death"

Sandoval alleges three assignments of error relating to aggravator (1)(f), which is that the offender "knowingly created a great risk of death to at least several persons." He claims that the trial court incorrectly instructed the jury on the aggravator, that it failed to give a limiting instruction that the risk of death to at least several other persons could not be found by using evidence of a risk of death to others after the murders occurred, and that the trial court erred in submitting jury instructions concerning accessorial liability regarding aggravator (1)(f). Sandoval also claims that he received ineffective assistance of counsel with regard to all three of these aggravators because his counsel did not raise these issues at trial.

(a) Standard of Review

Jury instructions must be read as a whole, and if they fairly present the law so that the jury could not be misled, there is no prejudicial error. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

[39,40] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Welch*, 275

Neb. 517, 747 N.W.2d 613 (2008). Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *Id.*

[41] A trial court is not obligated to instruct the jury on matters which are not supported by the evidence in the record. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

(b) Analysis

(i) Omission of "Great"

Aggravator (1)(f) as laid out in § 29-2523 is that "[t]he offender knowingly created a great risk of death to at least several persons." In the trial court's preliminary jury instruction, the modifier "great" was omitted. Sandoval's trial counsel objected to the omission, and the court acknowledged that the instruction was only a preliminary instruction. The instructions given to the jury at the close of the evidence of the aggravation trial instructed the jury on aggravator (1)(f) several times. In instruction No. 2A, the jury was told that it must find beyond a reasonable doubt that "the offender knowingly created a risk of death to at least several persons." Later on in the same instruction, the jury was informed that the essential elements to prove aggravator (1)(f) were (1) the offender knowingly created a great risk of death and (2) the risk was to more than two persons. Finally, the jury was given five separate verdict forms—one for each victim. The instruction on each verdict form asked, "Do you, the jury, unanimously find that the State has proven beyond a reasonable doubt that the defendant at the time this murder was committed, knowingly created a great risk of death to at least several persons?" The jury indicated "YES" in response to the question on all five verdict forms.

Read as a whole, it is clear that the omission of the modifier "great" in one instance in all of the jury instructions was not prejudicial. The jury was specifically instructed that "great risk of death" was an element of the aggravator and that it must determine whether Sandoval created a great risk of death, and not just a risk of death. The jury was likewise properly instructed on the five verdict forms. The jury instructions

fairly present the law, and the jury could not have been misled. See *Fischer, supra.* Because there was no prejudicial error, Sandoval's trial counsel did not provide ineffective assistance of counsel by failing to object to the jury instructions. This assignment of error is without merit.

(ii) Number of Persons Placed at Risk

Sandoval also claims that the trial court erred because the jury instruction explaining aggravator (1)(f) did not sufficiently limit the individuals who were placed at risk to be considered by the jury in determining whether this aggravator was present. He argues that the jury should have been instructed that it could not consider individuals placed at risk in the aftermath of the murders in the three men's subsequent attempt at escape, such as the woman who was held up at gunpoint and forced to hand over her car keys. Because there was clear evidence in support of aggravator (1)(f) before Sandoval exited the bank, we do not need to consider events occurring after the shootings at the bank.

Sandoval also claims that the jury should have been instructed not to consider individuals who faced a "'great risk of death'" more directly by one of his accomplices. Brief for appellant at 151. Specifically, Sandoval argues that because Staehr and Cahoy were in the office with Elwood and were shot at by Galindo, they were not placed at a "great risk of death" by Sandoval. Sandoval argues that it was only Galindo who placed Koepke at a "great risk of death" by shooting at her as she entered the bank.

Sandoval planned a bank robbery that involved three men with semiautomatic handguns entering a bank full of people. All three of the men fired at the people in the bank, putting eight directly in the crossfire and leaving five dead. Sandoval shot and killed every person near him. Considering the confined area of the bank, the three individuals who survived the incident were within range of Sandoval's weapon at all times and he unquestionably placed them at a great risk of death. These events unquestionably put the three survivors at great risk of death.

(iii) Accessorial Liability

It is also clear that Sandoval personally caused a great risk of death to Staehr, Cahoy, and Koepke in planning and carrying out a bank robbery in which three men with loaded weapons entered a small bank full of people. Accessorial liability does not need to be considered, because the evidence clearly establishes that Sandoval knowingly created a great risk of death by his own actions. A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

In this case, the evidence supported a finding that Sandoval personally killed three people and planned the robbery that caused two more people to be killed and three more people to be in the midst of gunfire. The trial court was not obligated to further instruct the jury on this issue. Because the court did not err in declining to give additional instructions, Sandoval's trial counsel did not err by failing to request such instructions. These assignments of error are without merit.

14. Motions for Acquittal as to Aggravating Circumstances

Sandoval alleges that the trial court erred in overruling his motions for judgment of acquittal as a matter of law with respect to the aggravating circumstances at the close of the State's case and at the close of all the evidence following the aggravation portion of the trial.

(a) Standard of Review

[42] When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt. *Gales II*.

(b) Analysis

Sandoval claims that the State did not present evidence sufficient to prove the alleged aggravating circumstances. In the State's "Notice of Aggravation," it sought to prove six

aggravators: (1) The offender has a substantial prior history of serious assaultive or terrorizing criminal activity; (2) the murder was committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of such crime; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence; (5) at the time the murder was committed, the offender also committed another murder; and (6) the offender knowingly created a great risk of death to at least several persons.

The State did not present evidence in support of the third aggravator, that the murder was committed for pecuniary gain, but the remaining five were submitted to the jury. The jury found that the aggravator alleging that Sandoval had a substantial prior history of serious assaultive or terrorizing criminal activity was not present and found that the other four factors were present. Because the jury found these aggravators to exist, death was a possible penalty. The cause was submitted to a three-judge panel to determine the existence of mitigating circumstances and to weigh any mitigating circumstances against the aggravating circumstances. Sandoval alleges that the evidence was insufficient for the jury to find the existence of aggravators (2), (4), and (6).

Sandoval does not set forth an argument in support of his claim challenging aggravator (3), which aggravator exists if at the time the murder was committed, the offender committed another murder. As the jury found Sandoval guilty of five counts of first degree murder, there was indisputably more than one murder and, therefore, sufficient evidence to submit the aggravator to the jury.

(i) Murder Committed to Conceal Identity of Perpetrator

Sandoval argues that the evidence offered by the State indicated that the murders were committed only for the purpose of concealing the murder of that particular victim, but not any other crime. Indeed, in *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), we noted that any murder renders the

victim unable to identify the perpetrator; therefore, for this aggravator to apply, a defendant must commit the murder in an effort to conceal a crime other than the murder itself.

The State presented evidence that Sandoval planned to commit a bank robbery. Rodriguez entered the bank several minutes before Sandoval, Vela, and Galindo to determine the location of bank employees. The three men were wearing hats and sunglasses, and Sandoval carried a backpack containing distraction devices when they entered the bank. After the five victims were killed, shots were fired at Koepke as she entered the bank. The men began to leave, and Cahoy heard them talk about an alarm and heard someone say, "'Hurry up, Hurry up.'"

From videos, photographs, and testimony offered as evidence during trial, the jury could reasonably infer that the victims were killed in an effort to conceal the identity of Sandoval, Vela, and Galindo as perpetrators of a bank robbery. Accordingly, the trial court did not abuse its discretion in overruling Sandoval's motions for judgment of acquittal as a matter of law.

(ii) Murders Were Especially Heinous, Atrocious, Cruel, or Manifested Exceptional Depravity

Sandoval also asserts that the State did not present sufficient evidence for aggravator (1)(d) to be submitted to the jury. Pursuant to § 29-2523, this aggravator exists with respect to each murder if the murder "was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." As discussed above, the consideration of aggravator (1)(d) was harmless error.

(iii) Offender Knowingly Created Great Risk of Death to at Least Several Persons

This aggravator requires the finding that Sandoval created a great risk of death to more than two persons. During the course of the robbery, Staehr, Cahoy, and Koepke were placed at great risk of death due to their presence in the bank and proximity to the gunfire. This evidence is sufficient to submit to the jury the question of whether Sandoval knowingly created a great risk

of death to more than two persons. This assignment of error is without merit.

15. Mitigation and Sentencing Errors

(a) Presentence Investigation Report

[43] Sandoval claims that the trial court erred in receiving and reviewing the presentence investigation report because it contained prejudicial victim impact evidence and because the sentencing panel was then afforded the opportunity to consider evidence of nonstatutory aggravating circumstances. It is presumed that judges disregard evidence which should not have been admitted. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Furthermore, the sentencing panel in this case specifically stated that it did not consider the victim impact statements. Because the sentencing panel did not consider the evidence that Sandoval argues is improper, his argument that it resulted in the application of nonstatutory aggravators is without merit.

(b) Denial of Jury at Mitigation Hearing

Sandoval claims that the trial court erred when it denied his motion for a jury at the mitigation hearing and sentencing. He argues that the Sixth and Eighth Amendments to the U.S. Constitution and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), require a jury to determine the existence of mitigating circumstances because the mitigators were factors that could increase his punishment. We rejected that argument in *State v. Gales*, 265 Neb. 598, 628-29, 658 N.W.2d 604, 626-27 (2003) (*Gales I*), stating that

> we understand *Ring* as recognizing a Sixth Amendment right to a jury determination of the existence of aggravating circumstances which determine "death eligibility," because in the absence of at least one such circumstance, the death penalty cannot be imposed. It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S. Ct.

> 2348, 147 L. Ed. 2d 435 (2000),] and *Ring*. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the "selection decision" in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. See § 29-2522; L.B. 1, § 14. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.

Accordingly, a jury is not required to determine the existence of mitigating factors or the sentence. This assignment of error is without merit.

(c) Denial of Rebuttal Evidence

Sandoval claims that the sentencing panel erred in denying him the opportunity to adduce evidence and to testify to rebut the State's case at the mitigation portion of the trial. Alternatively, he alleges that his trial counsel provided ineffective assistance of counsel by failing to make an offer of proof regarding the evidence and testimony that would have been offered in rebuttal.

[44,45] Rebuttal evidence is confined to new matters first introduced by the opposing party and is not an opportunity to bolster, corroborate, reiterate, or repeat a case in chief. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). It is limited to that which explains, disproves, or counteracts evidence introduced by the adverse party. See *id.* The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony. *Id.*

Sandoval argues that his constitutional right to present a defense was violated; however, he has not identified any evidence that was not available at the time of his case in chief. Sandoval notes that he has a right to testify and that he has a right to have witnesses testify on his behalf. He availed himself

of both. Accordingly, he was not denied his constitutional right to present a defense.

Nor has he identified any new issues raised by the State in its presentation of evidence that would have made rebuttal proper. The sentencing panel specifically determined that because the State did not develop any new issues in its case, rebuttal would not have probative value as to the issues facing the panel. Had Sandoval been permitted to present rebuttal evidence, he claims that he would have offered evidence of his prior drug use, racial tensions he experienced in high school, the poor conditions he endured throughout his childhood, his experiences while incarcerated, his limited ability to function outside of prison, and his alleged use of LSD on the day of the crimes. All of these issues were addressed in his case in chief. Because rebuttal evidence is limited to matters first introduced by the opposing party and is not to be used to repeat the case in chief, the evidence Sandoval now claims he was erroneously prohibited from offering was not proper rebuttal evidence. See *Molina, supra*. Therefore, the sentencing panel did not abuse its discretion in disallowing rebuttal testimony.

Sandoval was not denied the right to present his defense and was not entitled to present cumulative evidence on rebuttal after the State did not raise new issues. Because the sentencing panel did not err in disallowing the proposed rebuttal testimony, Sandoval's counsel did not err in failing to make an offer of proof. As such, this assignment of error is without merit.

(d) Sentencing Panel's Use of Transcribed Testimony

Sandoval argues that the three-judge sentencing panel erred in receiving into evidence the transcribed testimony from Sandoval's trial and aggravation trial. He claims that Nebraska's sentencing scheme does not authorize the sentencing panel's use of the transcribed testimony and that this use was prejudicial because Sandoval could not meaningfully ascertain how the sentencing panel used the evidence.

[46,47] We considered this issue in *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). We noted that a sentencing panel has broad discretion as to the source and type of

evidence and information which may be used in determining the kind and extent of the punishment to be imposed. See *id*. Furthermore, Neb. Rev. Stat. § 29-2521 (Reissue 2008) permits the panel to receive any evidence which the presiding judge deems to have probative value. We found that receipt of the records of the guilt and aggravation phases is authorized under the discretion given the presiding judge under § 29-2521. *Hessler, supra.*

Logic dictates that for a meaningful sentencing hearing to occur, the sentencing panel must know and understand the facts of the case. Indeed, after a defendant is found guilty of murder in the first degree and at least one aggravating circumstance is found to exist, § 29-2522 instructs the sentencing panel to determine a defendant's sentence based on whether the aggravating circumstances as determined to exist justify imposition of a sentence of death; whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The transcribed testimony from the guilt and aggravation phases of the trial serves this purpose. Accordingly, we conclude that the sentencing panel did not err by receiving evidence of the guilt and aggravation phases of the trial in the sentencing hearing. Likewise, because the court was within its discretion to consider such evidence, Sandoval's trial counsel did not provide ineffective assistance of counsel in failing to object to the receipt and use of the transcribed testimony. This assignment of error is without merit.

16. Death Penalty

(a) Death by Electrocution

[48] Sandoval also alleges two assignments of error challenging his sentence of death by electrocution, claiming it is unconstitutional and is cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution. His challenge to death by electrocution was made prior to our opinion in *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). In *Mata*, we concluded that

execution by electrocution is cruel and unusual punishment. Accordingly, we find that this assignment of error has merit; however, we affirm the sentence of death.

(b) Cruel and Unusual Punishment

[49] Sandoval also claims that the death penalty, however carried out and applied, is cruel and unusual punishment. Although he acknowledges that in *Gales II*, this court affirmed that the death penalty is not, per se, cruel and unusual punishment, Sandoval argues that this court has not yet analyzed the propriety of the imposition of the death penalty in cases of felony murder under "'evolving standards of decency.'" Brief for appellant at 188. In *Mata*, 275 Neb. at 31, 745 N.W.2d at 255-56, we reiterated that "'[t]he death penalty, when properly imposed by a state, does not violate either the eighth or [the] fourteenth amendment [to] the United States Constitution or Neb. Const. art. [I], § 9.'" We decline Sandoval's invitation to revisit this issue.

(c) Appropriateness of Sentence

Sandoval next argues that the trial court erred in declining to consider evidence of sentencing orders from all Nebraska first degree murder cases for the purposes of sentence excessiveness and proportionality review. He offered evidence of first degree murder cases in Nebraska in which the death penalty was not imposed, and the 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), which Sandoval refers to as "the *Baldus* study." Brief for appellant at 180. The three-judge panel did not consider cases in which the death penalty was not ultimately imposed in its proportionality review during the sentencing phase of the trial. We recently considered this issue in *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), and in accordance with that opinion, we find that this assignment of error is without merit.

(d) Discrimination

Sandoval also claims that the State's decision to seek the death penalty was based on invidious discrimination; was not

guided by rational, relevant, and consistent standards; and was based on irrational and illegal criteria.

[50] Sandoval is apparently arguing that the State abused its prosecutorial discretion in seeking the death penalty in Sandoval's case. However, the State retains broad discretion as to whom to prosecute and what charges to file. See, *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *Gales II*. This discretion is limited only to constitutional constraints, that is, a decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. See, *Wayte, supra*; *Gales II*. Decisions to prosecute often rely on "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan[, which] are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607.

[51] The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. *Gales II*. In order to dispel this presumption, a criminal defendant must present clear evidence to the contrary. *Id*. Such evidence is completely lacking here; thus, Sandoval's claim fails.

17. Ineffective Assistance of Counsel

Sandoval alleges that his trial counsel provided ineffective assistance with respect to several aspects of his case, including seeking a psychiatric evaluation, allowing speculative testimony from a witness, failing to call a forensic pathologist in rebuttal, and failing to adduce prior consistent statements.

(a) Standard of Review

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).

[52] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland*, an appellate court reviews such legal determinations independently of the lower court's decision. See *Gales II*.

(b) Analysis

(i) Psychiatric Evaluation

Sandoval alleges that he received ineffective assistance of counsel because his trial counsel recommended to the trial court that Sandoval be examined by a court-appointed psychiatrist to determine if Sandoval was competent to proceed pro se. He claims his attorney's action in asking the court to appoint a psychiatrist to determine Sandoval's competency provided the psychiatrist with the ability to be a damaging witness for the State at the mitigation phase of the trial. Sandoval also claims that the trial court erred in receiving the testimony of the psychiatrist at the mitigation phase of the trial and that his counsel provided ineffective assistance in failing to preserve a proper objection to the testimony. Finally, he alleges ineffective assistance because his counsel did not object to the testimony of the psychiatrist when he testified about Sandoval's propensity for truthfulness.

The facts Sandoval claims support his assertions are contradicted by the record. On February 20, 2003, Sandoval's trial counsel filed a motion to withdraw pursuant to Sandoval's request to proceed pro se. In the motion, Sandoval's counsel advised the court that he felt he had a duty to inform the court that he had a material concern that Sandoval may not be competent. Following his oral advisement to the court regarding this concern, the State, and not Sandoval's counsel, recommended that the court appoint a psychiatrist to evaluate Sandoval's competency. The court asked Sandoval if he had any objection to being examined by a professional, and Sandoval replied that he did not.

During the psychiatrist's testimony in the mitigation phase, Sandoval's counsel objected no fewer than 10 times and the court gave his counsel continuing objections to every subject of the psychiatrist's testimony. When the psychiatrist stepped down from the witness stand, the court sustained Sandoval's counsel's objection to all of the psychiatrist's testimony except for general testimony regarding traits of personality disorders. Sandoval's attorney diligently objected to testimony and succeeded in excluding all of the testimony derived from the court-ordered interview. As such, the record does not reveal any deficiencies in Sandoval's attorney's performance.

Also, there is no evidence that Sandoval suffered any prejudice from the psychiatrist's testimony. In its order, the sentencing panel specifically stated that it did not consider any of the psychiatrist's testimony that was derived from his court-ordered interview of Sandoval. Therefore, we do not consider whether the psychiatrist's testimony was proper, because the sentencing panel did not consider the testimony in reaching its determination. Further, it is presumed that judges disregard evidence which should not have been admitted. *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990). Sandoval did not suffer prejudice from the psychiatrist's testimony.

There is no evidence that Sandoval's counsel's performance was defective or that Sandoval suffered prejudice from the psychiatrist's testimony. The trial court did not err in receiving the testimony, and Sandoval's counsel did not provide ineffective assistance. These assignments of error are without merit.

(ii) Testimony of Todd Uhlir

Sandoval claims that his trial counsel was ineffective because he elicited speculative testimony from Todd Uhlir regarding a bullet's trajectory. During the aggravation phase of the trial, the State called Uhlir, the director of operations for the fast-food restaurant located across the street from the bank. On direct examination, Uhlir testified that a bullet from the robbery hit the glass of the drive-through window. He drew a diagram of the restaurant and indicated where employees are located on a typical morning.

Sandoval's counsel objected on the grounds that Uhlir was not at the restaurant at the time of the shootings, so he did not know where the employees were actually standing. In a sidebar, Sandoval's counsel explained that he was concerned the jurors would be misled by Uhlir's testimony and diagram, because they might think that was where people were actually standing when the bullet hit the window.

On cross-examination, Sandoval's counsel asked Uhlir questions to clarify that he was not at the restaurant during the robbery; that the bullet did not go through the glass; and that due to the angle at which the bullet was fired, it would have likely lodged in a wall and not traveled into the kitchen portion of the restaurant. Taken as a whole, the testimony elicited seems to be part of a deliberate trial strategy of showing the jurors that the likelihood of an employee's being hit by the stray bullet was low.

[53] Trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). As such, when reviewing an ineffective assistance of counsel claim, the court will not second-guess reasonable strategic decisions made by counsel. *Id*. Sandoval's counsel's cross-examination of Uhlir was not deficient and did not prejudice Sandoval. This assignment of error is without merit.

(iii) Failure to Call Forensic Pathologist

Sandoval claims that he received ineffective assistance because his trial counsel did not call a forensic pathologist as a witness to rebut the testimony of Dr. Jerry Jones. Jones testified concerning how long each of the victims had lived after being shot and the manner in which each ultimately had died.

During the guilt portion of the trial, Jones told the jury that Sun died from asphyxiation from bleeding in his air passages and extensive blood loss, Tuttle died from bone fragment disruption in her brain and bleeding around her brain stem, Bryant died from asphyxiation due to bleeding in her air passages, Elwood died from extensive bleeding in both chest cavities,

and Mausbach died from asphyxiation due to blood filling her air passages.

Jones explained that when a person's air passages fill with blood, the person has difficulty breathing. He or she would gasp to breathe, and cough, snort, or spit to try to get the blood out of his or her mouth. As an example, Jones explained that the blood on the wall near Mausbach was from her coughing blood in an attempt to breathe.

At the aggravation phase of the trial, Jones testified that when the victims asphyxiated, they were consciously attempting to expel blood from their airways and were essentially drowning in their own blood. He testified that it could take 1 to 2 minutes before a person became unconscious and 4 to 5 minutes before the person actually suffocated and died. Jones explained that although the person is gasping for air, the person is conscious, alert, and aware that he or she is dying. He characterized it as a "very agonizing" death. Jones also testified that although not as agonizing as asphyxiation, death by exsanguination—or blood loss—is not a pleasant way to die because blood loss leads to anxiety, apprehension, an impending sense of doom, and shortness of breath.

On cross-examination, Sandoval's attorney attempted to clarify the length of time that each victim was conscious after the shooting. He also asked Jones to confirm that it appeared that the gunshot wounds were intended to cause death and not to prolong the suffering. During the cross-examination, Jones also stated that he thought suffocation from blood was one of the worst ways to die. He stated that each second feels like "an eternity until the person dies."

Sandoval's trial counsel did not have an expert witness rebut Jones' testimony. Sandoval raised the issue at a hearing on his motion for substitute counsel, and Sandoval's attorney testified regarding the issue. He testified that in reaching the decision not to call a rebuttal witness, he considered whether arguments over the length of time the victims suffered before death would have a negative influence on the jury, whether additional gruesome testimony would have a favorable effect on the jury, and whether he wanted to give the State the opportunity to have Jones recalled to the stand to reiterate the suffering that the

victims endured before they died. These reasons indicate that the decision not to call a forensic pathologist to rebut Jones' testimony was carefully made and was part of a trial strategy which we will not second-guess. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). Accordingly, Sandoval's trial counsel was not deficient.

Furthermore, there is no evidence that Sandoval suffered any prejudice due to the fact that a doctor did not testify on his behalf. As his counsel noted, it is likely that an argument among experts over the precise number of seconds a victim suffered before he or she expired would not be well received by the jury. This assignment of error is without merit.

(iv) Failure to Adduce Prior Consistent Statements

Sandoval next argues that his trial counsel provided ineffective assistance because he did not adduce evidence of an alleged prior consistent statement made by Sandoval regarding his claim that he used LSD on the day of the murders. Sandoval alleges that during the mitigation phase of the trial, the State mentioned in its closing argument two statements Sandoval made about using LSD. Sandoval argues that his counsel should have offered the statements as mitigating evidence that Sandoval had not changed his story about using LSD. We conclude that Sandoval was not prejudiced by the failure to offer his prior consistent statement regarding his use of LSD on the day of the murders. Therefore, this assignment of error is without merit.

18. Independent Proportionality Review

[54] Under Neb. Rev. Stat. § 29-2521.03 (Reissue 2008), the Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). This review requires us to compare the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. *Id.* The purpose of this review is to ensure that the sentences imposed in this case

are no greater than those imposed in other cases with the same or similar circumstances. *Id.*

In conducting our independent proportionality review, we reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed. See, *Vela, supra*; *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009); *Mata, supra*; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *Gales I* (and cases noted therein). Particularly, we take note of *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), in which we affirmed a sentence of death for the defendant's convictions of two counts of first degree murder for the murder of two cabdrivers during a robbery.

The cases of Vela and Galindo, Sandoval's coconspirators, are most comparable. *Vela, supra*; *Galindo, supra*. As in *Vela* and *Galindo*, the murders in this case were committed in an effort to conceal the identity of the perpetrator, multiple murders were committed, and there was a great risk of death to more than two persons. Also comparable to *Galindo*, the sentencing panel found that no statutory mitigating circumstances existed and that one nonstatutory mitigating circumstance existed to which it gave little weight. Although the sentencing panel in *Vela* found three nonstatutory mitigating factors, it nevertheless concluded that the death penalty was not disproportionate or excessive.

Sandoval planned an armed bank robbery, recruited participants, and carried out the plan, which resulted in five murders. Based on our independent review, we find that the imposition of the death penalty for each of the five counts of first degree murder is proportional to the sentence imposed in the same or similar circumstances.

V. CONCLUSION

The trial court erred in instructing the jury on aggravator (1)(d); however, the error was harmless. Except for Sandoval's challenge of electrocution as the method of death, Sandoval's other assignments of error do not have merit. We conclude the evidence was sufficient to sustain the convictions and the sentences. Therefore, we affirm the convictions; affirm the panel's

sentences of death for the first degree murders of Elwood, Sun, Bryant, Mausbach, and Tuttle; and affirm the sentences imposed for use of a weapon to commit a felony.

AFFIRMED.

HEAVICAN, C.J., not participating.

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

I concur in the majority's opinion that the district court should not have instructed the jury on the "mental anguish" component of the heinous, atrocious, or cruel prong of aggravator (1)(d). But, in concurring, I disagree with the majority's statement that we have not previously recognized mental anguish as a component of the heinousness factor. I write separately to explain why the trial court should not have given the instruction in this case despite our previous recognition of the mental anguish component.

The majority opinion states that in *State v. Gales*,[1] we recognized that "mental anguish" had been included in the pattern jury instructions but that we did not consider its validity. It is true that the defendant failed to raise this issue on appeal, but we clearly preempted a future collateral attack in *Gales*:

> [T]he jury was instructed that in order to find that the murder of [one of the victims] was especially heinous, atrocious, or cruel, it must find that "[t]he defendant inflicted serious mental anguish or serious physical abuse — meaning sexual abuse — on the victim . . . before her death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate." With respect to the phrase "sexual abuse," the court's instruction was constitutionally sound and consistent with Nebraska law as explained in [*State v.*] *Ryan*[, 248 Neb. 405, 534 N.W.2d 766 (1995)]. Neither [the defendant's] objection at trial, nor his appellate brief, take issue with the district court's use of the phrase "serious mental anguish," and whether that phrase is consistent with prior Nebraska law is not before us in this appeal. We note, however, that the phrase "'[m]ental anguish includ[ing] a victim's uncertainty as to

[1] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

his ultimate fate'" has been held not to be unconstitutionally vague.[2]

In *Gales*, we did not know which prong of aggravator (1)(d) the jury believed was proved and could not have concluded that the instruction, as a whole, was constitutionally sound unless both prongs were constitutionally sound. When

> a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories[,] it is possible that the guilty verdict may have had a proper basis, [but] "it is equally likely that the verdict . . . rested on an unconstitutional ground."[3]

So I believe that we did recognize the propriety of the mental anguish component in *Gales*. But even if we had not, we had previously stated in *State v. Palmer*[4] that a victim's uncertainty as to his ultimate fate is a component of the heinousness prong:

> As a meaning for the words "especially heinous, atrocious, cruel" found in circumstance (1)(d) of § 29-2523, this court, in *State v. Simants*[, 197 Neb. 549,] 566, 250 N.W.2d [881,] 891 [(1977)], has adopted the definition utilized by the Florida court in *State v. Dixon*[, 283 So. 2d 1 (Fla. 1973)], that is, especially heinous, atrocious, cruel is "directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." . . .
>
> "Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death." *Phillips v. State*, 250 Ga. 336, 340, 297 S.E.2d

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[2] *Id.* at 483-84, 694 N.W.2d at 161, citing *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[3] *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), quoting *Bachellar v. Maryland*, 397 U.S. 564, 90 S. Ct. 1312, 25 L. Ed. 2d 570 (1970). See, also, *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990) (Marshall, J., concurring); *Leary v. U.S.*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). Compare *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[4] *State v. Palmer*, 224 Neb. 282, 315, 399 N.W.2d 706, 729 (1986).

> 217, 221 (1982). "A victim's uncertainty as to the ultimate fate can be significant in indicating mental suffering." *State v. Correll*, [148 Ariz. 468,] 480, 715 P.2d [721,] 733 [(1986)].

As the facts in *Gales* and *Walton v. Arizona*[5] illustrate, the mental anguish instruction is not unconstitutionally vague when the evidence would support two different findings: (1) The victim would have been uncertain whether the defendant intended to kill him and had time to agonize over whether the defendant would decide to kill him; or (2) the victim would have been certain of the defendant's intent to kill him and had time to agonize over his imminent doom before the defendant committed the murder.

In *Walton*, the U.S. Supreme Court affirmed the use of the mental anguish instruction when the victim was forced to lie on the ground while his kidnappers decided what to do with him. The defendant then forced him to walk out into the desert, taking a gun but not a rope, "surely making [the victim] realize that he was not going to be tied up and left unharmed."[6] In *State v. Correll*,[7] the case we cited in *Palmer*, armed assailants bound the victims and then drove them into the desert before killing them. The court in *Correll* stated, "At no time could they be certain what these two armed men intended beyond robbery."[8] Finally, in *Gales*,[9] the defendant killed two children by strangulation in the same house. A fact finder could have reasonably found that the child who was killed last would have been aware that the defendant had murdered the other child and would have feared for his or her own fate.

Although the mental anguish instruction is not unconstitutionally vague in the circumstances described above, I agree that it should not have been given in this case because the victims were all shot immediately. The State did not argue

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[5] *Walton, supra* note 2.

[6] *Walton, supra* note 2, 497 U.S. at 646 n.3.

[7] *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986).

[8] *Id.* at 480, 715 P.2d at 733.

[9] *Gales, supra* note 1.

that the victims would have agonized over whether the defendants intended to kill them or their imminent doom before they were shot. In fact, the State argued that the defendants planned to shoot everyone immediately so there would not be any witnesses. Under these facts, I agree that the mental anguish instruction failed to channel the jury's discretion for determining whether Sandoval was more deserving of the death penalty than any capital defendant whose victim did not die instantaneously.

Furthermore, the majority opinion implicitly assumes, and I agree, that the heinousness instruction was not otherwise warranted under our limiting construction in *Palmer*, quoted above, requiring that the murder be unnecessarily torturous to the victim.

I also concur in the majority's opinion that the court should not have instructed the jury on the "apparent relishing" component of the exceptional depravity prong. Here, the facts were too speculative, and therefore insufficient, to submit this component to the jury. We addressed case law relevant to this issue in *State v. Mata*.[10]

In *Mata*, the defendant argued that it was not clear whether the term "apparently relished" referred to the fact finder's perception of his conduct or his mental state. We rejected that argument. We noted that under an earlier version of aggravator (1)(b), the sentencing panel had to find that the defendant had murdered in an "apparent effort" to conceal a crime. We stated that under the earlier version, we had agreed with a federal court that "'"apparent"' means '"readily perceptible,"'" and that therefore, the provision "'"cannot be applied in speculative situations or where a strained construction is necessary to fulfill it."'"[11] In *State v. Lotter*,[12] we interpreted the term "'readily perceptible'" to mean "'easily capable of being noticed.'" We

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[10] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[11] *Id.* at 27, 745 N.W.2d at 253, quoting *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).

[12] *State v. Lotter*, 255 Neb. 456, 521-22, 586 N.W.2d 591, 635 (1998). Accord *Mata, supra* note 10.

concluded in *Lotter* that for the sentencing panel to conclude that the defendant murdered in an apparent attempt to conceal the commission of a crime, it must have been obvious to the panel that this was the defendant's purpose.[13]

In *Walton*, the U.S. Supreme Court approved the Arizona Supreme Court's holding that "a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing."[14] This court has similarly noted that "'depraved'" is "'marked by debasement, corruption, perversion, or deterioration.'"[15] But the Arizona court's definition approved in *Walton* did not include the word "apparent." So *Walton* should not control over our own case law regarding the similar phrase, "apparent effort to conceal," in the former version of aggravator (1)(b).

By analogy to our case law on a murder committed in an *apparent* attempt to conceal a crime, a court should not instruct a jury on the apparent relishing component of aggravator (1)(d) in speculative circumstances. A trial court should give the instruction only when the evidence would support a finding that the defendant's relishing of the murder was obvious. I believe the facts of this case were too speculative under a test set forth by the Arizona Supreme Court.

We adopted our exceptional depravity factors from the Arizona Supreme Court.[16] That court has said the following about its relishing component:

> The first factor, that a defendant relishes the murder, "refers to the defendant's actions or words that show debasement or perversion." *State v. Roscoe*, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996). To establish relishing, we usually "require that the defendant say or do something, other than the commission of the crime itself,

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[13] See *Lotter, supra* note 12.

[14] *Walton, supra* note 2, 497 U.S. at 655.

[15] See *Palmer, supra* note 4, 224 Neb. at 318, 399 N.W.2d at 731.

[16] See *id.*

> to show he savored the murder." *Id.*; *accord State v. Doerr*, 193 Ariz. 56, 67-68, ¶ 54, 969 P.2d 1168, 1179-80 (1998) (finding that defendant relished murder after defendant bragged to his cellmate about playing with the victim's blood); *State v. Detrich*, 188 Ariz. 57, 68, 932 P.2d 1328, 1339 (1997) (finding that defendant relished murder and demonstrated an "abhorrent lack of regard for human life" based on defendant's statement to his co-defendant, "It's dead, but it's warm. Do you want a shot at it?"); *State v. Jackson*, 186 Ariz. 20, 30, 918 P.2d 1038, 1048 (1996) (describing how defendant sang a rap song both immediately after killing his victim and then after showing a picture of the victim's children to his co-defendant); *see* [*State v.*] *Clark*, 126 Ariz. [428,] 437, 616 P.2d [888,] 897 [(1980)] (finding depravity when defendant kept a souvenir of his crime).[17]

But the Arizona Supreme Court concluded that the factor had not been proved beyond a reasonable doubt when the trial court found that the defendant reveled in the idea of meting out his own justice, enjoyed the spectacle the murder created in front of his friends, and enjoyed the emotional toll caused to the victim by the defendant's locking him in a trunk overnight. The court reasoned that the evidence failed to show the defendant "said or did anything, beyond the commission of the crime itself, that manifests that he savored the murder."[18]

The Arizona Supreme Court's test is obviously intended to narrow a jury's discretion by distinguishing murderers who relish the act of murdering from those who show indifference to human life—a definition that would fail to preclude arbitrary sentencing. Under that test, I do not believe that Sandoval's smiling at another customer who had unexpectedly entered the bank or after he was arrested are affirmative acts or statements sufficient to support a jury's finding that he obviously relished committing the murders, as distinguished from his indifference to human life. Thus, the court improperly instructed the jury to

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[17] *State v. Murdaugh*, 209 Ariz. 19, 31-32, 97 P.3d 844, 856-57 (2004).

[18] *Id.* at 32, 97 P.3d at 857.

determine the existence of the exceptional depravity prong of aggravator (1)(d).

In sum, I concur in the majority's opinion that the court should not have instructed the jury on either the heinousness prong or the exceptional depravity prong of aggravator (1)(d). But I dissent from its conclusion that the instructions were harmless error. I believe that these were substantial errors requiring us to remand the cause to the district court for the sentencing panel to resentence Sandoval.

The first question is, What is the proper test for determining whether the instructions on the heinousness and exceptional depravity prongs were constitutional error? Before the U.S. Supreme Court's 2006 decision in *Brown v. Sanders*,[19] Nebraska was a weighing state for determining whether an Eighth Amendment violation occurred because the sentencer considered an invalid aggravator.[20] Weighing states were characterized by sentencing schemes that required the sentencing body to weigh the statutory aggravating circumstances, which made the defendant eligible for the death penalty, against any mitigating circumstances supported by the evidence.[21] The U.S. Supreme Court had held that "there is Eighth Amendment error when the sentencer [in a weighing state] weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence."[22]

In contrast, in nonweighing states, after a jury found at least one aggravator, the sentencer determined whether to impose the death penalty by considering all the circumstances from both the guilt phase and the sentencing phase. Aggravating factors played no specific role in the sentencer's decision; the

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[19] *Brown v. Sanders*, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

[20] See, *Williams, supra* note 3; *State v. Reeves*, 239 Neb. 419, 476 N.W.2d 829 (1991).

[21] See, *Brown, supra* note 19; *Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). See, also, Neb. Rev. Stat. § 29-2522 (Reissue 2008).

[22] *Sochor v. Florida*, 504 U.S. 527, 532, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).

jury's finding of an aggravating factor only made the defendant death eligible.[23]

Before *Brown*, the Court considered the distinction between weighing and nonweighing states "of critical importance" in how an appellate court must review the effect of an aggravating circumstance that is later declared invalid.[24] The critical difference was the emphasis placed on statutory aggravating circumstances in weighing states.[25] So, in weighing states, a state appellate court could not just assume that because other aggravators supported the sentence, the absence of the invalid aggravator would have made no difference. The weighing process was considered skewed, and "only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[26]

In contrast, in nonweighing states, constitutional error presumptively occurred in only two circumstances: (1) if the invalid factor permitted the sentencer to draw adverse inferences from conduct that is constitutionally protected or irrelevant to sentencing, or that actually militates for a lesser penalty; or (2) if the invalid eligibility factor allowed the jury to hear evidence that otherwise would not have been before it.[27] And a state appellate court could determine that the invalid factor would not have made a difference to the jury's determination without engaging in reweighing or harmless error analysis.[28]

But in *Brown*, the Court emphasized what evidence the sentencer could have considered without the invalid aggravator in weighing and nonweighing states. It stated that in weighing states, the sentencer could not consider the evidence supporting that aggravator under a different factor, "[s]ince the eligibility

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[23] See *Stringer, supra* note 21.

[24] *Id.*, 503 U.S. at 232.

[25] See, *Brown, supra* note 19 (Breyer, J., dissenting; Ginsburg, J., joins); *id.* (Stevens, J., dissenting; Souter, J., joins); *Stringer, supra* note 21.

[26] *Stringer, supra* note 21, 503 U.S. at 232.

[27] *Brown, supra* note 19.

[28] See *Stringer, supra* note 21.

factors by definition identified distinct and particular aggravating features . . . .”[29] Conversely, it stated that in nonweighing states, the sentencer could consider this evidence under a different sentencing factor.

But the Court concluded, “This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.”[30] It concluded that the distinction failed to account for the same type of skewing occurring in a nonweighing state if one of the separate sentencing factors was later declared invalid. But it reasoned that prima facie claims of skewing in the sentencing factors would be illusory if “[o]ne of the *other* aggravating factors, usually an omnibus factor but conceivably another one, made it entirely proper for the jury to consider as aggravating the facts and circumstances underlying the invalidated factor.”[31] The Court concluded:

> We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States . . . if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[32]

It explained that its new rule meant “skewing will occur, and give rise to constitutional error, only where the [sentencer] could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.”[33]

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[29] *Brown, supra* note 19, 546 U.S. at 217.

[30] *Id.*, 546 at at 219.

[31] *Id.*, 546 U.S. at 220 (emphasis in original).

[32] *Id.* (emphasis in original).

[33] *Id.*, 546 U.S. at 221.

As the 11th Circuit has noted, many courts and commentators that have considered this issue have read *Brown* as announcing a uniform rule for weighing and nonweighing states alike.[34] Although the Sixth Circuit has concluded that *Brown* only announced a new rule for nonweighing states, it appears there is an inherent problem in that conclusion. *Brown* clearly discarded the previous terminology it had used to distinguish weighing and nonweighing states. But discarding the distinguishing terminology is inconsistent with announcing a new rule only for states formerly known as nonweighing states. Moreover, it seems to me that limiting the *Brown* rule to nonweighing states is refuted by the Court's analysis of California's statutes, which were at issue in *Brown*.

The Ninth Circuit had held that California is a weighing state because if a jury found the existence of eligibility factors, the court instructed it to consider a separate list of sentencing factors and to weigh only those factors against mitigating evidence. The *Brown* majority rejected this conclusion and classified California as a nonweighing state because one of the sentencing factors was an omnibus factor that permitted the jury to consider the "'circumstances of the crime.'"[35] The *Brown* majority then rejected the distinction between weighing and nonweighing jurisdictions altogether:

> *But leaving aside the weighing/non-weighing dichotomy and proceeding to the more direct analysis set forth earlier in this opinion*: All of the aggravating facts and

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[34] See, *Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007), citing *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), *vacated on other grounds sub nom. Hudson v. Spisak*, 552 U.S. 945, 128 S. Ct. 373, 169 L. Ed. 2d 257 (2007); *Slagle v. Bagley*, 457 F.3d 501 (6th Cir. 2006); 1 Wayne R. LaFave, Substantive Criminal Law § 3.5 (2d ed. 2003 & Supp. 2009-10); and *The Supreme Court, 2005 Term—Leading Cases*, 120 Harv. L. Rev. 125 (2006). See, also, *Clayton v. Roper*, 515 F.3d 784 (8th Cir. 2008); *Mitchell v. Epps*, No. 1:04CV865(LG), 2010 WL 1141126 (S.D. Miss. Mar. 19, 2010); 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, Substance and Procedure § 17.3(c) (4th ed. 2008); Charles H. Whitebread, *The 2005-2006 Term of the United States Supreme Court: A Court in Transition*, 28 Whittier L. Rev. 3 (2006).

[35] *Brown, supra* note 19, 546 U.S. at 222.

> circumstances that the invalidated factor permitted the jury to consider were also open to their proper consideration under one of the other factors. The erroneous factor could not have "skewed" the sentence, and no constitutional violation occurred.[36]

So I believe that *Brown* clearly intended to focus the inquiry—under any type of capital sentencing scheme—on whether the sentencer could consider the same facts and circumstances under a different aggravating factor.

Since 2002, under Nebraska's capital sentencing scheme, a jury, if not waived, only determines the existence of aggravating circumstances.[37] A three-judge panel determines the existence of mitigating circumstances, weighs aggravating and mitigating circumstances, conducts a proportionality review, and determines the sentence.[38] We have stated, "'[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 proportionality sentencing functions.'"[39] And as the U.S. Supreme Court in *Brown* noted, one of the reasons that the weighing/nonweighing distinction has been misleading is because the Court has held that the sentencer in capital cases must be allowed to weigh the facts and circumstances of the crime against the defendant's mitigating evidence.[40]

But under the Court's decision in *Ring v. Arizona*,[41] other than the finding of a prior conviction, the determination of aggravating circumstances must be made by a jury unless waived by the defendant.[42] The sentencing panel cannot give aggravating weight to any circumstance the jury did not find

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[36] *Id.*, 546 U.S. at 222-23 (emphasis supplied).

[37] See *Mata, supra* note 10.

[38] *Id.*; *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[39] *State v. Galindo*, 278 Neb. 599, 626-27, 774 N.W.2d 190, 218 (2009), quoting *Hessler, supra* note 38.

[40] See *Brown, supra* note 19.

[41] *Ring, supra* note 2.

[42] See, e.g., *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

to exist. So under *Brown*, when we determine that the court invalidly instructed the jury on an aggravating circumstance, the weighing process is unconstitutionally skewed unless the sentencing panel could have given aggravating weight to the same evidence under a different aggravating circumstance that the jury found to exist.

I believe that the evidence before the sentencing panel supporting the mental anguish component of the heinousness prong and the relishing component of the depravity prong could not have been considered under any of the remaining aggravating circumstances found by the jury: i.e., (1) the defendant committed the murder to conceal the identity of the perpetrator; (2) the defendant committed another murder at the time of the murder; (3) the defendant created a great risk of death to at least several persons. Thus, the weighing process was unconstitutionally skewed.

But *Brown* "deals only with the threshold matter of deciding when constitutional error has resulted from reliance on invalid aggravators, not with how appellate courts can remedy the error short of resentencing."[43] It "does not bar courts from engaging in harmless error review."[44] The U.S. Supreme Court has held that when an Eighth Amendment violation occurs, federal law does not require a state appellate court to remand for resentencing, but if it does not, it must "either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error."[45]

But as the majority opinion notes, we have held that appellate reweighing violates a defendant's due process rights under Nebraska's capital sentencing scheme.[46] We can only conduct harmless error review or remand the cause to the district court for resentencing.[47] But it appears to me that the majority's analysis is a reweighing rather than harmless error review.

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[43] *Jennings, supra* note 34, 490 F.3d at 1256.

[44] *Id.*

[45] *Sochor, supra* note 22, 504 U.S. at 532.

[46] See *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[47] See *id.*

In *State v. Ryan*,[48] we explained that *Chapman v. California*[49] governs harmless error analysis of constitutional error. *Chapman* requires the State to prove beyond a reasonable doubt that the error did not contribute to the death sentence: The question under *Chapman* "is not whether the legally admitted evidence was sufficient to support the death sentence, . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained.'"[50]

In *Ryan*, we adopted the Eighth Circuit's harmless error standard:

> "[T]he issue under *Chapman* is whether the sentencer actually rested its decision to impose the death penalty on the valid evidence and the constitutional aggravating factors, independently of the vague factor considered; in other words, whether what was actually and properly considered in the decision-making process was 'so overwhelming' that the decision would have been the same even absent the invalid factor."[51]

In *Ryan*, we noted that the sentencing judge's order indicated that the judge had found facts "to support the application of *either* the first or second prong of [aggravator] (1)(d) beyond a reasonable doubt."[52] We therefore rejected the defendant's argument that the sentence was heavily based on the judge's finding of exceptional depravity because the same facts overwhelmingly supported the heinousness prong.[53]

As discussed, I do not believe that we can reach that conclusion here because the jury did not find any other aggravating circumstance for which the mental anguish and relishing

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[48] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, Mata, supra* note 10.

[49] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[50] See *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), quoting *Chapman, supra* note 49.

[51] *Ryan, supra* note 48, 248 Neb. at 452, 534 N.W.2d at 796.

[52] *Id.* at 451, 534 N.W.2d at 795 (emphasis in original).

[53] See *Ryan, supra* note 48.

facts were relevant. So the error is not harmless unless we can say beyond a reasonable doubt that the sentencer was not substantially swayed by the error[54] because the evidence was "unimportant in relation to everything else the [sentencer] considered."[55] In *Chapman*, the Court stated, "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless."[56] I do not believe that a substantial error, which resulted in a sentencing panel's weighing evidence prejudicial to the defendant but not validly considered under any aggravator found by the jury, can be considered harmless.

Here, the evidence supporting the mental anguish and relishing components was highly prejudicial. The State's expert witness testified extensively about the agonizing deaths that each victim would have experienced. And four witnesses testified to facts relevant to Sandoval's purported relishing of the murders. The State also emphasized facts supporting the relishing component in its closing argument. The sentencing panel would have incorrectly relied on this emphasized evidence as validly supporting the heinousness and depravity prongs of aggravator (1)(d), and therefore supporting the death penalty.

Under these circumstances, I believe it is insufficient for the majority opinion to conclude that the evidence supported the remaining aggravating circumstances and that the sentencing panel gave little weight to the only mitigating circumstance it found to exist. I believe that this analysis clearly consists of reweighing the aggravators and mitigators, instead of concluding that this evidence did not contribute to the sentence beyond a reasonable doubt.[57]

The State has a heavy burden to show harmless error beyond a reasonable doubt. And the sentencing order provides no

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[54] See *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

[55] *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled on other grounds, Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

[56] *Chapman, supra* note 49, 386 U.S. at 23-24.

[57] Compare *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

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

PATRICIA RICHARDSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF COREY RICHARDSON, DECEASED, AND PATRICIA RICHARDSON, INDIVIDUALLY, APPELLEES, V. CHILDREN'S HOSPITAL AND DR. SCOTT JAMES, APPELLANTS.

787 N.W.2d 235

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

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

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

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

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

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

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

HEAVICAN, C.J.

INTRODUCTION

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSIGNMENTS OF ERROR

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

STANDARD OF REVIEW

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

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

ANALYSIS

Richardson's Expert Evidence Was Sufficient to Sustain Verdict

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

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

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

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[3] Brief for appellees at 11.

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

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

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

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

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

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

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

[7] *Id.*

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

[9] *Id.*

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

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

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

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

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

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

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

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

[13] *Id.*

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

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

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

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

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

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

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[14] *Rankin, supra* note 10.

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

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

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

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

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

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

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

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

[18] *Id.*

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

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

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

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

Plaintiff's Per Diem Argument Was Not Improper

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

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

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

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

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

Appellants' Remaining Assignments of Error

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

CONCLUSION

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

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

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

[24] *Id.*

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

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

REVERSED AND REMANDED FOR A NEW TRIAL.

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

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

786 N.W.2d 343

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

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

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

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

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

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

Jennifer M. Houlden, Deputy Lancaster County Public Defender, for appellee Deng M.

John C. McQuinn, Chief Assistant Lincoln City Attorney, for appellee State of Nebraska in No. S-09-983.

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

MILLER-LERMAN, J.

NATURE OF CASE

In these consolidated appeals, the Nebraska Department of Health and Human Services (DHHS) appeals portions of the orders of the separate juvenile court of Lancaster County committing Jorge O. in case No. S-09-966 and Deng M. in case No. S-09-983 to the custody of DHHS' Office of Juvenile Services (OJS) for placement at the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska. In each case, the court order indicated that the juvenile court rather than OJS would determine whether to discharge the juvenile from YRTC. DHHS asserts on appeal that the orders exceeded the juvenile court's statutory authority. We affirm the commitments to YRTC but vacate the orders to the extent they placed authority to discharge the juveniles from YRTC in the juvenile court rather than in OJS.

STATEMENT OF FACTS

In case No. S-09-966, Jorge was adjudicated in October 2008 to be under the juvenile court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(1) (Reissue 2008) after he admitted leaving the scene of a motor vehicle accident in violation of Neb. Rev. Stat. § 60-696(1)(a) (Cum. Supp. 2008). At that time, he was released to the custody of his mother under certain conditions, and the violation of those conditions could result in a more restrictive placement. After an evaluation by OJS, the juvenile court committed Jorge to the custody of OJS for inhome placement. On July 24, 2009, the juvenile court approved a request for a more restrictive placement in a group home. OJS later filed a motion to transfer Jorge to a more restrictive placement at YRTC. In an order filed September 1, the juvenile court sustained the motion to transfer and ordered

Jorge to be placed at YRTC. In the September 1 order, the court ordered that Jorge not be discharged without the court's approval and that subsequent to Jorge's discharge from YRTC, a review hearing be scheduled.

In case No. S-09-983, Deng was adjudicated in September 2009 to be under the juvenile court's jurisdiction pursuant to § 43-247(1) after he answered no contest to charges he had possessed stolen property and had committed an assault in violation of municipal ordinances of the city of Lincoln. In an order entered on September 14, the juvenile court ordered that Deng be committed to the custody of OJS for placement at YRTC. In the September 14 order, the court ordered that Deng not be discharged without the court's approval and that subsequent to Deng's discharge from YRTC, a review hearing be scheduled.

DHHS appeals the September 1, 2009, order regarding Jorge in case No. S-09-966 and the September 14 order regarding Deng in case No. S-09-983. We granted DHHS' motions to consolidate the two appeals.

ASSIGNMENTS OF ERROR

In each case, DHHS asserts that the juvenile court erred by entering an order that indicates that the juvenile court rather than OJS would determine whether to discharge the juvenile from YRTC and that a review hearing would be held subsequent to the juvenile's discharge from YRTC.

STANDARDS OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010).

[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. *Id.*

ANALYSIS

In each of these appeals, DHHS claims that under the controlling statutes and rules, the juvenile court was without

statutory authority to make the decision whether to discharge the juvenile from YRTC. The language in the court's orders in cases Nos. S-09-966 and S-09-983, to which objection is made, reads as follows: "IT IS FURTHER ORDERED that the minor child shall not be discharged from [OJS] without the approval of this Court." DHHS also objects to the additional language in each order to the effect that upon the juvenile's discharge, a review hearing purportedly pursuant to Neb. Rev. Stat. § 43-408 (Reissue 2008) should be scheduled.

In case No. S-09-966, counsel for all parties join in DHHS' argument seeking reversal for the reason that under the Health and Human Services, Office of Juvenile Services Act (OJS Act), Neb. Rev. Stat. §§ 43-401 through 43-423 (Reissue 2008), OJS rather than the juvenile court is empowered to decide without juvenile court approval when the juvenile should be discharged from YRTC. In case No. S-09-983, counsel for the juvenile, the Lancaster County public defender, agrees with DHHS; however, the Lincoln City Attorney, on behalf of the State, argues that the juvenile court's order in that case should be affirmed, because the order was within the juvenile court's general authority under the Nebraska Juvenile Code to exercise continuing jurisdiction.

We have considered the relevant statutes and conclude that to the extent there is a conflict between the OJS Act and the Nebraska Juvenile Code on the subject matter at issue, the OJS Act, which is the specific statute, controls over the general statute, the juvenile code. See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009). We therefore agree with the arguments tendered by DHHS, and in particular hold that under the statutory scheme established by the Legislature in the OJS Act, it is the responsibility of OJS to determine the discharge of juveniles committed to YRTC, and the juvenile court erred when it ruled to the contrary.

[3] We have observed that as a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Dakota M., supra*; *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008). The statutes and rules and regulations

quoted below are relevant to our resolution of the breadth of the juvenile court's statutory authority in these cases. In considering these statutes, we note that the general statutes pertaining to juveniles are found in the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008), whereas the particular statutes pertaining to OJS which control our disposition of these cases are found in the OJS Act at §§ 43-401 to 43-423.

OJS is a division within DHHS that is charged with the oversight, administration, and control of state juvenile correctional facilities and programs for juveniles who have violated the law. See § 43-404. Section 43-405(4) of the OJS Act provides that included in "[t]he administrative duties of [OJS]" is the duty to "[a]dopt and promulgate rules and regulations for the levels of treatment and for management, control, screening, evaluation, treatment, rehabilitation, parole, transfer, and *discharge* of juveniles placed with or committed to [OJS]." (Emphasis supplied.)

The administrative code pertaining to juveniles committed to YRTC, 401 Neb. Admin. Code, ch. 8, § 003 (1998), and entitled "Parole or Institutional Discharge of Committed Youth," provides:

> A team comprised of institutional treatment staff, the assigned Juvenile and Family Services Worker, and other designated persons involved with the case shall periodically review the youths' progress and submit recommendations for release to parole or institutional discharge to the Chief Executive Officer. *The Chief Executive Officer shall review the team's recommendation and, if he or she concurs, authorize the release of the youth to parole supervision or effect an institutional discharge of a youth from the state's custody.* If there is disagreement between the Chief Executive Officer and the team concerning a release recommendation, the Chief Executive Officer and team will discuss concerns and attempt to reach agreement. If the two parties cannot reach consensus, the matter shall be referred to the Protection and Safety Administration for resolution.

(Emphasis supplied.)

Section 43-412(2) of the OJS Act provides that "[t]he discharge of any juvenile pursuant to the rules and regulations or upon his or her attainment of the age of nineteen shall be a complete release from all penalties incurred by conviction or adjudication of the offense for which he or she was committed."

Section 43-408(2) of the OJS Act provides:

> The committing court shall order the initial level of treatment for a juvenile committed to [OJS]. Prior to determining the initial level of treatment for a juvenile, the court may solicit a recommendation regarding the initial level of treatment from [OJS]. Under this section, the committing court shall not order a specific placement for a juvenile. The court shall continue to maintain jurisdiction over any juvenile committed to [OJS] until such time that the juvenile is discharged from [OJS]. The court shall conduct review hearings every six months, or at the request of the juvenile, for any juvenile committed to [OJS] who is placed outside his or her home, except for a juvenile residing at a [YRTC]. The court shall determine whether an out-of-home placement made by [OJS] is in the best interests of the juvenile, with due consideration being given by the court to public safety. If the court determines that the out-of-home placement is not in the best interests of the juvenile, the court may order other treatment services for the juvenile.

Section 43-247 of the Nebraska Juvenile Code pertains to the juvenile courts and their jurisdiction. The city attorney directs our attention to the following language of § 43-247:

> Notwithstanding any disposition entered by the juvenile court under the Nebraska Juvenile Code, the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.

In its appellate briefs, DHHS summarizes its argument as follows:

> If the Legislature intended for the juvenile court to have the authority to require its approval for discharge

> of juveniles committed to a YRTC, the OJS Act would have been written to include such authority. As the [OJS] Act is currently written, OJS has the authority to provide treatment to the juveniles in accordance with the court's orders and to discharge the juveniles in accordance with OJS' rules and regulations.

Briefs for appellant at 13.

In its briefs filed on behalf of the juveniles, the public defender agrees with DHHS and states that there are only two possible statuses the juvenile may have following release from YRTC, parole or discharge, both of which preclude the subsequent involvement of the juvenile court in an OJS case. The public defender observes that the instant cases involve discharge. In its briefs, the public defender states that "if [the juvenile] were to be institutionally discharged, he would have a 'complete release' from all penalties incurred from the Juvenile Court adjudication and OJS commitment, including a complete release from the continuing jurisdiction of the Juvenile Court. Neb. Rev. Stat. § 43-412." Briefs for appellees Jorge and Deng at 3. Consistent with the foregoing, the public defender correctly notes that the appellate courts have recently concluded that only OJS has the authority to revoke a juvenile's parole. *In re Interest of Sylvester L.*, 17 Neb. App. 791, 770 N.W.2d 669 (2009). See § 43-416.

In response, and contrary to the position of DHHS and the public defender, the city attorney relies on certain cases and further argues that the juvenile court continues to maintain jurisdiction over the juvenile while at YRTC under the Nebraska Juvenile Code's general continuing jurisdiction provision in § 43-247 and also under § 43-408(2). The city attorney argues that the continuing jurisdiction language implies that the juvenile court possesses the authority to determine the juvenile's discharge from YRTC, notwithstanding the court's having committed the juvenile to OJS. We disagree with the city attorney's reading of the statutes.

[4] Included in the administrative duties of OJS under § 43-405(4) of the OJS Act is the duty of OJS to "[a]dopt and promulgate rules and regulations for the . . . discharge of juveniles placed with or committed to [OJS]." Such rules

and regulations governing "Parole or Institutional Discharge of Committed Youth" are found at 401 Neb. Admin. Code, ch. 8, § 003. Under these rules dealing with juveniles committed to YRTC, an assigned team reviews the committed juvenile's "progress and submit[s] recommendations for . . . institutional discharge to the Chief Executive Officer [to] effect an institutional discharge of a youth from the state's custody." Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Swift & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 773 N.W.2d 381 (2009). Finally, § 43-412(2) of the OJS Act provides that "[t]he discharge of any juvenile pursuant to the rules and regulations . . . shall be a complete release from all penalties incurred by conviction or adjudication of the offense for which he or she was committed."

Taking these provisions together, it is clear that although the juvenile court initially commits the juvenile to YRTC, once the juvenile is under OJS authority at YRTC, the decision to discharge is placed with OJS pursuant to the OJS Act and rules promulgated thereunder, and the OJS decision to discharge is a complete release from the juvenile court system with respect to the offense which occasioned the adjudication. The challenged juvenile court orders impede the institutional discharge power specifically placed in OJS by the OJS Act, and such orders attempting to place the decision to discharge in the juvenile court exceeded the juvenile court's statutory authority. As we have observed, the power of the juvenile court must be strictly construed from the applicable statutes and the court must therefore defer to the Legislature. *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008). Thus, the specific OJS statutory scheme outlined above, rather than the statutory general continuing jurisdiction language, controls the outcome of these cases.

For completeness, we note that in *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003), we endorsed the application of the continuing jurisdiction language where the juvenile was in inhome placement. To the extent *In re Interest of Tamantha S.* is inconsistent with our disposition of the present cases, it is disapproved. However, consistent with our resolution

of the discharge issue in these cases, we note that the appellate courts have held, as in *In re Interest of Sylvester L., supra*, that the decision to parole a juvenile from YRTC belongs to OJS. Under similar reasoning, as we now hold, the decision to discharge the juvenile from YRTC under the controlling statutes and rules and regulations belongs to OJS.

DHHS also takes issue with the portions of the challenged orders in which the juvenile court set review hearings subsequent to the juveniles' discharge from YRTC. We agree with DHHS that these orders were improper.

In ordering the review hearings, the juvenile court referred to § 43-408. A reading of § 43-408(2), however, shows there is no support for the juvenile court's orders setting review hearings under that provision. To the contrary, although § 43-408(2) provides for "review hearings every six months" for juveniles committed to OJS, the statute specifically exempts "a juvenile residing at a [YRTC]" from these periodic hearings. Further, under § 43-412(2), we conclude that the discharge from YRTC is a "complete release" precluding the exercise of juvenile court authority with respect to the case giving rise to the placement at YRTC. The juvenile court exceeded its statutory authority when it ordered the review hearings after discharge from YRTC.

CONCLUSION

The juvenile court did not err when it ordered Jorge and Deng committed to OJS for placement at YRTC, and we affirm this aspect of the orders. However, the juvenile court exceeded its statutory authority to the extent that it ordered that the juvenile court rather than OJS had the authority to determine the discharge of the juveniles from YRTC and further erred when it ordered review hearings subsequent to discharge. We therefore vacate these portions of the orders.

AFFIRMED IN PART, AND IN PART VACATED.

IN RE ESTATE OF CAROLYN K. HOCKEMEIER, DECEASED. TRI VALLEY HEALTH SYSTEM, APPELLEE, V. MARY E. HOCKEMEIER AND MICHAEL W. HOCKEMEIER, COPERSONAL REPRESENTATIVES OF THE ESTATE OF CAROLYN K. HOCKEMEIER, DECEASED, APPELLANTS.

786 N.W.2d 680

Filed July 30, 2010. No. S-09-1054.

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. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
4. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
5. **Decedents' Estates: Claims: Notice: Pleadings: Jurisdiction.** Where a properly presented claim against an estate is disallowed by a personal representative pursuant to Neb. Rev. Stat. § 30-2488(a) (Reissue 2008) and notice of a pending bar is given as provided therein, the filing of a petition for judicial allowance of the claim within the 60-day period specified in § 30-2488(a) is a jurisdictional requirement.

Appeal from the County Court for Furnas County: ANNE PAINE, Judge. Reversed and vacated, and cause remanded with directions to dismiss.

Patricia E. Dodson, of Dodson & Dodson, for appellants.

Kevin D. Urbom, of Urbom Law Offices, P.C., for appellee.

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

STEPHAN, J.

The personal representatives of the estate of Carolyn K. Hockemeier (Hockemeier) appeal from an order of the county court for Furnas County allowing the claim of Tri Valley

Health System (Tri Valley). We conclude that the probate court lacked jurisdiction to allow the claim.

BACKGROUND

Prior to her death on April 26, 2008, Hockemeier received various medical services from Tri Valley. Most of the services were provided prior to March 3, 2004. Hockemeier did not have health insurance and was therefore personally responsible for the cost of the services.

On March 3, 2004, Hockemeier entered into a "Time Payment Plan Contract" with Tri Valley. On that date, the balance due on Hockemeier's account with Tri Valley was $23,333.05. The contract provided that the balance was payable to Tri Valley in monthly installments of $100 until the balance was paid in full. The contract further provided that failure to make a monthly payment would result in termination of the contract and possible "other collection activity."

Hockemeier made timely payments pursuant to the contract until her death. On May 2, 2008, Hockemeier's surviving adult children, Michael W. Hockemeier and Mary E. Hockemeier, were appointed copersonal representatives of her estate. Mary continued making the $100 monthly payments to Tri Valley after Hockemeier's death by checks drawn on an account in the name of "Carolyn K. Hockemeier."

On May 12, 2008, Tri Valley filed a claim against the estate, asserting that it was owed $22,900 for the medical services it had provided to Hockemeier. The personal representatives mailed a written notice of disallowance to Tri Valley on May 30. The written notice denied the claim in full and specifically stated that "failure to file a Petition for Allowance or to commence a proceeding within sixty (60) days after the mailing of this notice will forever bar that part of your claim so disallowed."

On August 11, 2008, Tri Valley filed a document titled "Petition for Allowance of Fees" in which it claimed it was owed $22,700 by the estate for medical services provided to Hockemeier. After various delays, the county court conducted an evidentiary hearing and then entered an order allowing

Tri Valley's claim in the amount of $21,300. The personal representatives filed this timely appeal.

ASSIGNMENTS OF ERROR

The personal representatives assign, restated and renumbered, that the county court erred in (1) failing to recognize that the copersonal representatives personally assumed responsibility for the March 3, 2004, time payment contract, which resulted in a novation of the contract; (2) accelerating the time payment contract when the contract was not in default; (3) not dismissing Tri Valley's claim for failure to timely "prove up" the claim; and (4) not dismissing Tri Valley's claim because it petitioned for the allowance of "fees."

STANDARD OF REVIEW

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[2]

ANALYSIS

The personal representatives did not argue to the probate court or in their initial brief on appeal that Tri Valley's claim was barred because the petition for allowance was not timely filed. But the personal representatives did raise the issue at oral argument before this court. Because it posed a possible jurisdictional question for this court to consider, we ordered the parties to submit additional briefs on the issue.

[3,4] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the

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[1] *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

[2] *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

particular question which it assumes to determine.[3] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[4]

We have previously held that the time periods established by Neb. Rev. Stat. § 30-2485 (Reissue 2008) for the initial presentation of probate claims are mandatory and cannot be waived.[5] In this case, there is no contention that Tri Valley's claim was not timely presented. Rather, the focus is on the events which transpired after the personal representatives notified Tri Valley that they had disallowed its claim.

Neb. Rev. Stat. § 30-2488 (Reissue 2008) defines the power of a probate court to allow claims which have been disallowed by a personal representative. Section 30-2488(a) provides:

> Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance . . . if the notice warns the claimant of the impending bar.

The probate court is authorized to allow those claims which were "filed with the clerk of the court in due time and not barred by [§ 30-2488(a)]."[6]

Here, the personal representatives mailed notice of the disallowance of Tri Valley's claim on May 30, 2008, and the notice contained the requisite warning of the impending bar. But Tri Valley did not file its petition for allowance until August 11, a date clearly outside the 60-day window specified in § 30-2488(a).

The question before us is whether the 60-day period set forth in § 30-2488(a) is a jurisdictional requirement, or whether it is in the nature of a statute of limitations. If it is the latter,

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[3] *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008); *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

[4] *McClellan v. Board of Equal. of Douglas Cty., supra* note 3; *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[5] *In re Estate of Masopust*, 232 Neb. 936, 443 N.W.2d 274 (1989).

[6] § 30-2488(c).

Tri Valley's failure to file its petition within the time period cannot be raised by the personal representatives for the first time to this court. This is so because a statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pled by the party relying upon it and is waived if not pled.[7] But if filing within 60 days is a jurisdictional requirement, this court can and must consider Tri Valley's failure to timely file.[8]

A typical statute of limitations specifies only that an action must be commenced within a specified time period.[9] The language in § 30-2488(a) is unlike a typical statute of limitations because it does not merely specify the time for filing a petition to allow a disallowed claim; it also specifies the consequences of an untimely filing. The statute clearly and expressly states that as long as the notice of disallowance informs the claimant of the 60-day time limitation, the claim is *barred* if the claimant fails to act within that period. This statutory language is self-executing; if a petition for allowance is not filed within the prescribed period, the claim is barred by operation of law.

In *In re Estate of Lienemann*,[10] we affirmed the dismissal of a petition for allowance of a probate claim that was filed outside of the 60-day period specified in § 30-2488(a) and rejected an argument that an additional 3-day period for mailing should be allowed pursuant to Neb. Rev. Stat. § 25-534 (Reissue 1995). Agreeing with the reasoning of another court which had construed the term "barred" as used in a similar probate statute to mean that the claim no longer existed after the 60-day period had expired, we held that "the plain language of § 30-2488(a) provides for the finality of the personal representative's decision 60 days after the mailing of the notice of disallowance, whereupon the claim is

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[7] See, e.g., *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

[8] See, *Miller v. Regional West Med. Ctr., supra* note 1; *McClellan v. Board of Equal. of Douglas Cty., supra* note 3.

[9] See, e.g., Neb. Rev. Stat. §§ 8-1721.01, 20-211, and 20-342 (Reissue 2007); Neb. Rev. Stat. §§ 25-205 to 25-210, 25-212, and 25-222 to 25-224 (Reissue 2008).

[10] *In re Estate of Lienemann*, 277 Neb. 286, 761 N.W.2d 560 (2009).

barred."[11] Although our opinion did not specifically characterize the 60-day filing period in § 30-2488(a) as a jurisdictional requirement, we affirmed the order of the probate court which sustained a motion to dismiss for lack of subject matter jurisdiction.

We are not persuaded by Tri Valley's argument that Neb. Rev. Stat. § 30-2486(3) (Reissue 2008) authorized it to file the petition outside the 60-day period of § 30-2488(a). Section 30-2486(3) can permit additional time when a claim is contingent, unliquidated, or not presently due. It is clear from this record that the amount claimed by Tri Valley for medical services provided to Hockemeier was due and owing at the time of her death. The time payment contract was simply an accommodation to permit Hockemeier to pay the amount due in monthly installments without interest during her lifetime.

[5] We hold that where a properly presented claim against an estate is disallowed by a personal representative pursuant to § 30-2488(a) and notice of a pending bar is given as provided therein, the filing of a petition for judicial allowance of the claim within the 60-day period specified in § 30-2488(a) is a jurisdictional requirement. Because that requirement was not met in this case, the claim was barred and no longer existed by the time the petition for allowance was eventually filed, and the county court therefore lacked jurisdiction over the subject matter of the petition. And because the county court lacked jurisdiction, we are without jurisdiction to consider the merits of the appeal.[12]

CONCLUSION

For the reasons discussed, we reverse and vacate the order of the county court and remand the cause with directions to dismiss the petition for allowance of the claim.

REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

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[11] *Id.* at 291, 761 N.W.2d at 564. See *Mathieson v. Hubler*, 92 N.M. 381, 588 P.2d 1056 (N.M. App. 1978).

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

CURT SCHAUER AND SUSAN SCHAUER, APPELLANTS, V. ALVIN "JEEP" GROOMS ET AL., APPELLEES.

786 N.W.2d 909

Filed August 6, 2010. No. S-07-740.

1. **Jurisdiction: Judgments: Appeal and Error.** 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.
2. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
3. **Actions: Equity: Public Meetings: Appeal and Error.** An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
5. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case.
6. **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.
7. **Standing: Claims: Parties.** In order to have standing, a litigant must assert that his or her own legal rights and interests would benefit by the relief to be granted, and the litigant cannot rest his or her claim on the legal rights and interests of third parties.
8. **Standing: Legislature: Statutes.** The Legislature may, by statute, supplant common-law concepts of standing. When it does so, then a special injury is not required.
9. **Standing: Annexation.** Landowners do not have standing simply by virtue of their land's proximity to the annexed area.
10. **Zoning: Ordinances.** Zoning ordinances do not confer a vested right or interest upon their intended beneficiaries.
11. **Public Meetings: Statutes.** The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.
12. **Public Meetings: Statutes: Intent: Public Policy.** The intent of the Open Meetings Act is to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies.
13. **Public Meetings: Statutes: Intent: Notice.** The purpose of the agenda requirement of the public meetings laws is to give some notice of the matters to be

considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting.

14. **Public Meetings: Statutes: Public Officers and Employees: Public Policy.** The Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.
15. **Municipal Corporations: Public Officers and Employees: Statutes.** The fact that a statute gives a certain official the right to cast the deciding vote in case of a tie in a governmental body does not, of itself, make that official a member of that body for the purposes of ascertaining a quorum or majority, or for any other purpose.
16. **Municipal Corporations: Public Officers and Employees.** There is no meeting of a public body based upon unspoken thoughts of council members who happen to be sitting in the same room.
17. **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.
18. **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.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed.

George G. Vinton for appellants.

Steven M. Curry for appellee Green Plains Ord LLC.

Justin R. Herrmann and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellees Alvin "Jeep" Grooms et al.

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

MCCORMACK, J.

I. NATURE OF CASE

Curt Schauer and Susan Schauer live in Valley County, Nebraska, several miles outside of the City of Ord (City). The Schauers seek to invalidate the annexation by the City of neighboring vacant agricultural land. The annexation enabled the use of tax increment financing (TIF) for the construction of

an ethanol plant, which the Schauers opposed as a nuisance to their farmstead.

The Schauers alleged two causes of action: (1) that the annexation was invalid because it exceeded the statutory authority conferred to the City by Neb. Rev. Stat. § 17-405.01(2) (Reissue 2007) and by the Community Development Law[1] and (2) that the City had violated the Open Meetings Act[2] during the process that culminated in the formal action of the City's annexing the subject land. The district court granted summary judgment in favor of the defendants, and the Schauers appeal.

II. BACKGROUND

Sometime in early 2005, the Valley County Economic Development Board determined that it would be economically beneficial to the county to recruit a developer to build and operate an ethanol facility on undeveloped land somewhere in the county. The Valley County Economic Development Board's business development and recruitment committee envisioned that the developer recruited for the ethanol plant would take advantage of TIF when the City annexed the land under special statutory provisions pertaining to land declared blighted and in need of redevelopment.[3] It was apparently the City's and the county's understanding that the City was to make the blight determination necessary for the annexation—a point on which the Schauers disagree. In any event, TIF would not be available to the ethanol plant developer unless the land was annexed.[4]

The site ultimately selected for the ethanol facility became known as Redevelopment Area #3. It consisted of land noncontiguous to the City, approximately 4½ miles east of its border. Redevelopment Area #3 is located approximately one-eighth of a mile from the Schauers' home. Val-E Ethanol, LLC (Val-E), was eventually recruited to build a 40-million-gallons-per-year

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[1] Neb. Rev. Stat. §§ 18-2101 to 18-2144 (Reissue 1997).

[2] Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 1999, Cum. Supp. 2004 & Supp. 2005)

[3] See, generally, §§ 18-2101 to 18-2144.

[4] See *id.*

ethanol plant on the site. During the pendency of this appeal, Val-E's successor in interest filed for bankruptcy. Green Plains Ord LLC has since acquired the property and has been substituted as party defendant.

Several meetings of the Ord City Council, the Ord Planning Commission, and the Ord Community Development Agency were held in the process of the City's (1) declaring Redevelopment Area #3 blighted, (2) formally adopting a redevelopment plan for the area, (3) entering into a redevelopment financing agreement with Val-E and, finally, (4) annexing the land. Because the meetings leading up to the annexation are the subject of the Schauers' challenge under the Open Meetings Act, we will describe them in detail.

1. Public Bodies

The city council consists of six persons and is overseen by the mayor. At all times pertinent to this case, the council members were Alvin "Jeep" Grooms, Debra Eppenbach, Michael Blaha, Leon Koehlmoos, Dennis Philbrick, and Daniel Petska. Pursuant to Neb. Rev. Stat. § 17-105 (Reissue 2007), a majority of all members of the city council, four persons, constitutes a quorum for the transaction of business. The mayor may vote only when his or her vote "shall be decisive and the council is equally divided on any pending matter, legislation, or transaction."[5]

The community development agency was formed pursuant to § 18-2101.01. It consists of the city council sitting as the agency, with the mayor presiding. Action by the agency is undertaken by a majority vote if a quorum of four is present.

The planning commission consists of five members appointed by the mayor and approved by the city council. A majority of the commission, or three members, constitutes a quorum for the transaction of business. During the period in question, Blaha was the only city council member who also served on the planning commission.

The city clerk testified that based upon her review of the minutes of the meetings of these bodies, it has been the

[5] Neb. Rev. Stat. § 17-110 (Reissue 2007).

standard practice of the city council since 1968, of the community development agency since 1999, and of the planning commission since 1983, to post advance notice of all of their meetings at three public locations: the Ord township library, the Valley County courthouse, and the Ord city hall. Every posted notice briefly describes the agenda for the meeting and the place it will be held; and the agenda is available for inspection by the public at the offices of the city clerk.

2. Preliminary Resolutions and Tour/Dinner

The first meeting concerning Redevelopment Area #3 occurred on February 7, 2005. It was a regular meeting of the city council at the city hall, and notice of the meeting was posted in the usual manner. On the agenda was a resolution to move forward in support of the proposed ethanol facility in Valley County. Grooms, Eppenbach, Koehlmoos, and Philbrick were present, and all voted in favor of the resolution.

On February 22, 2005, a special joint meeting was held between the city council and the board of public works of the City. Prior notice of the meeting was posted. The mayor reported to the city council on Valley County's efforts to recruit a developer to build an ethanol plant and on the need to consider annexation and TIF for the site. The mayor asked for and received approval to hire an attorney with experience in TIF for an ethanol plant. Grooms, Eppenbach, Blaha, and Koehlmoos were in attendance, and all voted in favor of hiring said attorney.

The next day, on February 23, 2005, a special meeting of the city council was held, with prior notice posted in the customary manner. The city council authorized the City to hire a consulting firm to complete a blight and substandard determination study of Redevelopment Area #3. All city council members were in attendance, and all voted in favor of the authorization.

On May 17, 2005, after the study was completed, concluding the area was blighted and in need of redevelopment, a public announcement ceremony was held for the proposed Val-E plant. There were over 200 members of the public present, as well as several media outlets. Three members of the planning

commission and three members of the city council were present at the ceremony. There is no evidence that these officials did anything other than observe the ceremony.

On June 1, 2005, the Valley County Economic Development Board hosted a dinner and a tour of an ethanol facility similar to the one proposed by Val-E. Personal invitations were sent out to various individuals, including all of the city council members and the Schauers, but no public notice regarding the tour/dinner was published or posted. The Schauers later reported to the city council that they had elected not to attend the tour/dinner because their former neighbors, who had sold the property for the ethanol plant, were going to be there. The mayor and three of the five city council members: Eppenbach, Blaha, and Petska attended the tour/dinner. It does not appear that any of the planning commission members, other than Blaha, attended. Approximately 40 other individuals were in attendance.

The mayor and those city council members who attended the tour testified that they were split into two groups. The mayor and Petska were in one group, and Eppenbach and Blaha were in the other. One group watched a video explaining how ethanol is produced, while the other group toured the facility. After the tour, the participants went to a restaurant to eat dinner. Eppenbach, Blaha, Petska, and the mayor explained that they ate dinner at the same restaurant but that they did not "eat dinner together." All members testified that on the day of the tour/dinner, they did not discuss or receive information associated with the redevelopment plan and contract, they did not hold any formal or informal hearings, and they did not make policy or take any formal action on behalf of the city council.

On June 6, 2005, at a regular meeting of the city council, conducted after the customary advance public notice, the city council determined to forward the completed blight and substandard study to the planning commission and to set a public hearing on the study at the regular July city council meeting. City council members Grooms, Blaha, Koehlmoos, Philbrick, and Petska were in attendance and voted in favor of the determination.

3. Declaration of Redevelopment Area #3

The city clerk posted notice of a meeting of the planning commission to be held on June 8, 2005, identifying as an agenda item the "Blight and Substandard Determination for Redevelopment Area #3." At that meeting, the commission reviewed the blight and substandard determination study and approved a motion to recommend to the city council that it be approved.

In the meantime, Val-E applied to the Valley County zoning office for a conditional use permit to begin construction of the ethanol plant. On June 28, 2005, the Valley County Board of Supervisors approved Val-E's application for a conditional use permit, even though county zoning regulations stated that commercial fuel bulk plants shall be separated at least one-half mile from any neighboring dwelling unit. In a separate action, the Schauers instigated suit against the Valley County Board of Supervisors, its individual members, and Val-E, challenging the grant of the permit. After the annexation, the defendants moved to dismiss the case as moot.[6] The district court found the motion premature and stayed the suit pending the outcome of this appeal.

On June 29 and July 6, 2005, the city clerk posted notice in the customary manner, and also published notice in the local newspaper, of a July 19 hearing. The published notice stated that the purpose of the hearing was "to obtain public comment prior to consideration of declaration of an area of the City as blighted and substandard and in need of redevelopment pursuant to the Nebraska Community Development Law." The published notice also contained a legal description and map showing the area. The posted notice described the agenda as "Public Hearing on Blight and Substandard Analysis for Redevelopment Area #3."

The city clerk also mailed notice of the July 19, 2005, hearing by certified mail to representatives of neighborhood associations, presidents or chairpersons of the governing body of each county, and any school district, community college,

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[6] See, e.g., *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

educational service unit, and natural resources district within a 1-mile radius of Redevelopment Area #3, in accordance with the requirements of § 18-2115(2). The notice gave a legal description and contained an attached map of Redevelopment Area #3.

At the July 19, 2005, meeting, after receiving public comment, including that of the Schauers, the city council passed resolution No. 949. City council members Eppenbach, Blaha, Koehlmoos, Philbrick, and Petska were in attendance, and all voted in favor of the resolution. Resolution No. 949 declared Redevelopment Area #3 blighted, substandard, and in need of redevelopment.

4. Adoption of Redevelopment Plan and Financing Contract

On September 19, 2005, a special meeting was held, with prior posted notice, to consider "Road Improvement for the Ethanol Plant." At the meeting, details of the TIF proposal were discussed in the context of the possible use of sales tax funds for a county road project to the site. All city council members were present, and all voted in favor of pursuing up to $750,000 in bonds, secured against the sales tax fund, that would pay for infrastructure improvements on the county road providing access to the ethanol plant.

A meeting of the city council, sitting as the community development agency, was held on October 24, 2005. The posted notice for the meeting stated that it was to consider "Cost benefit analysis for Val-E Ethanol" and "Preliminary approval of redevelopment contract for Val-E Ethanol." At the time of the posting, the plan for Redevelopment Area #3 was the only redevelopment plan pending before the city council and the planning commission and was the only matter associated with an ethanol plant.

At the meeting, the community development agency adopted resolution No. 3, which stated that after review of the cost-benefit analysis, it recommended that the City adopt the redevelopment plan. The matter was forwarded to the planning commission for further consideration. All city council members were in attendance. Grooms, Eppenbach, Blaha, Philbrick,

and Petska voted in favor of the resolution; Koehlmoos, however, abstained from voting. The minutes explain that Koehlmoos abstained to avoid any appearance of impropriety, because he also served on the Valley County Economic Development Board.

On November 1, 2005, a meeting of the planning commission was held. The posted notice for the meeting stated that the agenda was the "Redevelopment Plan and Redevelopment Contract for Val-E Ethanol." At the meeting, the planning commission, like the community development agency, adopted resolution No. 3, recommending that the City approve the redevelopment plan and enter into a redevelopment contract with Val-E.

Notice of a meeting of the city council, scheduled for November 14, 2005, was posted in the customary manner and described the agenda as "Public Hearing - Redevelopment Plan and Contract for Val-E Ethanol" and "Annexation Ordinance for Val-E Ethanol Site." On October 26 and November 2, the city clerk also published notice of the November 14 meeting in the local newspaper. The notice explained that the purpose of the meeting was to obtain public comment prior to consideration of a redevelopment plan "for an area of the City which has been declared as blighted and substandard and in need of redevelopment pursuant to the Nebraska Community Development Law." The published notice included a detailed legal description of the land and stated that the land was 4½ miles east of the corporate limits of the City.

At the November 14, 2005, meeting, several members of the public, including the Schauers, were heard. Afterward, the city council passed resolution No. 961, which approved the official plan for Redevelopment Area #3 and the official redevelopment contract with Val-E. All council members, including Koehlmoos, were present and voted in favor of the resolution. A first formal reading of the proposed annexation ordinance was also made.

5. Adoption of Annexation Ordinance

On November 16, 2005, the city council held a special meeting, after notice was posted in the customary manner, for

the second reading of the proposed annexation ordinance. The notice described the agenda as "Annexation Ordinance for Val-E Ethanol Site." At the meeting, the second reading was made and the final reading was scheduled for November 21.

Notice of the November 21, 2005, meeting was posted in the usual manner. The agenda item for the meeting was "Annexation Ordinance for Val-E Ethanol Site." At the meeting, there was a final reading of the annexation ordinance. The City then passed ordinance No. 731, annexing Redevelopment Area #3 and expanding the municipal boundaries of the City to include it. All council members were present. Council member Koehlmoos abstained from voting to avoid the appearance of impropriety because of his involvement with the Valley County Economic Development Board. The remaining members all voted in favor of the annexation.

Four months later, on March 21, 2006, the Schauers filed this action seeking to void the annexation. They alleged two causes of action. In their first cause of action, the Schauers asserted that the annexation was brought about in a manner which was beyond the scope of the authority granted to the City through the relevant annexation and redevelopment statutes. In their second cause of action, the Schauers asserted that the annexation was tainted by violations of the Open Meetings Act.

III. ASSIGNMENTS OF ERROR

The Schauers assert generally that the district court erred in granting summary judgment in favor of the defendants and in refusing to grant summary judgment in their favor. More particularly, as concerns their first cause of action, the Schauers allege the court erred in (1) ruling that a second-class city can declare noncity land substandard and blighted under § 18-2109 and then annex the land because it is blighted under § 17-405.01(2); (2) concluding that there is an obvious conflict between §§ 17-405.01(2) and 18-2109; (3) ruling that there is no restriction in the Community Development Law, §§ 18-2101 to 18-2144, as to where a redevelopment project area can be located; (4) ruling that there is no issue of material fact regarding whether or not the City failed to specifically identify the area to be redeveloped under the redevelopment

plan as required under § 18-2115; (5) ruling that § 17-405.01 does not require the City to annex all of the property designated blighted and substandard in the redevelopment plan; (6) ruling that proper notice of the public hearings required under the Community Development Law was given by the City; (7) ruling that the Schauers have no standing to contest annexation of land by the City; (8) not ruling that the mayor of the City is required to vote on the ordinance annexing land; and (9) not ruling that the City's annexation of the real estate was an ultra vires act and was null and void ab initio.

As concerns their second cause of action, the Schauers allege that the district court erred in (10) ruling that the City had a designated method of giving notice of the time and place of public meetings as required under § 84-1411 and (11) ruling that the Open Meetings Act was complied with relating to the announcement ceremony on May 17, 2005, and the tour/dinner on June 1.

IV. STANDARD OF REVIEW

[1] 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.[7]

[2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[8]

[3] An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.[9]

[4] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[10] But

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[7] See *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[8] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[9] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). See *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

[10] See *Shoemaker v. Shoemaker, supra* note 9.

when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[11]

V. ANALYSIS

1. Standing

[5-8] We first address whether the Schauers, as neighboring landowners to the area being annexed, have standing to bring the two causes of action currently before us. Standing is a jurisdictional component of a party's case.[12] It 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.[13] In order to have standing, a litigant must assert that his or her own legal rights and interests would benefit by the relief to be granted, and the litigant cannot rest his or her claim on the legal rights and interests of third parties.[14] The Legislature may, however, by statute, supplant common-law concepts of standing.[15] When it does so, then a special injury is not required.[16]

At the outset, we clarify that while the Schauers allege numerous ways in which their interests were and will be physically and financially harmed by the construction and operation of the ethanol plant, this appeal solely concerns the validity of the annexation of the land on which the plant was built. The Schauers failed to bring an action within 30 days of the

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[11] See *id.*

[12] See *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[13] *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). See, also, *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[14] See *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

[15] See, e.g., *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

[16] See, *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998); *Metropolitan Utilities Dist. v. Twin Platte NRD, supra* note 15.

city council's decision to formally approve the redevelopment project with Val-E, ensuring its financing and redevelopment contract. Thus, under § 18-2142.01, this agreement is conclusively presumed to be in accordance with the purposes and provisions of the Community Development Law and Neb. Rev. Stat. §§ 18-2145 to 18-2154 (Reissue 1997 & Cum. Supp. 2004).[17] Furthermore, this appeal is not from an action for nuisance, because, at the time this suit was brought, the ethanol facility had not yet begun its operations.[18] Thus, the question of standing in this case is narrow: Do the Schauers have a personal stake in the annexation of their neighbor's land? If not, did the Legislature grant the Schauers standing by statute? We reject the Schauers' contention that no standing analysis is required because the annexation was void ab initio as an ultra vires act.

(a) First Cause of Action

We have addressed on numerous occasions the question of who, under common-law principles of standing, may challenge an annexation ordinance. We have long held that a person who owns property or is a voter in the territory sought to be annexed has standing to maintain an action against a municipality to enjoin the enforcement of the annexation or to have the attempted annexation declared void.[19] We have also held that a public power district has standing to challenge an annexation if the annexation removes property from within the power district's service territory, thereby causing lost revenue.[20] We have said that a municipality that is in the crosshairs of annexation has standing.[21] Finally, we have recognized the standing of

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[17] See §§ 18-2115(2) and 18-2129.

[18] See, e.g., *Horn v. Community Refuse Disposal, Inc.*, 186 Neb. 43, 180 N.W.2d 691 (1970); *Demont v. Abbas*, 149 Neb. 765, 32 N.W.2d 737 (1948).

[19] *Adam v. City of Hastings, supra* note 12; *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952).

[20] *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005).

[21] *City of Elkhorn v. City of Omaha, supra* note 9. See, also, *County of Sarpy v. City of Gretna, supra* note 14.

plaintiffs whose land would fall under a new zoning authority as a result of the challenged annexation ordinance.[22]

[9] But we have never held that a neighboring landowner, who neither owns a property interest in the annexed territory nor will be subject to new zoning regulations as a result of the annexation has standing to challenge the annexation of someone else's land. To the contrary, we have been clear that landowners do not have standing simply by virtue of their land's proximity to the annexed area.[23]

In *Adam v. City of Hastings*,[24] for instance, we held that landowners living adjacent to land being annexed did not have standing, even though their land fell within the zoning jurisdiction of the annexing body. This was because the plaintiffs' land fell within the annexing body's zoning jurisdiction even before the annexation. Furthermore, in *Adam*, we rejected the landowners' argument that they were harmed because of their new proximity to the city, which made them more susceptible to future annexation.[25] We concluded that such an alleged personal interest in the annexation was simply too remote.[26]

In this case, it is undisputed that the Schauers' property was not being annexed. They are not citizens or taxpayers of the annexing entity. Nor will the City's zoning authority extend to the Schauers' land by virtue of the annexation.[27] Nevertheless, the Schauers assert that they have standing. The Schauers argue they have a legal interest in the annexation, because, as a result of the annexation, Redevelopment Area #3 is no longer subject to a county zoning law prohibiting the construction of commercial fuel bulk plants within one-half mile of a neighboring dwelling unit.

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[22] See, *Adam v. City of Hastings, supra* note 12; *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992); *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977).

[23] See *Adam v. City of Hastings, supra* note 12.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] See § 17-405.01(2).

The Schauers acknowledge that even before the annexation of Redevelopment Area #3 by the City, the Valley County Board of Supervisors granted Val-E a conditional use permit to construct the ethanol plant. But the Schauers claim that the annexation still caused them harm because, if they lose this appeal to invalidate the annexation, then the Schauers' lawsuit against the county will be rendered moot.

[10] Zoning ordinances do not confer a vested right or interest upon their intended beneficiaries.[28] And we conclude that the mootness of another lawsuit, which may or may not have otherwise been successful, is too remote an interest to confer standing. Beyond that, all of the alleged personal, pecuniary, or property interests that the Schauers claim give them standing in this case pertain to the existence of the ethanol plant, not whether the land on which the plant is located should have been annexed by the City.

We are cognizant of the fact that only a city or village may offer TIF, and so, the annexation enabled financing which otherwise would not have been available. This, in turn, facilitated the ethanol plant's construction, which may or may not have occurred without it. But such a link is, again, too tenuous to give the Schauers a legal interest in the annexation. Moreover, as already mentioned, the financing contract is not in issue in this case, but is conclusively presumed to be in accordance with redevelopment laws.

Challenges to rezoning and to redevelopment plans and agreements are distinct from challenges to set aside an annexation. Standing to contest the former is unrelated to standing to contest the latter.[29] Under our common-law principles of standing for challenges to annexations, we conclude that we have no jurisdiction over the Schauers' claims described in their first cause of action.

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[28] See, *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949).

[29] See *Town of Berthoud v. Town of Johnstown*, 983 P.2d 174 (Colo. App. 1999). See, also, *Smith v. City of Papillion, supra* note 13.

(b) Second Cause of Action: Open Meetings Act

But, in their second cause of action, the Schauers allege that the Legislature has conferred standing upon them regardless of whether they can allege a particularized injury as a direct result of the annexation. We agree that the Open Meetings Act confers standing for the very limited purpose of challenging meetings allegedly in violation of the act.

Section 84-1414(3) of the Open Meetings Act states:

> *Any citizen* of this state may commence a suit . . . for the purpose of requiring compliance with or preventing violations of the Open Meetings Act, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of the act to discussions or decisions of the public body.

(Emphasis supplied.) Section 84-1414 does not exclude challenges under the Open Meetings Act when the ultimate result of the meetings is an annexation, as opposed to anything else; none of the cases discussed above involved challenges under the Open Meetings Act.[30]

[11] Furthermore, we have explained that the open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.[31] Through the Open Meetings Act, the Legislature has granted standing to a broad scope of its citizens who would lack the pecuniary interest necessary under common law, so that they may help police the public policy embodied by the act.[32] As the Nebraska Court of Appeals has explained, the electors of the township where the meetings are held may not be the only

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[30] See *City of Elkhorn v. City of Omaha, supra* note 9.

[31] *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 735 N.W.2d 399 (2007).

[32] See, e.g., *Cournoyer v. Montana*, 512 N.W.2d 479 (S.D. 1994); *Pueblo School Dist. v. High School Act*, 30 P.3d 752 (Colo. App. 2000); *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. App. 2001); *Highsmith v. Clark*, 245 Ga. 158, 264 S.E.2d 1 (1980); *Society of Plastics Ind. v. Suffolk Cty.*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006).

"'persons who are interested'" in the township's actions to be considered during the meeting.[33] Rather, the act clearly contemplates that "citizens," as well as members of the general public and reporters or other representatives of news media, are the intended beneficiaries of the openness sought by the act.[34] Having determined that they have standing, we turn now to the merits of the Schauers' Open Meetings Act claims.

2. Meetings

[12] Through the Open Meetings Act, the Legislature has declared that "the formation of public policy is public business and may not be conducted in secret."[35] The intent of the Open Meetings Act is thus to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies.[36]

(a) Officially Recognized Meetings

[13] An integral part of a meeting which is "open to the public"[37] is that the public be adequately notified of when and where the meeting will take place. Section 84-1411 of the Open Meetings Act governs the required notice and states in relevant part:

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the

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[33] *State ex rel. Newman v. Columbus Township Bd., supra* note 31, 15 Neb. App. at 663, 735 N.W.2d at 406.

[34] *Id.*

[35] § 84-1408.

[36] See *Alderman v. County of Antelope, supra* note 6.

[37] § 84-1408.

> principal office of the public body during normal business hours.

We have explained that the purpose of the agenda requirement of the public meetings laws is to give "some notice of the matter[s] to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting."[38]

The Schauers make no claim that any of the notices for the meetings leading up to the annexation were untimely or that they failed to specify where a meeting would be held. In fact, we cannot fully discern from the Schauers' briefs and the proceedings below exactly which meetings and in what manner the Schauers believe the various bodies of the City violated the Open Meetings Act. We have reviewed all of the meetings relevant to this case and find no violations of the act. But we discuss in more detail those meetings and gatherings for which the Schauers clearly articulate a challenge.

The Schauers first suggest that describing the land in the published notices as being "within the city," when actually it was not, was misleading.[39] We agree with the district court that the accompanying map and statement that the land was 4½ miles from the City's boundaries was sufficient to give reasonable notice to the public of which matters were to be under consideration at the meeting.

The Schauers also claim that the City somehow violated the Open Meetings Act, because the designated method of notice was not formally set forth in the minutes as such. We find no merit to this contention, derived from the statutory language set forth in § 84-1411 that the notice be "by a method designated by each public body and recorded in its minutes." The city clerk testified that she was able to discern, through the minutes of past meetings, a customary and consistent method of notifying the public.

Finally, the Schauers assert that the publications and postings—in public places within the City—were not likely to

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[38] *Pokorny v. City of Schuyler*, 202 Neb. 334, 339-40, 275 N.W.2d 281, 285 (1979).

[39] Brief for appellants at 22.

be seen by "the rural persons who would truly be affected by the redevelopment project and annexation."[40] We reject the Schauers' underlying premise that the citizens of the City are not the ones "truly . . . affected" by the annexation of this new territory within the City's boundaries and the resulting TIF indebtedness incurred by the City. But, regardless, we find the places of posting, combined with the publication of several key meetings in the local newspaper, were reasonable under the circumstances.

In summary, we reject any contention that the City failed to give proper notice or leave open for the public its official meetings leading up to and concerning the annexation of Redevelopment Area #3. The Schauers' main concern in this appeal, however, is with the presence of the City's officials at events the officials did not consider "meetings" at all.

(b) Tour/Dinner

The Schauers' principal concern under the Open Meetings Act is with the June 1, 2005, tour of the kindred ethanol facility and the dinner following the tour. It appears that there was no public notice of this tour/dinner because the City did not think it was a "meeting" governed by the act.

Section 84-1409(2) defines meetings as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." Section 84-1410(4) states further that "[n]o closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the [Open Meetings A]ct." However, § 84-1410(5) states:

> The act does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the

[40] Brief for appellants at 42.

public body has supervision, control, jurisdiction, or advisory power.

In *City of Elkhorn v. City of Omaha*,[41] we explained that the requirement of the Open Meetings Act is that "'[e]very meeting of a *public body* shall be open to the public . . . .'"[42] Thus, informational sessions attended by a subgroup of the city council, consisting of less than a quorum which, accordingly, had no power to make any determination or effect any action, were not meetings of a "public body" under the act.[43] We noted that the act defines "public body" so as to exclude "subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body."[44] And "if the [Open Meetings] Act does not apply to a subcommittee, it would also not apply to an even lesser subgroup."[45]

[14] We explained that the Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.[46] "The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives."[47] We concluded that by excluding nonquorum subgroups from the definition of a public body, the Legislature had balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.[48]

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[41] *City of Elkhorn v. City of Omaha, supra* note 9.

[42] *Id.* at 880, 725 N.W.2d at 805. See, also, § 84-1408 (emphasis supplied).

[43] § 84-1409.

[44] § 84-1409(1)(b)(i).

[45] *City of Elkhorn v. City of Omaha, supra* note 9, 272 Neb. at 881, 725 N.W.2d at 805.

[46] See *id.*

[47] *Id.* at 881, 725 N.W.2d at 806.

[48] *Id.*

During the tour of the ethanol facility, there was never a group of more than two city council members. Thus, we conclude that, as in *City of Elkhorn*, there was no meeting of a public body. As in *City of Elkhorn*, the small groups were merely acquiring information—information that was amply commented upon by the public in subsequent meetings of a quorum of the city council and which, moreover, there is no reason to believe the public did not have access to. We see no special benefit derived from passively touring an ethanol facility *at the same time* as the city council members.

Nor is there evidence, as the Schauers suggest, that separating the groups into less than a quorum for the tour was somehow a "'walking quorum[]'"[49] designed to circumvent the requirements of the Open Meetings Act. There is simply no evidence that, through the tour, the city council was attempting to reach a consensus and form public policy in secret.

[15] With regard to the dinner, there were three city council members and the mayor eating at the same restaurant. The presence of the mayor is inconsequential, because the fact that a statute gives a certain official the right to cast the deciding vote in case of a tie in a governmental body does not, of itself, make that official a member of that body for the purposes of ascertaining a quorum or majority, or for any other purpose.[50] But the Schauers argue that city council member Koehlmoos was disqualified, as opposed to merely abstaining from voting, and that therefore, he should not be counted in determining whether there was a quorum present at the dinner.[51] Accordingly, the three members present at the dinner constituted a quorum and a "public body."

The Schauers are incorrect in their somewhat bald assertion that city council member Koehlmoos was disqualified. The only evidence in the record as concerns Koehlmoos' decision to abstain from voting on the annexation was that he served on the Valley County Economic Development Board.

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[49] Brief for appellants at 41.

[50] See 59 Am. Jur. 2d *Parliamentary Law* § 9 (2002).

[51] See *id.*

The Schauers assert that we should infer that Koehlmoos was "working with" Val-E "in promoting the ethanol plant to the City."[52] Even if true, there is no evidence that this alleged promotion of the facility was for anything other than the benefit of Valley County residents. There is no evidence that Koehlmoos had either a personal interest affecting his partiality or a personal, financial gain at stake.[53] The Schauers make no argument as to how Koehlmoos' favoring of the ethanol project made him unable to be a fair arbiter of the City's interests. In fact, the Schauers make no argument that the annexation of Redevelopment Area #3 was anything other than beneficial to the City.

Furthermore, the Schauers were unable to present any evidence that the dinner was "for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body."[54] Rather, the attending city council members and the mayor specifically testified that at the dinner, they did not discuss or receive information associated with the redevelopment plan and contract and that they did not hold any hearing, make policy, or take any formal action on behalf of the city council.

[16] As indicated by *City of Elkhorn*,[55] the secret formation of policy prohibited by the Open Meetings Act refers to the formation of such policy as a group. This implies some communication between a meaningful number of its members, from which the public has been excluded. If there is no meeting of a public body when less than a quorum convenes and discusses an issue, there is likewise no meeting of a public body when, although there is a quorum present, there is no interaction as to the policy in question. There is no meeting of a public body

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[52] Brief for appellants at 41.

[53] See, generally, Annot., 4 A.L.R.6th 263 (2005 & Supp. 2010); 83 Am. Jur. 2d *Zoning and Planning* § 731 (2003 & Cum. Supp. 2010); 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2000).

[54] See § 84-1409(2).

[55] *City of Elkhorn v. City of Omaha, supra* note 9.

based upon unspoken thoughts of council members who happen to be sitting in the same room.[56]

A similar case to the one at hand was presented in *Harris v. Nordquist*.[57] There, the court held that gatherings of a quorum of the school board at various restaurants, sometimes after official meetings, were not "meetings" under open meetings law, and the trial court was correct in granting summary judgment in favor of the board. The court explained that the only evidence presented was that the board did not meet for the purpose of deciding on or deliberating toward a decision on any matter and, furthermore, that the board did not discuss or deliberate about board business at the gatherings.

Likewise, in *Board of Com'rs v. Costilla Conservancy*,[58] the court held that the plaintiffs had failed to demonstrate the requisite link between the policymaking function of the board and the attendance of certain members at an informational meeting held at a restaurant. The meeting was organized by two state government departments and a private mine to report about the mine's efforts to comply with pollution regulations. Although the plaintiffs argued that the lack of detailed information on what occurred at the gathering should not be held against the people, the council members testified that they did nothing other than listen passively to a highly technical presentation, eat dinner, and leave.

The court in *Costilla Conservancy* explained that the public meetings law was not so broad and sweeping as to require public access to any gathering of any sort that is attended by a quorum of a local public body.[59] Such a position, the court explained, would make an already broad statute virtually limitless. Instead, the transparency required by the law pertained only to those gatherings in which the public could legitimately take part in or gain insight into the policymaking

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[56] See, generally, *Harris v. Nordquist*, 96 Or. App. 19, 771 P.2d 637 (1989). See, also, *Kessel v. D'Amato*, 97 Misc. 2d 675, 412 N.Y.S.2d 303 (1979); *Board of Com'rs v. Costilla Conservancy*, 88 P.3d 1188 (Colo. 2004).

[57] *Harris v. Nordquist, supra* note 56.

[58] *Board of Com'rs v. Costilla Conservancy, supra* note 56.

[59] *Id.*

process.[60] There was simply no evidence that the gatherings in question involved a policymaking function, and thus, the board was entitled to summary judgment.

[17,18] While the Schauers argue that it can be "inferred"[61] that a public meeting occurred, the defendants presented to the court evidence that there was no formation of public policy at the gathering, and the Schauers failed to present any evidence showing otherwise. 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.[62] 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.[63] The district court properly concluded on summary judgment that the tour/dinner was not a meeting under the Open Meetings Act.

(c) Announcement Ceremony

Based on our discussion concerning the tour/dinner, it should be apparent that the passive attendance of several officials at the May 17, 2005, announcement ceremony likewise did not violate the Open Meetings Act. But, in any event, the announcement ceremony was not placed in issue below, and it is thus not properly before us on appeal.[64] The Schauers allege no other secret meetings in violation of the act.

VI. CONCLUSION

The Schauers lack standing to assert the claims made in their first cause of action, and they failed to raise any material issue

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[60] *Id.*

[61] Brief for appellants at 36.

[62] *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

[63] *Id.*

[64] See, e.g., *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

of fact in their second cause of action. We affirm the court's judgment in favor of the defendants in this suit to set aside the annexation of Redevelopment Area #3 by the City.

AFFIRMED.

VIVIKA A. DEVINEY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE.

786 N.W.2d 902

Filed August 6, 2010. No. S-08-1259.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists 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 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. **Negligence.** Foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of the foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.
4. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
5. **Federal Acts: Railroads: Employer and Employee.** The Federal Employers' Liability Act requires that a railroad provide its employees with a reasonably safe workplace.
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: Proximate Cause.** Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.
8. **Animals: Liability.** The doctrine of ferae naturae essentially provides that a landowner cannot be held liable for the actions of dangerous animals on his or

her property unless he or she has reduced the animals to his or her possession and control.

9. **Employer and Employee: Negligence.** An employer breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees.
10. **Federal Acts: Railroads: Negligence: Damages.** Under the Federal Employers' Liability Act, an employee who suffers an injury caused in whole or in part by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused in part by the actions of a third party.
11. **Federal Acts: Railroads: Proof: Notice.** The essential element of reasonable foreseeability in Federal Employers' Liability Act actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury.

Petition for further review from the Court of Appeals, SIEVERS, CARLSON, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Richard J. Dinsmore and Jayson D. Nelson, of Law Office of Richard J. Dinsmore, P.C., L.L.C., and Cortney S. LeNeave and Richard L. Carlson, of Hunegs, LeNeave & Kvas, P.A., for appellant.

William M. Lamson, Jr., Anne Marie O'Brien, and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Vivika A. Deviney (Deviney) brought this suit against her employer, Union Pacific Railroad Company (UP), under the Federal Employers' Liability Act (FELA),[1] for injuries she sustained after contracting "West Nile" virus (WNV). The Douglas County District Court granted UP's motion for summary judgment, and Deviney appealed the decision to the Nebraska Court of Appeals. In a split decision, the Court of Appeals reversed

[1] 45 U.S.C. §§ 51 through 60 (2006).

the decision of the district court,[2] and UP filed a petition for further review. We granted UP's petition for further review. We affirm the decision of the Court of Appeals.

BACKGROUND

Deviney was a conductor for UP when she contracted WNV, a mosquitoborne illness. Deviney claimed she contracted WNV during the course of her employment as a conductor in Bill, Wyoming, on or about August 3, 2003. Deviney alleges that as a part of her employment, she conducted a roll-by inspection of a train near "East Cadaro Junction" in Wyoming, which inspection required her to examine the exterior of a passing train for defects or problems. Deviney alleges that during the inspection, she was bitten by mosquitoes more than once, but fewer than 25 times. She called the dispatcher to complain, but Deviney stated that the dispatcher's only response was to laugh.

Deviney also stated that she had taken precautions against mosquito bites by wearing long pants and a sweater, and by applying insect repellant containing 7 percent "DEET." Evidence in the record indicates there was a pond on mine property near East Cadaro Junction and that the water in the pond came from a silo owned by the mine. The record is unclear as to how close the pond was to UP's right-of-way. There is also evidence in the record that there were mosquitoes inside the Bill trainyard, that there was standing water in the trainyard as a result of the washing of equipment, and that there was a pond located on the trainyard property.

Within a week, Deviney developed headaches, diarrhea, vomiting, and nausea, and she was eventually diagnosed with WNV. Deviney was in a hospital and then a rehabilitation facility from August 13 to October 17, 2003. As a result of the virus, Deviney allegedly suffered 84-percent hearing loss in one ear and 20-percent hearing loss in the other ear and continues to suffer from fatigue, vertigo, impaired vision, and weakness in her left side. Deviney was unable to return to work, although

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[2] *Deviney v. Union Pacific RR. Co.*, 18 Neb. App. 134, 776 N.W.2d 21 (2009).

the record is unclear as to what contact, if any, Deviney had with UP after August 3.

Deviney brought suit under FELA in the Douglas County District Court against UP for her injuries. Deviney claims her injuries were caused through UP's negligence in not warning employees about the danger of mosquitoes and in not treating the standing water on or near UP's property. As noted, the Douglas County District Court granted summary judgment for UP and Deviney appealed. The Court of Appeals reversed the decision of the district court, and UP filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In its petition for further review, UP claims, restated, that the Court of Appeals erred in finding (1) that UP breached its duty to Deviney and (2) that Deviney's injuries were reasonably foreseeable.

STANDARD OF REVIEW

[1] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists 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.[3]

[2] In reviewing a summary judgment, we view the evidence in a 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.[4]

ANALYSIS

[3] We first turn to the impact of our recent decision in *A.W. v. Lancaster Cty. Sch. Dist. 0001*[5] on this case. Although the circumstances in *A.W.* are very different from those in the present case, *A.W.* addresses the nexus of legal duty and the

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

[4] *Id.*

[5] *A.W. v. Lancaster Cty. Sch. Dist. 0001, ante* p. 205, 784 N.W.2d 907 (2010).

foreseeability of harm. In the past, we have often treated the foreseeability of an injury as a question of law.[6] As we noted in *A.W.*, however, this places us in the position of deciding as a matter of law questions that are dependent upon the facts and circumstances of a particular case.[7] With *A.W.*, we have reframed the issue of foreseeability—the lack of foreseeable risk in a specific case may be a basis for a no-breach determination—but such a ruling is not a no-duty determination.[8] Therefore, we held:

> [F]oreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.[9]

[4,5] With that understanding, and utilizing that framework, we address UP's assignments of error. UP argues that the Court of Appeals erred in finding that UP breached its duty to Deviney and in finding that Deviney's injuries were reasonably foreseeable. Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.[10] FELA law requires that a railroad provide its employees with a reasonably safe workplace.[11]

[6,7] In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the

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[6] See *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999), *abrogated, A.W., supra* note 5.

[7] *A.W., supra* note 5.

[8] *Id.*

[9] *Id.* at 216, 784 N.W.2d at 917.

[10] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[11] *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697 (3d Cir. 1970).

plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.[12] Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.[13]

UP's legal duty is a question of law and is well established under FELA. But whether UP breached that duty and whether Deviney's injuries were reasonably foreseeable are questions of fact. And because this case comes before us on a grant of summary judgment, the question is whether Deviney produced sufficient evidence to present a genuine issue of material fact on those two points.

[8] UP argues that it did not have a duty to protect Deviney from mosquitoes and asks us to apply the doctrine of ferae naturae. The doctrine of ferae naturae essentially provides that a landowner cannot be held liable for the actions of dangerous animals on his or her property unless he or she has reduced the animals to his or her possession and control.[14] This doctrine has been applied to insects.[15]

As already noted, however, under FELA, an employer has a duty to provide a reasonably safe place to work. Under *A.W.*, foreseeability is an issue of fact that relates to a breach of that duty, to be determined by the fact finder.[16] We look for guidance in other FELA cases in which railroads have been found liable for damages stemming from insect bites.[17] Those same FELA cases, along with the set of facts in this case, inform our

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[12] *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998).

[13] *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002).

[14] *Nicholson v. Smith*, 986 S.W.2d 54 (Tex. App. 1999).

[15] *Id.*

[16] *A.W., supra* note 5.

[17] See, *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963); *Pehowic, supra* note 11; *Grano v. Long Island R. Co.*, 818 F. Supp. 613 (S.D.N.Y. 1993).

decision as to whether Deviney presented sufficient evidence to overcome a motion for summary judgment.

Though we could find no FELA cases that specifically address mosquitoborne illnesses, there are cases dealing with injuries arising from other insect bites and stings. In *Pehowic*, the employee had reported that an area owned by the railroad was overgrown by vegetation and brush and had a large concentration of bees.[18] The employee notified the dispatcher of the presence of the brush and bees and stated that it was unsafe. After the employee was stung by a bee and treated for his reaction to the sting, he filed a suit under FELA, claiming that the railroad had been negligent in not trimming the brush.[19] The railroad argued that it could not be chargeable with the acts of wild bees.[20] The court found that failure to trim the brush could be found by a jury to be a breach of duty.

[9] *Grano* involved several railroad employees who contracted Lyme disease, a tickborne illness, during the course of their employment.[21] In that case, the court determined that the employer was negligent for failing to provide its employees with a reasonably safe place to work because it failed to maintain and inspect worksites or to spray for ticks. The court stated that "'[a]n employer breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees.'"[22]

Finally, in *Gallick*, the railroad had knowledge of a stagnant pool of water on its property that contained dead rats and pigeons.[23] After being bitten by an insect similar to those flying around the stagnant pool, the employee developed an infection that resulted in the amputation of both his legs. The U.S. Supreme Court held that the railroad could be found liable for

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[18] *Pehowic, supra* note 11.

[19] *Id.*

[20] *Id.*

[21] *Grano, supra* note 17.

[22] *Id.*, 818 F. Supp. at 618.

[23] *Gallick, supra* note 17.

the injuries because it knew of the existence of the pool and could also be charged with knowledge of the increased risk to its employees.[24]

In the present case, Deviney testified that there were a lot of mosquitoes in the Bill trainyard. UP's treatment plant and operations manager in Bill testified that there was an evaporation pond, on UP property one-quarter to one-half mile from the office, that often contained standing water. He testified that he had noticed more mosquitoes coming from a creek on the property and that he had treated both the pond and the creek for mosquitoes in the past. He also testified that he did not remember whether he had treated the pool in 2003 and that he used larvicide to treat for mosquitoes only when he noticed a problem after the mosquitoes hatched. According to the record, however, larvicide is effective only if used before mosquitoes hatch.

Deviney testified that she also had not been made aware of UP's accident prevention bulletin, which had been issued in 2002. The bulletin recommended using an insect repellant containing 20 to 30 percent DEET, but the repellant Deviney used contained only 7 percent DEET. Deviney also stated that she was required to get out of the train to perform her roll-by inspection, that she was bitten a number of times, and that her age placed her in a high-risk group for WNV.

In order to overcome UP's motion for summary judgment, Deviney had to produce enough evidence to present a genuine issue of material fact that UP breached its duty to provide a reasonably safe place to work. In light of the FELA cases discussed above, Deviney has presented enough evidence for her action to survive the motion for summary judgment. Deviney presented evidence that UP knew or should have known of the potential hazard posed by the presence of mosquitoes in the Bill trainyard and that UP failed to exercise reasonable care to inform and protect her from that hazard.

[10] Deviney also presented evidence that there was a pond on mine property near East Cadaro Junction where she

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[24] *Id.*

conducted a roll-by inspection. Deviney stated that she received more than 1 bite but fewer than 25 mosquito bites at that location. UP argues that it cannot be held liable for mosquitoes breeding on a third party's property. The Court of Appeals, citing *Carter v. Union Railroad Company*,[25] stated that Deviney had presented enough evidence for her action to survive summary judgment. "Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party."[26] We agree with the assessment of the Court of Appeals that Deviney has presented enough evidence of a potential breach of duty to overcome a motion for summary judgment on this issue.

[11] As previously noted, foreseeability is an issue of fact, relating to breach of duty, to be determined by the fact finder. We recognize that "[t]he essential element of reasonable foreseeability in FELA actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury."[27] UP's own accident prevention bulletin demonstrates that UP at least knew of the risks posed by WNV, and Deviney presented evidence that UP knew or should have known of the presence of mosquitoes where she was required to work. We therefore agree with the Court of Appeals that Deviney presented sufficient evidence for her action to survive a motion for summary judgment.

CONCLUSION

We conclude that under FELA, UP owed Deviney a duty to provide a reasonably safe workplace, and that Deviney presented sufficient evidence to give rise to a genuine issue of material fact as to whether UP breached that duty. We also hold

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[25] *Carter v. Union Railroad Company*, 438 F.2d 208 (3d Cir. 1971).

[26] *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 165-66, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). See, also, *Holsapple v. Union Pacific RR. Co.*, 279 Neb. 18, 776 N.W.2d 11 (2009).

[27] *Grano, supra* note 17, 818 F. Supp. at 618.

that Deviney presented sufficient evidence of a genuine issue of material fact as to the foreseeability of contracting WNV. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. STATE CODE AGENCIES TEACHERS ASSOCIATION, NSEA-NEA, ALSO KNOWN AS STATE CODE AGENCIES EDUCATION ASSOCIATION, APPELLEE.

788 N.W.2d 238

Filed August 13, 2010. No. S-09-718.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by the 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. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **Commission of Industrial Relations: Evidence.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables as to wage rates and other conditions of employment for purposes of establishing an array are within the field of its expertise and should be given due deference.
6. ____: ____. Generally, the Commission of Industrial Relations' guideline for assembling an array of school districts is to select districts from one-half to twice as large as the subject school. Although the size criterion is a general guideline and not a rigid rule, it is based on objective criteria, provides predictability, and should not be lightly disregarded when a sufficient number of comparables which meet the guideline exist.

Appeal from the Commission of Industrial Relations. Affirmed.

A. Stevenson Bogue and Jennifer R. Deitloff, Special Assistant Attorneys General, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The State of Nebraska (State) appeals the decision of the Commission of Industrial Relations (CIR), which affirmed the Special Master's ruling implementing the final offer of the State Code Agencies Teachers Association (SCATA) for salary increases for the 2009-11 biennium. We affirm the decision of the CIR.

SCOPE OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by the 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. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

FACTS

The SCATA is a bargaining agent that represents teachers employed by the State in employment negotiations with the State. Its membership consists of approximately 72 teachers who teach in 13 state-operated residential facilities, including centers for people with developmental disabilities, youth rehabilitation centers, treatment centers, and correctional centers located throughout Nebraska. The teachers are certified by the State of Nebraska and teach 877 students in grades kindergarten through 12.

The SCATA teachers' salaries are computed according to an index schedule made up of nine columns representing educational attainment and 18 steps representing each year of experience. An index number is assigned to each position on the schedule, and salaries for each position are calculated by multiplying the corresponding index number by the base salary. The first step in the first column, representing a first-year teacher with a bachelor's degree, has an index of "1" and is effectively equal to the base salary.

Each step and column beyond the base salary has an index 4 percent greater than the previous step and column, ranging from 1.04 to 1.96. Teachers who have obtained a master's degree plus 36 hours of education and have taught for 18 years—the maximum amount of education and experience provided for on the index schedule—receive 1.96 times the base salary. Increasing the base salary by a certain percentage has the effect of increasing every other salary on the schedule by that same percentage. As the base salary is the foundation for computing all other positions on the salary schedule, the parties negotiate wage increases in terms of an increase in base salary. Adding the indexes for all of the teachers in the district generates the staff index. The parties can determine the entire cost of a proposed salary schedule by multiplying the staff index by the base salary.

In negotiating a new collective bargaining agreement for the contract period of July 1, 2009, to June 30, 2011, the SCATA and the State reached an impasse. Pursuant to the State Employees Collective Bargaining Act (Bargaining Act), Neb. Rev. Stat. §§ 81-1369 to 81-1390 (Reissue 2008), the parties met with a mediator on January 9, 2009, and reached a tentative agreement subject to the SCATA members' ratification. A ratification vote was held from January 12 to 14, which resulted in the SCATA members' rejecting the contract.

On January 15, 2009, the SCATA invoked the Special Master procedure pursuant to the Bargaining Act and the parties exchanged final offers. The State submitted a motion to dismiss the Special Master proceeding, claiming that the SCATA failed to timely submit a final offer on or before January 10, as required by § 81-1382(1). The Special Master denied the

State's motion, concluding that the parties did exchange final offers as contemplated by the statute.

SCATA's Final Offer

The SCATA's final offer was based on an array of eight comparison districts based on a "labor market" theory, that is, the array included the "host city" school districts that establish the local labor market for teachers in the communities in which state facilities are located. For example, the Beatrice State Developmental Center is located in Beatrice, so the SCATA included the Beatrice school district as a comparator. The SCATA's array included Beatrice, Fillmore Central, Hastings, Johnson County, Kearney, Lincoln, Omaha, and York school districts. Its theory was that the State had to compete with the local public schools in the labor market for teachers.

Based on its analysis of this array, the SCATA concluded that the SCATA teachers' base salaries lagged significantly behind base salaries in the array districts. The SCATA's base salary for 2008-09 was $28,273. The mean, median, and midpoint of base salaries for 2008-09 calculated from the SCATA's proposed array produced figures of $30,330, $29,425, and $29,877, respectively. The mean is the arithmetic average of the salaries in the array. The median is the middle value in the array. The SCATA relied most heavily on the midpoint figure in its comparability analyses, which it calculated by taking the average of the mean and median figures. The SCATA's final offer proposed an actual increase in base salary of 4.2 percent to $29,459 in 2009-10.

Although salary information for 2009-10 was available for only Lincoln and York, and not available for any district for 2010-11, the SCATA analyzed wage increases from 1998 to 2008 for five districts: Beatrice, Hastings, Kearney, Lincoln, and York, which resulted in a midpoint annual increase of 3.95 percent. Based on this calculation, the SCATA's final offer proposed an increase of 3.9 percent to $30,609 for 2010-11.

State's Final Offer

The State proposed an array of nine comparison districts based on district size guidelines and geographic proximity determined by commuting distance to State facilities.

The State's array includes the school districts of Ashland-Greenwood, Beatrice, Fillmore Central, Hastings, Holdrege, Johnson County, Kearney, Ralston, and York. It notes that size is an array selection criteria the CIR has heavily relied upon. Using its selected array districts, the State calculated mean, median, and midpoint salaries of $28,698, $28,850, and $28,774, respectively. It proposed a final offer with an increase in base salary of 4 percent to $29,404 for contract year 2009-10. Claiming it could not rely on speculative data for the 2010-11 salary increases, the State offered an increase of 1.4 percent to $29,816 for 2010-11.

Special Master Hearing

On January 28, 2009, the parties participated in a hearing before the Special Master in Lincoln. The only unresolved issue presented for resolution was wages. Both parties had the opportunity to present all the evidence they deemed appropriate. On February 3, the Special Master issued his ruling selecting the SCATA's final offer as most reasonable.

In reaching his decision, the Special Master included all comparator school districts presented by both parties, resulting in an 11-member array. He concluded that although Lincoln and Omaha are large districts, they were reasonable comparables considering the SCATA's argument that the State had to compete in those labor markets to recruit and retain teachers. He also accepted the State's recommendations of the Ashland-Greenwood, Holdrege, and Ralston districts, noting that they were within commuting distance of host cities. The other six districts—Beatrice, Fillmore Central, Hastings, Johnson County, Kearney, and York—were included in both the SCATA's and the State's arrays. The parties stipulated that all school districts proposed were sufficiently similar under Neb. Rev. Stat. § 48-818 (Reissue 2004).

Considering salary data from all 11 array districts, the Special Master calculated that the SCATA base salary was $1,021 below the midpoint of comparison base salaries and $1,161 below the base salary that would produce the midpoint schedule cost. He concluded that the SCATA teachers' salaries lagged significantly behind peer salaries for the 2008-09 year.

Noting that the parties were bargaining for future comparability for 2009-10 and 2010-11, the Special Master forecast base salaries for 2009-10 and 2010-11. He based the prediction on historical average increases of 3.25 percent during the 1998-99 to 2008-09 period and considered that for 2009-10, the base salary in Lincoln increased 3.14 percent and the base salary in York increased 2.76 percent. Characterizing his estimate as "extremely conservative," the Special Master predicted that base salaries for 2009-10 in the remaining districts would increase by 2.5 percent and that they would increase by 2 percent for 2010-11. He determined that the SCATA's final offer moved the bargaining unit members closer to true comparability for the upcoming biennium and selected the SCATA's offer as being the most reasonable.

The State timely appealed the Special Master's decision to the CIR. Before the hearing, the SCATA filed a motion in limine to prevent the State from offering new evidence or new witness testimony for the CIR to consider. The State opposed the motion and indicated it wished to submit "updated and previously unavailable" evidence of terms and conditions of employment of the comparator employers. See brief for appellant at 8. The CIR granted the SCATA's motion, reasoning that because it was charged to act as an "appellate body," the matter should proceed as an appeal on the record made at the Special Master hearing.

The State submitted an offer of proof for the record. The first exhibit of the offer of proof was a table of base salaries for 2008-09 for the nine districts proposed by the State. The information in the table was identical to the information relied on by the Special Master except that it did not include Lincoln or Omaha. The second exhibit of the offer of proof consisted of tables showing salary information for the State's final offer, the SCATA final offer, and comparability figures calculated by the State from its proposed array. It assumed no salary increases in array districts for the second year.

On May 11, 2009, the CIR held a hearing to resolve the following issues as presented by the State: (1) whether the Special Master had jurisdiction to issue a ruling in the case; (2) whether the decision of the Special Master with respect

to wages was significantly disparate from prevalent rates of pay and conditions of employment as determined by the CIR, pursuant to § 48-818; (3) whether the Special Master's array selection was improper; and (4) whether the Special Master's prediction of wage increases in 2009-10 and 2010-11 should be given deference. The CIR affirmed the Special Master's order. The State appeals.

ASSIGNMENTS OF ERROR

The State alleges the CIR erred in (1) determining the Special Master had jurisdiction, (2) granting the SCATA's motion in limine and refusing to allow the parties to submit additional evidence, (3) determining that the Special Master's decision to include Lincoln and Omaha in the array was not significantly disparate, (4) determining that the Special Master's prediction of wage increases for 2010-11 was to be given deference, and (5) determining that the Special Master's decision that the Bargaining Act requires the setting of wages for the second year of the contract without comparability data was not significantly disparate under § 48-818.

ANALYSIS

Special Master Jurisdiction

[2] The first issue is whether the Special Master had jurisdiction to resolve the parties' dispute. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007). In this case, jurisdiction is determined by the Bargaining Act.

The purpose of the Bargaining Act is to "promote harmonious, peaceful, and cooperative relationships between state government and its employees and to protect the public by assuring effective and orderly operations of government." § 81-1370. In furtherance of this purpose, the Legislature sets forth a specific schedule for contract negotiations. Bargaining must begin on or before the second Wednesday in September of the year preceding the beginning of the contract period. § 81-1379. No later than January 10, the parties "shall reduce to writing and sign all agreed-upon issues and exchange final offers on each

unresolved issue. Final offers may not be amended or modified without the concurrence of the other party." § 81-1382(1). "No later than January 15, the parties . . . shall submit all unresolved issues that resulted in impasse to the Special Master." § 81-1382(2).

The State argues that adherence to the January 10 deadline is mandatory. It points to *State Code Agencies Ed. Assn. v. State*, 231 Neb. 23, 434 N.W.2d 684 (1989), in support of its claim that the deadline is absolute and, thus, that the Special Master lacked jurisdiction. In *State Code Agencies Ed. Assn.*, the State Code Agencies Education Association was certified as the bargaining agent for teachers employed by the State on October 28, 1987, and attempted to initiate contract negotiations on November 2. The State refused on the ground that bargaining did not begin before the second Wednesday in September, as required by § 81-1379. Although the CIR directed the State to begin negotiations, we reversed, noting that the association had full knowledge of the timing requirements and had chosen not to timely initiate the actions necessary to become certified and start the negotiations.

Likewise, in the case at bar, the State claims that the January 10 deadline is jurisdictional. We disagree. January 10 simply marks the end of the negotiations between the parties. The Bargaining Act permits parties to agree to modify final offers after January 10; therefore, January 10 is not the litmus test for CIR jurisdiction. See § 81-1382(1).

As the CIR notes in *State Law Enforcement Barg. Council v. State of NE*, 13 C.I.R. 104, 109 (1998), the primary purpose of the Bargaining Act is to "encourage voluntary resolution of disputes in the collective bargaining process, and, to the extent the parties failed in achieving voluntary agreement on all issues, to provide an efficient, speedy, simple, cost effective means for resolving all remaining unresolved issues."

The parties' actions were in furtherance of this purpose, as the negotiators reached a voluntary tentative final agreement in mediation on January 9, 2009. No unresolved issues existed from January 9 until January 14, when ratification failed. The parties then exchanged new final offers and submitted the unresolved issues to the Special Master in accordance with

the timeline set forth in § 81-1382(2). We conclude that the parties' actions complied with § 81-1382 and that the Special Master had jurisdiction.

Motion in Limine and Denial of Additional Evidence

The next issue is whether parties can present additional evidence to the CIR after the Special Master hearing. After the State appealed the Special Master's ruling to the CIR, the SCATA filed a motion in limine to prevent the offering of additional evidence. The CIR sustained the motion, reasoning that allowing additional evidence at this stage of the proceedings would permit parties to "bolster what defects now apparently exist in the evidence."

[3] An appeal of a Special Master's ruling to the CIR is governed by the Bargaining Act. Therefore, we must interpret the Bargaining Act to determine whether the CIR correctly sustained the motion. Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

Section 81-1383(1) of the Bargaining Act provides that parties "may appeal an adverse ruling on an issue to the commission on or before March 15. . . . No party shall present an issue to the [CIR] that was not subject to negotiations and ruled upon by the Special Master." Section 81-1383(2) instructs:

> (2) The [CIR] shall show significant deference to the Special Master's ruling and shall only set the ruling aside upon a finding that the ruling is significantly disparate from prevalent rates of pay or conditions of employment as determined by the [CIR] pursuant to section 48-818. The [CIR] shall not find the Special Master's ruling to be significantly disparate from prevalent rates of pay or conditions of employment in any instance when the prevalent rates of pay or conditions of employment, as determined by the [CIR] pursuant to section 48-818, fall between the final offers of the parties.

Section 48-818 of the Industrial Relations Act provides that the CIR shall establish rates of pay which are comparable to

the prevalent wage rates paid for the same or similar work. In contrast to the Bargaining Act, the Industrial Relations Act provides in part that if a special master is appointed under that act,

> [s]hould either party to a special master proceeding be dissatisfied with the special master's decision, such party shall have the right to file an action with the [CIR] seeking a determination of terms and conditions of employment pursuant to section 48-818. Such proceeding shall *not* constitute an appeal of the special master's decision, but rather shall be heard by the [CIR] as an action brought pursuant to section 48-818.

Neb. Rev. Stat. § 48-811.02(5) (Reissue 2004) (emphasis supplied). The Industrial Relations Act provides the parties with the right to file an action with the CIR and is explicit that such proceeding filed with the CIR after the Special Master's decision is not an appeal. § 48-811.02(5).

[4] Where § 48-811.02(5) of the Industrial Relations Act proclaims that the CIR's review is *not* an appeal, § 81-1383(1) of the Bargaining Act specifically states that the CIR's review is an appeal of an adverse ruling. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010). As we are required to give meaning to each word in the language of the statute, the Legislature's description of the action as an appeal in the Bargaining Act is controlling. The Legislature has clearly established a method of review for cases arising under the Bargaining Act that is more circumscribed than those arising under the Industrial Relations Act.

The Bargaining Act is cumulative to the Industrial Relations Act, except where the provisions are inconsistent, in which case the Bargaining Act prevails. § 81-1372. Although the CIR acts as a specialized body of first impression in the Industrial Relations Act, the Legislature clearly changes the CIR's role in the Bargaining Act to that of an appellate body. This interpretation is in line with the other provisions of the Bargaining Act designed to streamline the negotiation process.

Furthermore, the CIR is required to give significant deference to the Special Master's ruling. § 81-1383(2). The Special Master is required to determine the most reasonable final offer on each disputed issue, and then the CIR's review is limited. It is only to set the ruling aside if it finds the ruling is significantly disparate. § 81-1383. The CIR could not give deference to the Special Master if it allowed new evidence, because such evidence would not have been taken into consideration in the initial ruling. Allowing additional evidence would significantly dilute that required deference and would cause the Special Master hearing to be a mere formality. Accordingly, permitting supplementary evidence would render the language of § 81-1383(2) meaningless. There is nothing in the statute that allows parties to present additional evidence before the CIR, and the procedure following the Special Master ruling is for the Legislature to determine.

We note that the CIR has previously permitted additional evidence following the Special Master hearing. See *State Law Enforcement Barg. Council v. State of NE*, 13 C.I.R. 104 (1998). That case was not appealed to this court, and therefore, the issue was not previously presented to us and we do not find that case instructive or in any way binding.

Even if the CIR was permitted to receive and consider additional evidence, the offer of proof does not show that the receipt of such evidence would have made a difference in this case. The State's offer of proof purported to be a corrected version of exhibit 25, which was received by the Special Master. The only correction was changing the number of contract days for Hastings from 187 to 185, which had the effect of raising Hastings' base salary from $29,100 to $29,420. This caused the 2008-09 mean base salary of the State's proposed array to increase from $28,662 to $28,698, median base salary to be unchanged, and midpoint base salary to increase from $28,756 to $28,774. These are the same figures cited and used by the Special Master in his ruling.

The other offer of proof submitted by the State was a table of salary figures that the State claimed utilized "previously presented information and data to provide the Commission with data and a method for comparing the final offers of both parties

with comparability." The State explains that in assembling this data, it assumed no increase in base salaries for the second year of the contract on the ground that it believed speculative data were prohibited. As we reach the opposite conclusion in later analysis in this opinion, this offer of proof would not have made a difference in this case. All of the evidence proffered by the State in its offer of proof is either not helpful to its case, redundant of evidence already in the record before the Special Master, or based on incorrect assumptions. The CIR's decision would not have been different had it taken this information into consideration.

We conclude that the parties are not permitted to offer additional evidence before the CIR and that the CIR did not err in granting the motion in limine and in denying the State's requests. Section 81-1383(1) clearly characterizes the CIR's review of the Special Master's ruling as an appeal, and it does not provide for the admission of additional evidence.

Inclusion of Lincoln and Omaha in Array

The State also argues that the CIR should not have affirmed the Special Master's inclusion of Lincoln and Omaha school districts in the array. The State claims that Lincoln and Omaha are too large to be array members.

[5,6] Determinations made by the CIR in accepting or rejecting claimed comparables as to wage rates and other conditions of employment for purposes of establishing an array are within the field of its expertise and should be given due deference. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005). Generally, the CIR's guideline for assembling an array of school districts is to select districts from one-half to twice as large as the subject school. *Allen Ed. Assoc. v. Allen Consolidated Schools*, 14 C.I.R. 101 (2002); *Scotts Bluff Co. Sch. Dist. No. 79-0064 v. Lake Minatare Education Assoc.*, 13 C.I.R. 256 (1999) (citing numerous cases). Although the size criterion is a general guideline and not a rigid rule, it is based on objective criteria, provides predictability, and should not be lightly disregarded when a sufficient number of

comparables which meet the guideline exist. *Lake Minatare Education Assoc., supra.*

However, size of the district is only one factor the CIR considers when reviewing an array of comparables. Other factors used to determine comparability are geographic proximity, population, job descriptions, job skills, and job conditions. See *Hyannis Ed. Assn., supra*. In selecting cities in reasonably similar labor markets for the purpose of comparison of prevalent wage rates, the question is whether, as a matter of fact, the cities selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. *Omaha Assn. of Firefighters v. City of Omaha*, 194 Neb. 436, 231 N.W.2d 710 (1975). The State argues that Lincoln and Omaha should be excluded because of the size of the districts.

The SCATA represents approximately 72 teachers who teach approximately 877 students in 13 facilities located across Nebraska. Unlike most school district negotiation cases, where the school district may be the only employer of teachers in the city or town, the "district" represented by the SCATA has employees in facilities located within other school districts. We have stated that

> "[w]henever there is another employer in the same market hiring employees to perform same or similar skills, the salaries paid to those employees must be considered by the CIR *unless* evidence establishes that there are substantial differences which cause the work or conditions of employment to be dissimilar."

Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty., 229 Neb. 301, 311, 427 N.W.2d 28, 37 (1988) (quoting *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *disapproved on other grounds, Hyannis Ed. Assn., supra*). Furthermore, in this case, the parties stipulated that aside from size, all of the school districts were sufficiently similar under § 48-818.

The SCATA's members teach in facilities located in Beatrice, Geneva (Fillmore Central), Hastings, Tecumseh (Johnson County), Kearney, Lincoln, McCook, Omaha, and

York. The final 11-district array used by the Special Master was as follows:

District	Enrollment	2008-09 Base Salary	Proposed By
Ashland-Greenwood	848	$28,500	State
Beatrice	2,143	$30,100	Both
Fillmore Central	630	$28,650	Both
Hastings	3,375	$29,420	Both
Holdrege	1,150	$27,800	State
Johnson County	549	$28,850	Both
Kearney	5,084	$29,429	Both
Lincoln	34,061	$34,908	SCATA
Omaha	48,075	$32,285	SCATA
Ralston	3,095	$26,533	State
York	1,232	$29,000	Both

Beatrice, Hastings, Kearney, Lincoln, Omaha, and Ralston all exceed the twice-as-large guideline, yet both parties proposed Beatrice, Hastings, and Kearney.

The State claims that failure to adhere to the twice-as-large guideline was error. It calculates that by including Ashland-Greenwood, Lincoln, Omaha, and Ralston as array districts, the Lincoln and Omaha areas were weighted as 36 percent of the array and argues that those markets were weighted too heavily. However, as noted by the CIR, 5 of the 13 facilities, or 38 percent, are located in Lincoln or Omaha.

The Special Master noted that all districts proposed by both parties were within reasonable driving distances of state facilities; therefore, he did not exclude any district based on geographic proximity. Regarding the inclusion of Lincoln and Omaha in the array, the Special Master found that five districts exceeded the size guideline and that there was "no persuasive reason for tossing out" all of them. He acknowledged that Lincoln and Omaha were "vastly larger" than the SCATA district but determined that a large percentage of the SCATA's labor market came from those areas. He included all proposed districts in the array.

On appeal, the CIR concluded that the Special Master's use of all 11 of the proposed array school districts to determine comparability was not significantly disparate from § 48-818.

It also reiterated the facts that the facilities are located within other school districts is unique, that both parties failed to adhere to the size guidelines, and that the parties stipulated that all school districts were sufficiently similar.

We may modify, reverse, or set aside an order of the CIR 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. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

There is no evidence that the CIR acted without or in excess of its powers in affirming the decision of the Special Master, nor is there evidence that the order was procured by fraud or is contrary to law. Comparing the Lincoln and Omaha school districts to the facilities represented by the SCATA, the districts meet comparability criteria in the areas of geographic proximity, job descriptions, job skills, and job conditions. The Special Master and CIR thoughtfully considered the impact of including comparators exceeding the size guidelines and found there was a persuasive argument for including such comparators.

We conclude that the facts support the CIR's order by a preponderance of the competent evidence on the record considered as a whole. The CIR did not err in affirming the Special Master's decision to include Lincoln and Omaha in the array.

Wage Increases for 2010-11

The State's remaining assignments of error relate to the Special Master's setting of wages for 2010-11. It claims that the CIR erred in affirming the Special Master's conclusion that the Bargaining Act requires the setting of wages for the second year of the contract even if there is insufficient comparability data. The State also claims that the Special Master's salary increase figures for 2010-11 were speculative and that, therefore, the CIR should not have shown deference to the figures.

As noted above, we are limited in our review. See *Hyannis Ed. Assn., supra*. There is no evidence that the CIR acted without or in excess of its powers in giving deference to the Special Master's decision or that the CIR's order was procured by fraud or is contrary to law. Accordingly, we consider whether the facts found by the CIR support its order and whether the order is supported by a preponderance of the competent evidence on the record considered as a whole.

Section 81-1377(4) of the Bargaining Act states that "[a]ll contracts involving state employees and negotiated pursuant to the Industrial Relations Act or the . . . Bargaining Act shall cover a two-year period coinciding with the biennial state budget . . . ." Other sections of the Bargaining Act make it clear that the Legislature crafted the Bargaining Act in order to have a known amount to include in the biennial budget. See §§ 81-1377(1), 81-1383(4) and (5), 81-1384(1), and 81-1385(2). By requiring state employees to negotiate a 2-year contract coinciding with the biennial state budget, the Legislature has placed emphasis on knowing the cost it will incur for state employee contracts for the biennial budget.

Negotiations pursuant to the Industrial Relations Act require comparable figures to set salaries for the following year. See § 48-818. See, also, *Lincoln Fire Fighters Assn. v. City of Lincoln*, 198 Neb. 174, 252 N.W.2d 607 (1977); *Bellevue Police Officers Association v. The City of Bellevue, Nebraska*, 8 C.I.R. 186 (1986). Because the Bargaining Act requires 2-year contracts negotiated on a rigid timeline, which may occur before full comparability data are available, the requirements of the two acts are inconsistent. When the Industrial Relations Act and the Bargaining Act are inconsistent, the Bargaining Act prevails. Therefore, the comparability requirement of the Industrial Relations Act is superseded by the 2-year contract requirement of the Bargaining Act. § 81-1372. We find that the State and the SCATA must negotiate a 2-year contract regardless of the availability of comparable data.

We must then consider whether the CIR erred in giving deference to the Special Master's decision. Section 81-1383(2) instructs that the CIR "shall show significant deference to the Special Master's ruling and shall only set the ruling aside upon

a finding that the ruling is significantly disparate from prevalent rates of pay or conditions of employment as determined by the [CIR] pursuant to section 48-818."

Although the CIR typically does not make decisions on wages or benefits based on speculation, see *Douglas Cty. Health Dept. Emp. Assn. v. Douglas Cty.*, 229 Neb. 301, 427 N.W.2d 28 (1988), *disapproved on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005), and *General Drivers & Helpers Union v. Co. of Douglas*, 13 C.I.R. 202 (1999), appropriate comparability data for the second year of the contract did not exist at the time of negotiations. However, the absence of such data does not absolve the State of its duty under § 81-1377 to negotiate a 2-year contract. As the Special Master noted, failing to predict salary increases for future years would result in the SCATA teachers' salaries being significantly below actual comparability and in a constant catchup status.

To avoid lagging salaries and because actual comparability data were not available for most districts for the 2009-10 year and were unavailable for all districts for 2010-11, the Special Master forecast salaries based on historical increases. He considered salary data provided by the SCATA for five of the comparison districts for the period of 1998-99 to 2008-09. The base salaries in these districts increased an average of 3.95 percent annually during that time period. During the same time period, the SCATA base salaries increased an annual average of 3.25 percent. The Special Master noted the declining private economy, the expected modest decline in state revenues for 2008, and the increases in base salaries for 2009-10 in Lincoln and York of 3.14 percent and 2.76 percent respectively.

Considering this evidence and characterizing his estimate as "extremely conservative," the Special Master forecast that base salaries for the remaining comparison districts would increase by 2.5 percent for 2009-10 and 2 percent for 2010-11. Relying on this prediction, the Special Master determined that although both the State's and the SCATA's final offers brought the SCATA teachers closer to true comparability, the SCATA's offer did a much better job of doing so.

For 2010-11, the SCATA's final offer was an increase of 3.9 percent, based on its calculation that the SCATA raises averaged 3.25 percent over the last 10 years. Although the State protested that it could not make an offer for 2010-11 due to the lack of array data, it ultimately offered an increase of 1.4 percent. The Special Master concluded that both parties submitted reasonable final offers and that both parties' final offers propose reasonable increases in the SCATA base salary for 2009-10. But the Special Master found that the SCATA's final offer for 2010-11 was more reasonable than the State's and better moved the SCATA's members toward true comparability. Recognizing the importance attached to comparability in § 81-1382(3) of the Bargaining Act and § 48-818 of the Industrial Relations Act, he found that the SCATA's final offer was more reasonable.

On appeal, the CIR acknowledged that the Legislature had charged that it "shall show significant deference to the Special Master's ruling and shall only set the ruling aside upon a finding that the ruling is significantly disparate from prevalent rates of pay or conditions of employment as determined by the [CIR] pursuant to section 48-818." See § 81-1383(2). The CIR further determined that the Special Master's ruling fit within the intent and spirit of § 48-818 and that his ruling was clearly based on comparability. Accordingly, it concluded that the Special Master's decision was not significantly disparate and affirmed his ruling.

Considering the facts found by the Special Master and the CIR, as well as the competent evidence on the record, we find that the facts support the CIR's order and that the order is supported by a preponderance of the competent evidence on the record considered as a whole. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005). Therefore, there are no grounds for this court to modify, reverse, or set aside the decision of the CIR.

CONCLUSION

The CIR correctly determined that it had jurisdiction to hear the appeal in this case. It did not err in disallowing additional evidence to be submitted, finding that the Special Master's

inclusion of Lincoln and Omaha school districts in the array was not significantly disparate, or finding that the Special Master was correct in requiring the parties to negotiate a 2-year contract even though sufficient comparability data were not available. We affirm the decision of the CIR.

AFFIRMED.

THE BOARD OF TRUSTEES OF THE NEBRASKA STATE COLLEGES, APPELLANT, V. STATE COLLEGE EDUCATION ASSOCIATION, APPELLEE.

787 N.W.2d 246

Filed August 13, 2010. No. S-09-738.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by the 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.

Appeal from the Commission of Industrial Relations. Affirmed.

Patrick J. Barrett, of Fraser Stryker, P.C., L.L.O., for appellant.

Mark D. McGuire, of McGuire & Norby, for appellee.

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

WRIGHT, J.

NATURE OF CASE

The Board of Trustees of the Nebraska State Colleges (Board) appeals the decision of the Commission of Industrial Relations (CIR), which affirmed the Special Master's ruling implementing the final offer of the State College Education

Association (SCEA) for salary increases for the 2009-11 biennium. We affirm the decision of the CIR.

SCOPE OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by the 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. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

FACTS

The Board operates Nebraska's three state colleges: Chadron State College, Peru State College, and Wayne State College. The SCEA is a bargaining agent for a faculty bargaining unit established under Neb. Rev. Stat. §§ 81-1373(3) and 81-1379(2) (Reissue 2008) of the State Employees Collective Bargaining Act (Bargaining Act), Neb. Rev. Stat. §§ 81-1369 to 81-1390 (Reissue 2008). The SCEA represents approximately 265.01 full-time-equivalent faculty members who work at the three state colleges in the ranks of professor, associate professor, assistant professor, and instructor. The SCEA is the exclusive bargaining representative of the employees, and the parties have bargained on a system-wide basis for many years.

The SCEA and the Board reached an impasse during negotiations for a new collective bargaining agreement for the July 1, 2009, to June 30, 2011, contract year. Pursuant to the Bargaining Act, the parties exchanged final offers on January 12, 2009, and submitted those final offers to the Special Master by January 15.

SCEA's Final Offer

The SCEA based its final offer on an array selected in 1997 by the Nebraska Coordinating Commission on Postsecondary Education, which included institutions located all across the

United States. It compiled a separate array for each of the three state colleges. For Chadron State College, the SCEA proposed an array consisting of Eastern New Mexico University, Fort Hays State University (Kansas), Lander University (South Carolina), North Georgia College and State University, Northern State University (South Dakota), Northwestern Oklahoma State University, Southern Arkansas University, Southern Oregon University, Southwest Minnesota State University, and University of North Carolina at Pembroke.

The array for Peru State College consisted of Black Hills State University (South Dakota), Concord University (West Virginia), Dakota State University (South Dakota), Dickinson State University (North Dakota), Indiana University-East, Northwestern Oklahoma State University, Southwest Minnesota State University, University of Arkansas at Monticello, University of South Carolina at Aiken, and Western State College of Colorado.

Wayne State College's array consisted of Bemidji State University (Minnesota), Eastern New Mexico University, Fort Hays State University (Kansas), Georgia Southwestern State University, Minot State University (North Dakota), Northern State University (South Dakota), Southeastern Oklahoma State University, Southern Arkansas University, and Southern Oregon University. The SCEA defends its geographically broad arrays on the ground that college and university faculty are part of a national labor pool. It also notes that the peer schools selected are classified as similar by the Nebraska Coordinating Commission on Postsecondary Education, are all public institutions of comparable size, and are located outside of metropolitan areas.

In arriving at its final offer, the SCEA relied on data indicating that state college faculty salaries as a whole were below market by 4.17 percent for the 2007-08 academic year. The SCEA calculated annual average increases for the past decade and predicted 4.22-percent increases for each of the next 2 years. It proposed a 7-percent across-the-board increase for 2009-10 and a 4-percent across-the-board increase for 2010-11 to maintain comparability. The offer provided for a 6-percent increase in the minimum promotion base salary and minimum

new-hire base salary of each academic rank for 2009-10 and a 3-percent increase in minimum base salary for each rank for 2010-11. It also proposed a $3,000 increase to faculty members who are promoted to a new rank.

The SCEA justifies its offer for an 11-percent increase over 2 years on the grounds that faculty members were 5.02 percent below market for 2007-08 and that the average annual faculty increase for 1996-97 through 2006-07 as calculated by the American Association of University Professors is 4.22 percent.

The SCEA argues for across-the-board increases, because prior CIR wage comparability cases involving institutions of higher education measured the amount by which all bargaining unit members were below comparability and then ordered across-the-board increases for the unit. See, *Metropolitan Tech. Comm. College Educ. Ass'n v. Metropolitan Comm. College Area*, 14 C.I.R. 127 (2003); *Board of Regents of the University of Nebraska v. American Association of University Professors*, 7 C.I.R. 1 (1983). It claims that any attempt to differentiate salary raises by faculty rank is not consistent with CIR precedent.

Board's Final Offer

In calculating its final offer, the Board used an array of nine colleges and universities located within 500 air miles of the nearest Nebraska state college. The array consisted of Black Hills State University (South Dakota), Dakota State University (South Dakota), Fort Hays State University (Kansas), Minot State University (North Dakota), Northern State University (South Dakota), Northwestern Oklahoma State University, Southeastern Oklahoma State University, Southwest Minnesota State University, and Western State College of Colorado. The proposed array members were located in rural, nonmetropolitan areas and had student enrollment similar to the Nebraska state colleges. All of these institutions were also included in the SCEA's array.

From this array, the Board proposed salary increases based on academic rank. It performed comparability analyses on a system-wide basis using data from the "Integrated Postsecondary

Education Data System" for the most recent academic year available, 2007-08, for each rank. The Board concluded that for 2007-08, professors were above market by .73 percent, associate professors were below market by 6.78 percent, assistant professors were below market by 11.73 percent, and instructors were below market by 4.36 percent. Relying on *Douglas County Health Department Employees Association v. County of Douglas*, 8 C.I.R. 208 (1986), *affirmed* 229 Neb. 301, 427 N.W.2d 28 (1988), the Board claimed that salaries of job classifications above comparability need not be increased.

Accordingly, the Board proposed raises as follows: Professors receive no increase in their base salary in either year, associate professors receive a 3.39-percent increase in each year, assistant professors receive a 5.87-percent increase for 2009-10 and a 5.86-percent increase for 2010-11, and instructors receive a 2.18-percent increase for both years. The Board also proposed eliminating sections appearing in the 2007-09 contract that provided for increases in minimum promotion base salaries and minimum new-hire base salaries of each academic rank.

Special Master Hearing

The Special Master held a hearing on January 20, 2009, at which time both parties presented evidence. The SCEA and the Board also filed posthearing briefs. The Special Master issued his ruling on February 27. The Special Master made clear that he was required to choose between two "decidedly unattractive" final offers. He observed that each party submitted an "in your face" salary offer that was "highly unpalatable" to the other party but that he was nonetheless required to select one of the final offers as presented.

Reviewing the proposed arrays, the Special Master found that both arrays were reasonable. He compiled an array consisting of 12 Midwestern schools located in states adjacent to Nebraska or in a state adjacent to those adjacent states. The resulting array consisted of the nine schools proposed by the Board plus Bemidji State University in Minnesota, Dickinson State University in North Dakota, and Eastern New Mexico State University.

The Special Master used this array and calculated comparability figures similar to those reached by both the Board and the SCEA. He found that for 2007-08, professor salaries were approximately even with the market, associate professor salaries were almost 5 percent below market, assistant professor salaries were almost 13 percent below market, instructor salaries were about 2 percent below market, and the entire bargaining unit as a whole was 4.5 percent below market. The Special Master also determined that based on these parties' past practices and negotiating history, faculty ranks did not constitute separate job classifications.

Noting the inherent timelag in calculating comparability with data from 2007-08, the Special Master projected salary increases for 2008-09, 2009-10, and 2010-11. He used the Board's 2008-09 salary increase data from eight of the schools in the Board's proposed array. These eight schools reported mean, median, and midpoint salary increases of 3.75 percent, 4 percent, and 3.88 percent, respectively. The mean is the arithmetic average of the salaries in the array. The median is the middle value in the array. The midpoint is calculated by taking the average of the mean and median figures. As these figures were actual salary increases, the Special Master found the data superior to the projections proposed by the SCEA. As Nebraska state college faculty received a 4-percent increase in 2008-09, the Special Master found that the comparability results from 2007-08 did not change in any meaningful way in 2008-09.

Looking forward to the 2009-11 contract term, the Special Master took judicial notice of the worsening national economy and concluded that there was no basis for the SCEA's assumption that wages in peer institutions would increase by 4.22 percent in 2008-09, 2009-10, and again in 2010-11. Instead, the Special Master forecast average salary increases of 2.5 to 3 percent. He based this prediction on the fact that eight state government bargaining units represented by the Nebraska Association of Public Employees/AFSCME Local 61 agreed to increases of 2.9 percent and 2.5 percent for the next 2 years—equivalent to a 5.47-percent compounded increase. Therefore,

the Special Master assumed a 2-year market increase figure of 5.5 percent for comparability purposes.

The Special Master noted that faculty salaries were 4.5 percent below market in 2007-08 and had remained at the same rate below market in 2008-09. He then predicted a 5.5-percent increase among comparable institutions during the next 2 years and determined that the salary increase needed to maintain comparability during the 2009-11 contract term was about 10 percent. He noted that although the Board's offer moved some faculty (assistant professors and associate professors) closer to comparability than they are now, professors and instructors would fall below comparability over the next 2 years.

For the 2009-11 contract, the Special Master concluded that the SCEA's final offer of 11 percent did a better job of moving all unit members toward comparability and keeping them comparable for the duration of the contract than did the Board's offer of 4.33 percent. He also noted that the Board provided no rationale for removing provisions appearing in the 2007-09 contract regarding rank base minima. The Special Master selected the SCEA's offer as being the most reasonable.

CIR Hearing

The Board appealed the Special Master's decision to the CIR. Before the hearing, the SCEA filed a motion in limine to prevent the Board from offering new evidence or new witness testimony for the CIR to consider. The Board opposed the motion and indicated it wished to submit evidence refuting the Special Master's conclusions. The CIR granted the motion in limine, noting that the further introduction of additional evidence was "in conflict with the intent of the Legislature in providing a speedy and inexpensive resolution to an appeal filed" to the CIR. It also noted that the CIR is required to show significant deference to the Special Master's ruling and set the ruling aside only if it finds the ruling is significantly disparate from prevalent rates of pay or conditions of employment as determined by the CIR pursuant to Neb. Rev. Stat. § 48-818 (Reissue 2004). The Board submitted an offer of proof for the record.

After a May 20, 2009, hearing, the CIR issued its "Opinion and Order on Appeal," affirming the Special Master's order. It found that "[e]ffective changes in the salary structure are not achieved by having the Special Master impose substantial structural changes requested by one party over the vehement objections of the other party." Accordingly, it found that the Special Master's selection of the SCEA's proposal instituting across-the-board increases over the Board's faculty rank increases was not disparate pursuant to § 48-818.

The CIR also determined that the Bargaining Act required parties to negotiate a 2-year contract despite the fact that accurate data for § 48-818 did not exist. It concluded that the Special Master's consideration of speculative data for the purpose of determining future comparability for the 2-year contract was not disparate pursuant to a § 48-818 analysis.

Finally, the CIR reviewed the Special Master's numbers and calculations and concluded that the comparability analysis was correct. Accordingly, the comparability figure of 10 percent fell between the Board's offer of 4.33 percent and the SCEA's offer of 11 percent. Giving the Special Master significant deference, the CIR concluded that the ruling was not significantly disparate from prevalent rates of pay or conditions of employment. The CIR affirmed the Special Master's ruling implementing the SCEA's final offer.

The Board appealed, and we granted its petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

The Board alleges, combined and restated, that the CIR erred in (1) granting the SCEA's motion in limine and refusing supplemental evidence and (2) affirming the Special Master's order.

ANALYSIS

Motion in Limine and Denial of Additional Evidence

The first issue is whether pursuant to the Bargaining Act, parties can present additional evidence to the CIR after the Special Master hearing. We recently addressed this issue in

State v. State Code Agencies Teachers Assn., ante p. 459, 788 N.W.2d 238 (2010), and we adopt the reasoning set forth therein. We conclude that pursuant to the Bargaining Act, the CIR's review of a Special Master's ruling is an appeal and that the CIR did not err in granting the motion in limine and denying the Board's request to offer new evidence.

The Bargaining Act clearly defines the CIR's role in state employee cases to be an appellate body and not a redundant finder of fact. § 81-1383. The CIR is to show significant deference to the Special Master's ruling and is to set the ruling aside only upon a finding pursuant to § 48-818 that the ruling is significantly disparate. § 81-1383(2). The Special Master's decision is *not* significantly disparate if the prevalent rates of pay fall between the final offers of the parties. *Id.*

For these reasons, the CIR did not err in granting the SCEA's motion in limine and disallowing additional evidence to be submitted for its consideration.

Affirming Special Master's Order

The Board next claims that the CIR erred in affirming the Special Master's order because the order was significantly disparate. Its contention is based on the CIR's exclusion of additional evidence and the Special Master's classification of the four faculty ranks as a single job classification. The Board also claims that second-year wages were based on speculative data. The Board argues that the CIR should have found that the Special Master's order was significantly disparate and implemented the Board's final offer.

We may modify, reverse, or set aside an order of the CIR 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. See *Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005). There is no evidence that the CIR acted without or in excess of its powers or that the order was procured by fraud or is contrary to law.

In reviewing the CIR's order, we note that pursuant to § 81-1383(2), the CIR cannot find the Special Master's ruling to be significantly disparate from prevalent rates of pay when the prevalent rates of pay and conditions of employment, as determined by the CIR pursuant to § 48-818, fall between the final offers of the parties. Therefore, our review is limited to whether the facts found by the CIR support the CIR's conclusion that the prevalent rates of pay and conditions of employment fall between the final offers of the parties and whether the order is supported by a preponderance of the competent evidence on the record considered as a whole.

The Board's claim that the prevalent rates of pay were not between the final offers of the parties is based on the exhibits the Board submitted as an offer of proof in response to the SCEA's motion in limine. As discussed above, the CIR properly declined to consider the supplemental evidence when determining the prevalent rates of pay. See *State v. State Code Agencies Teachers Assn., ante* p. 459, 788 N.W.2d 238 (2010). In viewing the facts considered by the CIR, the evidence supports the CIR's conclusion that the prevalent rates of pay fell between the final offers of the parties.

The Board also argues that the CIR erred in affirming the Special Master's order on the ground that it found that the faculty ranks of professor, associate professor, assistant professor, and instructor constitute a single job classification. In its analysis, the Board overlooks or ignores the reasoning stated by the Special Master and the CIR for that decision. As noted by the CIR, the parties' past practice has been to impose across-the-board salary increases. The Board did not offer any evidence in support of changing this practice. We agree with the CIR that substantial changes in salary structure are not achieved by imposition over the "vehement objections of the other party." Indeed, this decision is in line with the CIR's history of leaving changes in salary structure to collective bargaining. See, *Board of Regents of the University of Nebraska v. American Association of University Professors*, 7 C.I.R. 1 (1983) (citing *West Holt Faculty Ass'n v. School District Number 25 of Holt County*, 5 C.I.R. 301 (1981), and *Omaha Association of*

Firefighters, Local 385 v. City of Omaha, Nebraska, 2 C.I.R. 117 (1975), *affirmed* 194 Neb. 436, 231 N.W.2d 710 (1975)). We likewise conclude that the facts support the CIR's determination that the Special Master's refusal to unilaterally impose salary structure changes was not disparate when reviewed pursuant to § 48-818. The order is supported by a preponderance of the competent evidence on the record considered as a whole.

Finally, the Board claims that the CIR erred in giving deference to the Special Master's order, because it was based on speculative evidence for future wage increases. We also addressed this issue in *State v. State Code Agencies Teachers Assn., supra*, concluding that the Bargaining Act requires 2-year contracts. And, as second-year comparability data are not always available at the time of negotiations, we observed that failing to predict salary increases for future years would result in bargaining unit members' salaries constantly being significantly below actual comparability and in a constant catchup status. *Id.* Accordingly, the CIR did not err in deferring to the Special Master on this issue, and this assignment of error is without merit.

CONCLUSION

The Bargaining Act does not permit additional evidence to be submitted to the CIR after the order is issued by the Special Master, and therefore, the CIR properly granted the SCEA's motion in limine. Furthermore, the CIR did not err in finding that the Special Master's order was not significantly disparate. We affirm the decision of the CIR.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN A. SELLERS, RESPONDENT.

786 N.W.2d 685

Filed August 13, 2010. No. S-10-146.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, John A. Sellers, was admitted to the practice of law in the State of Nebraska on September 19, 2000. At all times relevant, respondent was engaged in the private practice of law in Grand Island, Nebraska.

Formal charges were filed on February 11, 2010. On June 7, 2010, respondent filed a conditional admission under Neb. Ct. R. § 3-313 of the disciplinary rules, in which he knowingly did not challenge or contest the facts set forth in the formal charges and waived all proceedings against him 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 state that on August 13, 2008, a client hired respondent to represent him in a child custody modification case in the district court for Hall County. The client paid respondent an advance fee of $1,000. The client had custody of his minor children and was seeking permission from the court to relocate with his children to Nevada in order to start a new job.

On September 3, 2008, respondent learned that another member of his law firm was representing an individual in a civil suit in which respondent's client was a defendant. Respondent informed his client of the conflict and told him that respondent could "work around it." Respondent did not get his

client's informed consent or the informed consent of the other client involved in the conflict.

On September 5, 2008, respondent appeared in court for a pretrial conference regarding his client's custody modification case. Trial of the case was set for November 13. The court's pretrial order required final witness lists to be filed with the court and exchanged between the parties by October 10. No additional witnesses would be permitted to testify except upon stipulation by the parties or by order of the court.

Respondent failed to prepare and file his witness list by October 10, 2008. Respondent prepared the witness list on the day of trial, November 13, and brought the list to trial. Opposing counsel objected to respondent's witnesses due to his failure to comply with the pretrial order. The court sustained the objection. Respondent requested that the trial be continued. Respondent's request was granted; however, the court entered a temporary order on custody, ruling that respondent's client could not remove the children from the State of Nebraska. In the event the client chose to leave the state to pursue his employment, the mother of the children would be granted parenting time if she so desired. The court directed respondent to prepare a written order.

After the November 13, 2008, hearing, the client terminated the engagement with respondent. On November 26, respondent filed a motion to withdraw, which was granted on December 3.

Respondent told the Counsel for Discipline of the Nebraska Supreme Court that he prepared the proposed order as directed by the court and sent the order to opposing counsel. Opposing counsel did not receive the draft order, and respondent did not follow up to confirm that the order was filed with the court. The client made repeated calls to respondent's office in December 2008 seeking a copy of the order, but respondent did not return those calls or provide the client with a copy of the order.

On January 9, 2009, the client filed a grievance against respondent with the Counsel for Discipline. Notice of the grievance was mailed to respondent's business address by certified mail. Respondent was directed to file a written

response to the grievance within 15 working days. Respondent failed to respond to the notice, so a second notice was mailed to respondent by regular U.S. mail on February 25, 2009. Respondent again failed to respond, so a third notice was mailed to respondent on March 17. On March 30, respondent filed a response.

In his response, respondent acknowledged that he had a conflict of interest in representing the client. Respondent explained how he attempted to address the conflict, but acknowledged that because of that conflict, he was unable to prepare the witness list in a timely manner. Respondent claimed that he did prepare the proposed order and sent it to opposing counsel but did not follow up to determine if the order was filed. Respondent eventually submitted the proposed order to opposing counsel and the court on January 20, 2009.

On July 14, 2009, the Counsel for Discipline sent a letter to respondent seeking additional information. Respondent again did not respond to the request, and the Counsel for Discipline had to contact him three additional times before receiving a response.

The formal charges state that the foregoing acts and omissions by respondent constitute violations of his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2007) and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.7 (conflict of interest; current clients), 3-501.10 (imputation of conflicts of interest; general rule), and 3-508.4 (misconduct).

ANALYSIS

Section 3-313 of the disciplinary rules 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 his conditional admission, respondent knowingly does not challenge the allegations in the formal charges, conditioned on the receipt of the following discipline: that respondent be suspended from the practice of law for 90 days, effective 30 days after the filing of this opinion, and that respondent pay all costs and expenses related to the prosecution of this case pursuant to Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules.

Pursuant to § 3-313 of the disciplinary rules, 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 his oath of office as an attorney licensed to practice law in the State of Nebraska and §§ 3-501.1, 3-501.3, 3-501.4, 3-501.7, 3-501.10, and 3-508.4 of the rules of professional conduct.

Respondent has waived all additional proceedings against him 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 his oath of office as an

attorney licensed to practice law in the State of Nebraska and §§ 3-501.1, 3-501.3, 3-501.4, 3-501.7, 3-501.10, and 3-508.4 of the rules of professional conduct and that respondent should be and hereby is suspended from the practice of law for 90 days, effective 30 days after the filing of this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with §§ 7-114 and 7-115 of the Nebraska Revised Statutes and §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

JOHN DOE, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

788 N.W.2d 264

Filed August 27, 2010. No. S-09-256.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Motions to Dismiss: Immunity.** A trial court may properly address a claim of sovereign immunity under a Neb. Ct. R. Pldg. § 6-1112(b)(6) motion.
4. **Notice: Service of Process.** Although Neb. Rev. Stat. § 25-505.01 (Reissue 2008) does not require service to be sent to the defendant's residence or restrict delivery to the addressee, due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.
5. **Service of Process: Waiver.** Under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), voluntary appearance of the party is equivalent to service that waives a defense of

insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.

6. **Public Officers and Employees: Service of Process: Claims.** State officials, in their individual capacities, can challenge service while still reserving the right, in their official capacities, to contest a plaintiff's claims on other grounds.
7. **Constitutional Law: Immunity.** The 11th Amendment does not define the scope of the states' sovereign immunity. States also have inherent immunity from suit.
8. **Constitutional Law: Immunity: Waiver.** Under 11th Amendment immunity, a nonconsenting state is generally immune from suit unless the state has waived its immunity or Congress has validly abrogated it.
9. **Constitutional Law: Immunity: Municipal Corporations.** Eleventh Amendment immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state.
10. **Constitutional Law: Immunity: Public Officers and Employees: Declaratory Judgments: Injunction.** Eleventh Amendment immunity does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law.
11. **Actions: Immunity.** Under state sovereign immunity, a suit against a state agency is a suit against the state.
12. **Actions: Public Officers and Employees: Immunity.** A court must determine whether actions against individual officials sued in their official capacities are in reality actions against the state and therefore barred by sovereign immunity.
13. ____: ____: ____. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
14. ____: ____: ____. Actions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds.
15. **Public Officers and Employees: Immunity.** If the State does not have immunity from suit, state officials sued in their official capacities cannot assert it.
16. **Tort Claims Act: Governmental Subdivisions.** The State Tort Claims Act governs tort claims brought against the Board of Regents of the University of Nebraska and the University of Nebraska Medical Center.
17. **Tort Claims Act: Jurisdiction: Immunity: Waiver.** Once a plaintiff establishes subject matter jurisdiction under the State Tort Claims Act, the defendant may affirmatively plead that the plaintiff has failed to state a cause of action under Neb. Rev. Stat. § 81-8,219 (Reissue 2008) because an exception to the waiver of sovereign immunity applies.
18. **Tort Claims Act: Fraud.** Fraud by concealment is a form of deceit and therefore falls within the ambit of Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008).
19. **Constitutional Law: Immunity.** Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states.

20. ____: ____. For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority.
21. ____: ____. Under § 5 of the 14th Amendment, Congress may enact legislation abrogating state sovereign immunity to remedy and prevent violations of that amendment. This authority permits Congress to enact prophylactic legislation that both prevents and deters unconstitutional conduct by prohibiting conduct that is somewhat broader than the conduct forbidden by the amendment.
22. ____: ____. To be classified as remedial, and therefore a valid exercise of its power under § 5 of the 14th Amendment, Congress' legislation abrogating state sovereign immunity must exhibit a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.
23. **Constitutional Law: Immunity: Federal Acts: Discrimination.** Congress has validly abrogated the State's 11th Amendment immunity regarding claims under title II of the Americans with Disabilities Act of 1990 when a plaintiff alleges discrimination in public education.
24. **Actions: Federal Acts: Discrimination.** A plaintiff seeking recovery for a violation under title II of the Americans with Disabilities Act of 1990 must allege the following: (1) The plaintiff has a disability; (2) the plaintiff is otherwise qualified to receive the benefits of a public service, program, or activity; and (3) the defendants excluded the plaintiff from participation in or denied the plaintiff the benefits of such service, program, or activity or otherwise discriminated against the plaintiff because of his or her disability.
25. **Immunity: Federal Acts: Discrimination.** In general, courts should follow the Supreme Court's analytical framework set out in *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006), for determining abrogation of sovereign immunity in claims under title II of the Americans with Disabilities Act of 1990.
26. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
27. ____. A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.
28. **Schools and School Districts: Due Process.** For academic dismissals, due process is satisfied if the student was informed of the nature of the faculty's dissatisfaction and the potential for dismissal and if the decision to dismiss was careful and deliberate.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John Doe, pro se.

Amy L. Longo and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellees.

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

CONNOLLY, J.

I. SUMMARY

John Doe sued the Board of Regents of the University of Nebraska (Board), the University of Nebraska Medical Center (UNMC), and the following UNMC faculty members in each individual's official and individual capacities: John Gollan, M.D., Ph.D.; Carl Smith, M.D.; Sonja Kinney, M.D.; Jeffery Hill, M.D.; David O'Dell, M.D.; Wendy Grant, M.D.; Sharon Stoolman, M.D.; and Michael Spann, M.D. (collectively the UNMC faculty members). Doe seeks damages for fraudulent concealment, alleged violations of his constitutional rights, and breach of contract stemming from his dismissal from UNMC's College of Medicine.

The district court dismissed with prejudice Doe's complaint against the UNMC faculty members in their individual capacities because Doe did not perfect service. The court also dismissed with prejudice Doe's complaint against the Board, UNMC, and the UNMC faculty members in their official capacities. The court found that Doe failed to state a claim for which relief can be granted or that his claims were barred by sovereign immunity. Doe appeals.

We affirm in part and reverse in part. We conclude that the court properly dismissed Doe's claims for fraudulent concealment, violation of his due process rights, and breach of contract. But the court erred in dismissing Doe's claims under title II of the Americans with Disabilities Act of 1990 (ADA)[1] and § 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)[2] against the Board, UNMC, and the UNMC faculty members in their official capacities. We conclude that Congress has validly abrogated 11th Amendment immunity for title II claims of discrimination in public education. And the State now concedes that it waived immunity for claims under the Rehabilitation Act. We also reverse the district court's dismissal of the UNMC

[1] 42 U.S.C. § 12131 et seq. (2006).

[2] 29 U.S.C. § 794(a) (2006).

faculty members, in their individual capacities, and remand the cause for a determination of whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit.

II. BACKGROUND

1. Doe's Complaint

We glean the following facts from Doe's complaint. Doe suffers from major depressive disorder. He qualifies as an individual with a disability under the ADA and the Rehabilitation Act. During his second year of medical school, UNMC granted Doe a leave of absence from school to receive treatment for depression, insomnia, and anxiety.

In the fall of 2005, Doe returned and began his third year of medical school. During that academic year, he earned a near-failing grade in his pediatrics clerkship and failing grades in his obstetrics and gynecology clerkship and internal medicine clerkship. Doe appealed his obstetrics and gynecology grade, which was upheld by both the obstetrics and gynecology department and UNMC. Doe did not appeal his pediatrics clerkship grade or his internal medicine clerkship grade. He alleges that O'Dell told him that his failure of the "NBME shelf exam," one component of his internal medicine clerkship grade, was not appealable and resulted in an automatic failure of the clerkship. Doe claims that UNMC prevented him from appealing his grade on the internal medicine NBME shelf exam, but that UNMC allowed a medical student who was not disabled to appeal.

Doe then began his family medicine clerkship. During that clerkship, Doe notified Hill, chair of UNMC's scholastic evaluation committee, that his mental health was deteriorating and that he needed to seek treatment from his psychologist. Doe alleges that Hill ignored Doe's concerns about his mental health but that Doe saw the psychologist on several different occasions. Hill did, however, require Doe to sign a contract to continue in medical school. Doe refused to sign the contract, and the matter was brought before the evaluation committee.

At a hearing, the evaluation committee presented Doe with a new contract, to which had been added a professionalism clause that provided: "'I understand that any ratings of –2 or below on the professionalism ranking system, coupled with any negative comments concerning professionalism behavior, in any required clerkship or senior elective will be grounds for termination of enrollment.'" Doe signed the contract but claims that the defendants did not require other nondisabled students with similar academic standing to sign a contract containing a professionalism clause.

In the fall of 2006, Doe completed his surgery clerkship. During the clerkship, Doe developed a hernia that required surgery. Doe scheduled the surgery on the day he was required to take the surgical NBME shelf exam. He alleges that the surgery clerkship director, Grant, allowed him to reschedule the examination. That same day, however, Spann required him to see patients. Doe claims that Spann did not require other students to see patients that morning because the students were scheduled to be taking the NBME shelf exam.

Spann also completed an evaluation of Doe, giving him a poor performance evaluation. Doe claims that Grant's negative remarks influenced Spann's evaluation and that Grant provided Spann with privileged and fictitious information regarding Doe. Based on Spann's evaluation, the evaluation committee dismissed Doe from medical school because he violated the professionalism clause. Under the evaluation committee guidelines, Doe appealed his dismissal. The appeals board and the medical school's dean upheld the decision.

Doe claims that the defendants (1) fraudulently concealed information regarding his grades and evaluations, (2) discriminated against him because of his disability, (3) violated his due process rights, and (4) were contractually obligated to allow Doe to review all information used by UNMC in determining his grades and dismissing him.

2. Defendants Move for Dismissal

The defendants moved to dismiss under the following subsections of rule 12(b) of the Nebraska Court Rules of Pleading

in Civil Cases[3]: subsection (1) (lack of jurisdiction), subsection (5) (insufficiency of service), and subsection (6) (failure to state a claim). They asserted that (1) the State Tort Claims Act[4] immunizes the Board, UNMC, and the UNMC faculty members from claims of fraudulent concealment; (2) sovereign immunity immunizes the Board, UNMC, and the UNMC faculty members, in their official capacities, from claims for money damages; (3) the UNMC faculty members, in their individual capacities, have qualified immunity; and (4) none of the parties had been properly served. The record shows, however, that Doe served summons at the Attorney General's office under Neb. Rev. Stat. § 25-510.02(1) (Reissue 2008). And at the hearing on the motion to dismiss, the Board, UNMC, and the UNMC faculty members stated that they were not challenging service on them in their official capacities. But they maintained that Doe did not properly serve summons on the UNMC faculty members in their individual capacities.

3. District Court's Order

The court found that Doe failed to properly serve the UNMC faculty members in their individual capacities. Because 6 months had passed since Doe had filed his complaint, the court dismissed the UNMC faculty members in their individual capacities.[5] The court also dismissed all the claims against the remaining defendants. Regarding his fraudulent concealment claim, the court concluded that the State Tort Claims Act barred suits against the defendants for misrepresentation or deceit claims. But even if that conclusion was incorrect, the court dismissed the claim for two additional reasons. First, Doe failed to allege facts indicating that the defendants' alleged concealment of any records met the criteria of fraudulent misrepresentation. Second, Doe did not claim that any alleged concealment affected his dismissal. Regarding Doe's discrimination claim, the court concluded that the alleged facts did not involve a fundamental right abrogating the State's sovereign

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[3] See Neb. Ct. R. Pldg. § 6-1112(b).

[4] See Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2008).

[5] See Neb. Rev. Stat. § 25-217 (Reissue 2008).

immunity. And, regarding Doe's due process claims, the court concluded that the defendants had qualified immunity. The court also concluded that Doe alleged insufficient facts to show that the defendants had violated a liberty or property interest. The court further concluded that Doe's allegations showed the defendants afforded him due process required for academic dismissal. Finally, the court found that Doe failed to state a breach of contract claim.

III. ASSIGNMENT OF ERROR

Doe assigns, consolidated and restated, that the district court erred in dismissing his complaint.

IV. STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[6] Until now, we have stated that complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[7] In other cases, we have similarly stated that dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[8]

Because the Nebraska Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure, we have adopted from federal case law these standards for testing the sufficiency of a plaintiff's complaint.[9] But the U.S. Supreme Court has recently revised the federal standard for determining

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[6] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[7] *Id.*

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

[9] See, *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

whether a complaint can survive a motion to dismiss for failure to state a claim. So we consider these cases in determining whether to revise our standard also.

In 2007 and 2009 cases, the Supreme Court held that to prevail against a motion to dismiss, a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[10] In *Bell Atlantic Corp. v. Twombly* (*Twombly*),[11] the Court concluded that a plausibility standard is more consistent with Fed. R. Civ. P. 8(a)(2), which requires a pleading to contain "'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[12] And it reasoned that general pleading principles oblige a plaintiff to provide more than labels and conclusions, or a mere recitation of the elements of a claim, because courts are not required to accept as true legal conclusions or conclusory statements. Instead, the allegations must raise the right to relief "above the speculative level."[13]

In *Twombly*, the issue was whether the plaintiffs should be permitted to engage in discovery for facts that might prove the necessary element of their claim: that the defendants had agreed not to compete with each other, in violation of antitrust laws. The plaintiffs specifically alleged that the illegal agreement existed and also alleged circumstantial evidence of an agreement. But the circumstantial evidence—parallel business behavior—was legal conduct unless it stemmed from the defendants' preceding agreement. To prevail, a plaintiff is also required to adduce evidence tending to exclude the possibility of independent action.

The Second Circuit had held that the complaint was sufficient because the defendants' parallel conduct in not competing was just as consistent with collusion as permissible business behavior and because the defendants had not shown that "no

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[10] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[11] *Twombly, supra* note 10.

[12] *Id.*, 550 U.S. at 556.

[13] *Id.*, 550 U.S. at 555.

set of facts"[14] would permit the plaintiffs to prove collusion. In reversing, the Supreme Court stated that its earlier "'no set of facts'" language had been interpreted to mean that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[15] It reasoned that such interpretations permitted conclusory pleadings to survive a motion to dismiss if any possibility existed that the plaintiff would later establish facts to support recovery. The Court concluded that in some cases, this interpretation permitted expensive discovery for groundless claims. Accordingly, the Court held that in antitrust cases, a complaint must allege

> enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely."[16]

Applying these principles, the Court held that the complaint's

> allegation of parallel conduct and a bare assertion of conspiracy [did] not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make [an antitrust] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.[17]

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[14] *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *reversed, Twombly, supra* note 10.

[15] *Twombly, supra* note 10, 550 U.S. at 561.

[16] See *id.*, 550 U.S. at 556.

[17] *Id.*, 550 U.S. at 556-57.

So, the complaint in *Twombly* was insufficient for two reasons: (1) The allegation of a conspiracy was a legal conclusion not entitled to an assumption of truth; and (2) the complaint's only factual allegation did not support an inference of a preceding agreement even if true. But in a decision issued 2 weeks after *Twombly*, the Court reversed a decision affirming the dismissal of a complaint for conclusory allegations. In *Erickson v. Pardus*,[18] the Court emphasized that

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Specific facts are not necessary*; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'". . . In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

In 2009, the Supreme Court held that *Twombly*'s plausibility standard applied to all civil actions. In *Ashcroft v. Iqbal*,[19] the majority explained the plausibility standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" . . .
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory

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[18] *Erickson v. Pardus*, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (emphasis supplied), citing *Twombly, supra* note 10.

[19] *Iqbal, supra* note 10, 556 U.S. at 678-79 (citations omitted).

> statements, do not suffice. . . . [Fed. R. Civ. P.] 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." . . .
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

In *Iqbal*, the plaintiff alleged that after the September 11, 2001, terrorist attacks, government officials created a policy to detain Muslim men for discriminatory purposes and they knew of and condoned the detainees' mistreatment during detention. The majority concluded that these allegations were bare assertions, amounting to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[20] As such, the Court deemed the allegations to be "conclusory and not entitled to be assumed true."[21] The majority also concluded that the complaint's factual allegations were implausible in the light of the more likely explanation

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[20] *Id.*, 556 U.S. at 681.

[21] *Id.*

that the men were held because of their suspected links to the attacks until cleared of terrorist activity.

The majority rejected the argument that its plausibility standard was contrary to notice pleading: "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual content."[22] But the four-justice dissent disagreed with the majority's statement that the allegations were all conclusory. The dissent concluded that the complaint stated a claim of discriminatory conduct assuming that its allegations were true. And it found no principled basis for the majority's disregard of some allegations and acceptance of others.

Some of the Supreme Court's reasoning for its plausibility standard is consistent with what we have previously said in reviewing dismissal orders. Specifically, we have stated that we will accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[23] Also, like its federal counterpart,[24] Neb. Ct. R. Pldg. § 6-1108(a)(2) also requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. And we share the Supreme Court's concern that the "no set of facts" language could permit some meritless claims to proceed to discovery.

But we are also concerned that lower federal courts have interpreted the Court's plausibility standard as a heightened pleading standard. In some cases decided after *Twombly* and *Iqbal*[25]—frequently, cases requiring the plaintiff to show a defendant's intent or alleged involvement in unlawful conduct—federal courts have required a complaint to contain specific factual allegations of the defendant's claimed misconduct

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[22] *Id.*, 556 U.S. at 686.

[23] See *Kanne v. Visa U.S.A.*, 272 Neb. 489, 723 N.W.2d 293 (2006), citing *Kellogg, supra* note 9.

[24] Fed. R. Civ. P. 8(a)(2).

[25] *Iqbal, supra* note 10.

to survive a motion to dismiss for failure to state a claim.[26] In addition, commentators have found that courts dismiss a higher percentage of civil rights claims and employment discrimination claims when the plausibility standard is cited.[27]

But we do not believe that the Supreme Court intended dismissal to hinge on whether the plaintiff can allege specific facts of a necessary element. In *Twombly*, the Supreme Court specifically stated that it was not requiring "heightened fact pleading of specifics."[28] In *Erickson*,[29] it reiterated that allegations of specific facts are not required and that a judge must accept as true all of the factual allegations contained in the complaint. In practical effect, it appears the plausibility standard mainly comes into play when the plaintiff cannot allege direct evidence of a necessary element at the pleading stage.

We recognize that the Court's decision in *Iqbal* reflects a tension in how different judges might view the same allegations. For example, even the *Iqbal* majority treated what were basically the same allegations both as implausible factual allegations and as a mere recitation of the elements. And we recognize that Congress has attempted to overturn the "*Twombly-Iqbal*" standard—which is perceived as a shift toward fact pleading—and restore the old standard.[30] This

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[26] See, e.g., *In re Travel Agent Com'n Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009); *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009); *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009); *Panther Partners Inc. v. Ikanos Communications, Inc.*, 347 Fed. Appx. 617 (2d Cir. 2009); *Lopez v. Beard*, 333 Fed. Appx. 685 (3d Cir. 2009).

[27] See Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011 (2009).

[28] *Twombly, supra* note 10, 550 U.S. at 570.

[29] *Erickson, supra* note 18.

[30] See, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. Supp. 2010); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

legislation stalled in committee.[31] But we believe that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery.

[2] Accordingly, we hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[32]

V. ANALYSIS

1. State's Claims of Sovereign Immunity Are Affirmative Defenses

The court dismissed all of Doe's claims against the UNMC faculty members in their individual capacities for insufficient service of process. It also dismissed the following claims against the Board, UNMC, and the UNMC faculty members in their official capacities as barred by the State's sovereign immunity: Doe's fraudulent concealment claim, his discrimination claims under the federal ADA and the Rehabilitation Act, and his due process claims. Alternatively, it concluded that Doe failed to state a claim of fraudulent concealment and was afforded sufficient due process for academic dismissal. It also concluded that Doe failed to state a breach of contract claim.

We have previously concluded that "when a motion to dismiss raises both rule 12(b)(1) [(subject matter jurisdiction)] and [rule 12(b)](6) . . . , the court should consider the rule 12(b)(1) . . . first and should then consider the rule 12(b)(6) . . . only if

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[31] See, H.R. 4115, 155 Cong. Rec. H13351 (daily ed. Nov. 19, 2009); S. 1504, 155 Cong. Rec. S7869 (daily ed. July 22, 2009).

[32] See *Twombly, supra* note 10. See, also, *Morgan v. Hubert*, 335 Fed. Appx. 466 (5th Cir. 2009), citing *In re Southern Scrap Material Co., LLC*, 541 F.3d 584 (5th Cir. 2008).

it determines that it has subject matter jurisdiction."[33] We have also held that when a motion to dismiss raises rule 12(b)(6) and any combination of rule 12(b)(2), (4), and (5), the court should consider dismissal under rule 12(b)(2), (4), and (5) first. And then the court should consider dismissal under rule 12(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.[34] Here, the court failed to specify whether it considered the defendants' sovereign immunity claims to fall under the defendants' 12(b)(1) motion or their 12(b)(6) motion.

[3] The defendants contend that the court's conclusion that the State's sovereign immunity barred some of Doe's claims meant that the court lacked subject matter jurisdiction for those claims. But we have interpreted exceptions to the State's waiver of immunity under both the State Tort Claims Act and the Political Subdivisions Tort Claims Act as affirmative defenses that the State must plead and prove.[35] The U.S. Supreme Court has not decided whether 11th Amendment immunity is a jurisdictional issue.[36] But under its current view, states can waive 11th Amendment immunity, and, following the Court's lead in some cases, federal courts often decide the merits of a claim without addressing sovereign immunity.[37] So we conclude that a trial court may properly address a claim of sovereign immunity under a 12(b)(6) motion. We next determine whether the record shows sufficient process and service before considering whether Doe stated claims for which a court could grant relief. The defendants do not dispute that Doe perfected service on the Board, UNMC, and the UNMC faculty members in their official capacities. But they contend that Doe

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[33] *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 600, 694 N.W.2d 625, 629-30 (2005).

[34] *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008).

[35] See *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

[36] See *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998).

[37] See 13 Charles Alan Wright et al., Federal Practice and Procedure § 3524.1 (2008).

did not perfect service on the UNMC faculty members in their individual capacities.

2. Record Fails to Show Whether Doe Properly Served UNMC Faculty Members in Their Individual Capacities

The district court found that Doe had not properly served the UNMC faculty members in their individual capacities. Doe argues that he complied "in all substantial respects" with Neb. Rev. Stat. §§ 25-505.01 and 25-508.01 (Reissue 2008) and that the defendants received actual notice of the lawsuit.[38] He argues that when the defendants have actual notice, a court should liberally construe rules governing service.

Because Doe has sued the UNMC faculty members in their individual capacities, § 25-508.01 governs service upon them. Section 25-508.01(1) provides that "[a]n individual party . . . may be served by personal, residence, or certified mail service." Here, the record lacks evidence that Doe served the UNMC faculty members personally or at their residences. Instead, he served them individually by sending the complaint, by certified mail, to the risk management office at UNMC. Section 25-505.01 governs service by certified mail. Section 25-505.01(c)(i) requires that service of summons be made "within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery."

[4] Unlike many state statutes that permit certified mail service, § 25-505.01 does not require service to be sent to the defendant's residence or restrict delivery to the addressee.[39] But due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.[40] As stated, the district court made no findings regarding service,

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[38] Brief for appellant at 30.

[39] See, John P. Lenich, Nebraska Civil Procedure § 10:9 (2008); 62B Am. Jur. 2d *Process* § 211 (2005).

[40] See *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

and we cannot determine from the record whether sending the summons to UNMC's risk management office was reasonably calculated to notify each defendant that he or she had been sued in his or her individual capacity.

[5] Doe further argues, however, that through their attorney, the defendants, on August 5, 2008, all made voluntary appearances at a hearing regarding their motion to dismiss. And under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), voluntary appearance of the party is equivalent to service[41] that waives a defense of insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.[42]

[6] But the defendants affirmatively pled insufficiency of service of process under rule 12(b)(5) and voluntarily appeared in their individual capacities only to object to the sufficiency of process. While they also moved to dismiss Doe's complaint under other subsections of rule 12(b), the defendants, in their official capacities, did not waive a defense or objection by joining one or more other 12(b) defenses or objections in a responsive motion.[43] In sum, state officials, in their individual capacities, can challenge service while still reserving the right, in their official capacities, to contest a plaintiff's claims on other grounds. So, the only issue regarding individual service is whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants in their individual capacities. We conclude that this question presents an issue of fact, and we remand the cause for that determination.

3. Sovereign Immunity Principles

As noted, the district court found that Doe's claims against the Board, UNMC, and the UNMC faculty members in their official capacities were barred by sovereign immunity or that

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[41] See § 25-516.01(1). See, also, *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

[42] See § 25-516.01(2). See, also, *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[43] See § 6-1112(b).

he failed to state a cause of action in law or equity. We will address each of Doe's claims individually. But we first pause to explain the applicable sovereign immunity principles.

[7] Regarding Doe's discrimination claims under the ADA and the Rehabilitation Act, federal law governs whether a defendant is entitled to 11th Amendment immunity.[44] But "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."[45] States also have inherent immunity from suit as "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[46]

[8-10] Under 11th Amendment immunity, a nonconsenting state is generally immune from suit unless the state has waived its immunity or Congress has validly abrogated it.[47] But 11th Amendment immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[48] And 11th Amendment immunity does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law.[49]

[11-13] Under state sovereign immunity, we have held that a suit against a state agency is a suit against the state.[50] And we have held the Board and the University of Nebraska are state agencies.[51] In reviewing actions against state employees, we have similarly held that a court must determine whether actions

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[44] See 13 Wright et al., *supra* note 37, § 3524.2 (citing cases).

[45] *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

[46] *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[47] See, *id.*; 13 Wright et al., *supra* note 37, § 3524.

[48] *Alden, supra* note 46, 527 U.S. at 756.

[49] See, *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002); *Alden, supra* note 46.

[50] *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

[51] *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

against individual officials sued in their official capacities are in reality actions against the state and therefore barred by sovereign immunity.[52] In addressing this issue, we have stated that an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.[53] We have further stated that suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but that if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.[54]

We recognize that the "'affirmative action'" test, which we adopted in 1995,[55] has been criticized as easily manipulated to limit "the ability of citizens to vindicate their rights."[56] But in the light of the cases we cited and the facts of the 1995 case in which we adopted the test, we believe that we meant that sovereign immunity bars suits to compel affirmative actions that require a state official to expend public funds. In recent cases interpreting the standard, we have not interpreted "affirmative action" to include suits to compel state officers to take an action required by law when that action would not require them to expend public funds.[57]

[14] So we hold that actions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds. As the Supreme Court has consistently stated, "'when the action is in essence one for the recovery of money from the state, the state

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

[53] *Id.*

[54] *Id.*

[55] See *County of Lancaster v. State*, 247 Neb. 723, 728, 529 N.W.2d 791, 794 (1995).

[56] Lenich, *supra* note 39, § 20:10 at 732-33.

[57] See *County of Lancaster, supra* note 55. Compare *State ex rel. Steinke, supra* note 52.

is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"[58]

[15] Finally, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, [as an] entity, may possess, such as the Eleventh Amendment."[59] So if the State does not have immunity from suit, state officials sued in their official capacities cannot assert it.[60] And, obviously, if the district court correctly determined that Doe failed to state a cause of action, we need not consider a sovereign immunity defense.

4. Fraudulent Concealment

Doe's first claim raises allegations of fraudulent concealment. Doe argues that under the Board's bylaws, Kinney and Smith had a duty to disclose any evaluations or material used by the obstetrics and gynecology department to determine his grade. He argues that Kinney and Smith had knowledge of material facts; they concealed or suppressed those facts with the intent to mislead him; they misled him; and he suffered damages.

The Board, UNMC, and the UNMC faculty members, in their official capacities, contend that because the State has not waived immunity for misrepresentation claims, they are immune from suit.

[16-18] As we know, the State Tort Claims Act[61] governs tort claims brought against the Board and UNMC. Under that act, the State has waived its sovereign immunity for many tort claims, but it also lists exceptions to the waiver.[62] Once a plaintiff establishes subject matter jurisdiction under the State Tort Claims Act, the defendant may affirmatively plead

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[58] *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997).

[59] *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

[60] See *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996).

[61] See §§ 81-8,209 through 81-8,235.

[62] See § 81-8,219.

that the plaintiff has failed to state a cause of action under § 81-8,219 because an exception to the waiver of sovereign immunity applies.[63] Under § 81-8,219(4), one of the listed exceptions is for claims "arising out of . . . misrepresentation [or] deceit." And we have stated that "[f]raud by concealment is a form of deceit" and therefore falls within the ambit of § 81-8,219(4).[64]

Here, Doe alleges that the defendants fraudulently concealed information from him to his detriment. The exception in § 81-8,219(4) bars this claim against the Board and UNMC for fraudulent concealment. Further, under his fraudulent concealment claim, Doe sought money damages, not to compel state officials to do an act they were lawfully required to do. Thus, his claim against the UNMC faculty members in their official capacities is also barred.

5. Discrimination Because of Disability

(a) Americans with Disabilities Act

Doe alleges that he qualifies as an individual with a disability under the ADA. He claims that under title II of the ADA, the defendants failed to accommodate his disability and treated him differently from nondisabled students. The Board and UNMC argue that the State's sovereign immunity under the 11th Amendment bars Doe's claim under title II of the ADA. They argue that Doe has alleged no title II violation involving a fundamental right and, so, that they are immune from suit under the 11th Amendment.

Title II of the ADA prohibits discrimination against a qualified individual with a disability, in the participation or receipt of public services, programs, or activities, because of the disability.[65] It also requires state schools and universities to make reasonable modifications to their rules, policies, or practices to accommodate a disabled student's participation in state

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[63] See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[64] *Security Inv. Co. v. State*, 231 Neb. 536, 550, 437 N.W.2d 439, 448 (1989). See, also, 37 Am. Jur. 2d *Fraud and Deceit* § 1 (2001).

[65] See 42 U.S.C. § 12132.

educational programs.[66] By incorporating the remedies available under the federal Rehabilitation Act, title II of the ADA also authorizes private suits against public entities to enforce its provisions.[67]

[19] But the 11th Amendment generally bars claims against a state or state officials sued in their official capacities. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states.[68] So whether Doe can sue the State depends upon whether Congress has validly abrogated the State's 11th Amendment immunity under the ADA.

[20] For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority.[69] Regarding the first element, we have recognized that Congress has unequivocally expressed its intent to abrogate immunity under the ADA.[70]

[21,22] The second element—whether Congress had the power to abrogate state immunity—depends on whether Congress exceeded the scope of its enforcement power under § 5 of the 14th Amendment. Under § 5, Congress may enact legislation abrogating state sovereign immunity to remedy and prevent violations of that amendment.[71] This authority

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[66] See, *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), citing 42 U.S.C. § 12131(2); *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006).

[67] See, 42 U.S.C. § 12133; *Lane, supra* note 66.

[68] *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

[69] *Id.*

[70] *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006). See, also, *Garrett, supra* note 68.

[71] See, e.g., *Lane, supra* note 66.

permits Congress to enact "'prophylactic'" legislation that both prevents and deters unconstitutional conduct by prohibiting conduct that is somewhat broader than the conduct forbidden by the amendment.[72] But Congress' enforcement power under § 5 is limited to remedial legislation.[73] It cannot use its § 5 authority to substantively redefine the 14th Amendment right at issue.[74] To be classified as remedial, and therefore a valid exercise of its § 5 power, Congress' legislation must exhibit a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[75]

We have stated that the congruence and proportionality test has two parts.[76] The first looks to the legislative history and what specific injury Congress is attempting to address.[77] The second requires the statutory remedy to be congruent and proportional to the injury identified in the congressional findings.[78] But federal appellate courts have characterized the test as requiring a three-part inquiry: (1) Identify the constitutional right at issue; (2) determine whether there was a history of unconstitutional discrimination to support Congress' prophylactic legislation; and (3) determine whether the rights and remedies created by the statute are congruent and proportional to the constitutional rights it purports to enforce and Congress' record of constitutional violations.[79]

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[72] See *id.*, 541 U.S. at 518.

[73] *Keef, supra* note 70, citing *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

[74] See, *Lane, supra* note 66; *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003), quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[75] *Keef, supra* note 70, 271 Neb. at 743, 716 N.W.2d at 63.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] See, e.g., *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), citing *Garrett, supra* note 68; *Ass'n for Disabled Americans v. Fla. Intern. Univ.*, 405 F.3d 954 (11th Cir. 2005).

Before 2004, the Court had stated that when the discrimination targeted by Congress is subject only to rational basis review, the legislation must be in response to an identified, widespread pattern of the states' unconstitutional conduct, i.e., irrational reliance on Congress' prohibited criteria.[80] But when the alleged discrimination is subject to heightened scrutiny, it is "easier for Congress to show a pattern of state constitutional violations."[81]

For example, in *Board of Trustees of Univ. of Ala. v. Garrett*,[82] the Court concluded that under title I of the ADA, Congress' abrogation of states' immunity failed the congruence and proportionality test. Title I prohibits employment discrimination against a qualified individual with a disability. The Court stated that the first step was to identify the constitutional right at issue. Because the Court had concluded that state action on the basis of disability is not subject to heightened review, the constitutional right at issue was the right to be free from irrational employment discrimination based on disabilities.

But the Court concluded that Congress had failed to "identify a pattern of irrational state discrimination in employment against the disabled."[83] The Court further noted that Congress had not mentioned a pattern of state employment discrimination in the ADA's legislative findings.[84] In a footnote, it stated that most of the anecdotes submitted to Congress' task force "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which are areas addressed in Titles II and III of the ADA."[85] And even if the legislative record had been sufficient to show a pattern of state violations, the Court concluded, the legislation was not narrow enough and would unnecessarily cause hardships

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[80] See *Hibbs, supra* note 74.

[81] *Id.*, 538 U.S. at 736.

[82] See *Garrett, supra* note 68.

[83] *Id.*, 531 U.S. at 368.

[84] *Garrett, supra* note 68.

[85] *Id.*, 531 U.S. at 371 n.7.

for businesses. In *Kimel v. Florida Bd. of Regents*,[86] the Court applied similar reasoning in concluding that Congress had not validly abrogated sovereign immunity against age discrimination suits.

But in 2004, under title II of the ADA, the Court in *Tennessee v. Lane*[87] reached a different result in addressing Congress' abrogation of states' immunity. There, the plaintiffs, who were wheelchair-dependent paraplegics, were denied physical access to, and the services of, the state court system because of their disability. The Court found title II was intended to prohibit irrational disability discrimination. But the Court stated that unlike title I, title II was intended to enforce a variety of other constitutional guarantees, violations of which were subject to heightened review. It concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[88]

The Court rejected the dissent's position that "a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves."[89] It stated that "evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry."[90] Because title II was aimed at the enforcement of basic rights that invoked heightened scrutiny, the Court compared the rights at issue in *Lane* to those in an earlier case in which it reviewed legislation aimed at sex discrimination in the workplace.[91] As noted, the Court had stated that it would consider broader evidence of discrimination for legislation that prohibits discrimination invoking heightened scrutiny.

In *Lane*, the Court considered a history of statutes, cases, and anecdotes, collected by Congress' task force, dealing with

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[86] See *Kimel, supra* note 74.

[87] See *Lane, supra* note 66.

[88] *Id.*, 541 U.S. at 524.

[89] *Id.*, 541 U.S. at 527 n.16.

[90] *Id.*, 541 U.S. at 528 n.16.

[91] See *Hibbs, supra* note 74.

access to judicial services and public services generally. But much of the evidence was unrelated to access to courts. The Court also considered evidence that showed disability discrimination in public services and programs such as "the penal system, public education, and voting."[92] Finally, the Court stated that Congress' legislative findings in the ADA had found persistent discrimination against persons with disabilities

> "in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." . . . This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that *inadequate provision of public services* and access to public facilities was an appropriate subject for prophylactic legislation.[93]

In sum, for determining whether the congressional record was sufficient to support prophylactic legislation, the Court treated discrimination subject to rational basis review the same as discrimination subject to heightened review because Congress intended the legislation to address "systematic deprivations of fundamental rights."[94]

But in considering whether the legislation was an appropriate response to a pattern of unequal treatment, the Court explicitly limited its reasoning and holding to whether "Congress had the power under § 5 to enforce the constitutional right of access to the courts."[95] In a footnote, it stated, "Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only [the] prohibition on irrational discrimination."[96] It held that "Title II, as it applies to the class of cases implicating

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[92] *Lane, supra* note 66, 541 U.S. at 525.

[93] *Id.*, 541 U.S. at 529 (emphasis omitted) (emphasis supplied). See, also, 42 U.S.C. § 12101(a)(3) (2006).

[94] *Lane, supra* note 66, 541 U.S. at 524.

[95] *Id.*, 541 U.S. at 531.

[96] *Id.*, 541 U.S. at 532 n.20.

the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[97] Accordingly, some courts, including this court, limited *Lane*'s holding to situations involving access to the courts.[98]

We addressed 11th Amendment immunity against a title II claim in *Keef v. State*.[99] There, handicapped parking permitholders brought a claim against the State, alleging that the State's $3 charge for a handicapped parking placard violated title II of the ADA.[100] In analyzing *Lane*, we held that Congress did not validly abrogate 11th Amendment immunity as it applies to suits for damages involving parking placard fees. We concluded that "[t]he holding in *Lane* was limited by the Court to when a fundamental right, such as access to the courts, is at issue."[101] Furthermore, in addressing the congruence and proportionality test, we determined that

> abrogating 11th Amendment immunity under the ADA to invalidate a fee for a parking placard is not congruent to the specific findings of Congress, which were concerned with denial of fundamental rights in providing public services. Nor is the remedy proportional to those findings when the fee appears to be a modest cost-recovery measure and there is no evidence of animus toward the class.[102]

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[97] *Id.*, 541 U.S. at 533-34.

[98] See, *Lane, supra* note 66; *Keef, supra* note 70. See, also, *Bill M. ex rel William M. v. Nebraska Dept. H.H.S.*, 408 F.3d 1096 (8th Cir. 2005) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999)), *vacated sub nom. United States v. Nebraska Dept. of HHS Finance and Support*, 547 U.S. 1067, 126 S. Ct. 1826, 164 L. Ed. 2d 514 (2006); *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), *vacated* 412 F.3d 500; *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), *vacated and superseded* 449 F.3d 1149 (11th Cir. 2006).

[99] See *Keef, supra* note 70.

[100] *Id.*

[101] *Id.* at 746, 716 N.W.2d at 65.

[102] *Id.* at 747-48, 716 N.W.2d at 66.

Although we recognized the U.S. Supreme Court's 2006 decision in *United States v. Georgia*,[103] we rejected the appellants' argument that this decision broadly abrogated sovereign immunity for title II claims. In *Georgia*, the Court held that Congress validly abrogated sovereign immunity regarding an inmate's title II claims to the extent that the claims also violated the 14th Amendment. And it remanded for the lower court to determine whether Congress validly abrogated sovereign immunity for his title II claims that did not independently violate the 14th Amendment.

In *Keef*, we did not read *Georgia* as requiring us to consider abrogation of sovereign immunity beyond title II claims involving fundamental rights. But we now conclude that the Supreme Court has signaled to lower courts that *Lane* allows Congress a broader scope of enforcement power for abrogating sovereign immunity. Although we did not recognize its actions when *Keef* was decided, the Court had signaled a broader application of *Lane* by vacating several title II decisions and remanding for reconsideration in the light of *Lane*.[104] Most notably on point, in one of those vacated decisions, the Sixth Circuit had concluded that sovereign immunity barred a student's title II claim that university officials had not reasonably accommodated her disability so that she could complete her master's

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[103] *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006).

[104] See, *Klingler v. Director, Dept. of Revenue, State of Mo.*, 545 U.S. 1111, 125 S. Ct. 2899, 162 L. Ed. 2d 291 (2005), *vacating* 366 F.3d 614 (8th Cir. 2004); *Columbia River Correctional Institute et al. v. Phiffer*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating* 63 Fed. Appx. 335 (9th Cir. 2003); *Parr v. Middle Tennessee State University et al.*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating Parr v. Middle Tennessee State University*, 63 Fed. Appx. 874 (6th Cir. 2003); *Rendon et al. v. Florida Department of Highway Safety and Motor Vehicles et al.*, 541 U.S. 1059, 124 S. Ct. 2387, 158 L. Ed. 2d 960 (2004), *vacating State v. Rendon*, 832 So. 2d 141 (Fla. App. 2002); *Spencer v. Easter et al.*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating U.S. v. Spencer*, 63 Fed. Appx. 160 (4th Cir. 2003); *Spencer v. Easter*, 109 Fed. Appx. 571 (4th Cir. 2004).

degree program.[105] We agree with the defendants that the right to education is not a fundamental right.[106] But we conclude that the Supreme Court's remands for reconsideration in light of *Lane* require us to consider whether Congress nonetheless validly abrogated sovereign immunity for ADA claims even if the violation does not directly infringe upon a claimant's fundamental right.

Moreover, since *Lane*, four federal appellate courts have considered Congress' abrogation of sovereign immunity for title II claims of irrational disability discrimination in public education. Each court concluded that Congress has validly abrogated sovereign immunity for such claims.[107]

The First and Third Circuits explicitly recognized that because there is no fundamental right to education and individuals with disabilities are not a suspect class, the claimants failed to show that the challenged conduct violated the 14th Amendment under a rational basis review.[108] But in determining whether title II was justified as a response to a pattern of discrimination, three circuit courts have stated that the Court in *Lane* broadly looked at the history of disability discrimination as a whole and conclusively settled that "Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services."[109]

In contrast, the First Circuit believed that the better approach was to focus on the category of state conduct at issue. But it

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[105] See *Parr v. Middle Tennessee State University, supra* note 104, 63 Fed. Appx. 874 (6th Cir. 2003).

[106] See, generally, *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007). See, also, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Catlin v. Sobol*, 93 F.3d 1112 (2d Cir. 1996).

[107] See, *Bowers, supra* note 79; *Toledo, supra* note 66; *Constantine v. Rectors, George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Ass'n for Disabled Americans, supra* note 79.

[108] See, *Bowers, supra* note 79; *Toledo, supra* note 66.

[109] *Constantine, supra* note 107, 411 F.3d at 487. Accord, *Bowers, supra* note 79; *Ass'n for Disabled Americans, supra* note 79.

concluded that because *Lane* considered a broad class of disability discrimination, it should similarly consider Congress' abrogation as a response to discrimination in public education generally.[110] It also determined that under *Lane*, the appropriate sources for determining whether there is a history of widespread constitutional violations are state statutes, court decisions, and examples from the ADA's legislative history. Reviewing those sources, the court concluded that despite the enactment of the Rehabilitation Act, "the thirty years preceding the enactment of the ADA evidence a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled students within schools."[111]

These cases illustrate that under *Lane*, courts need not determine whether Congress identified a wide pattern of states' irrationally discriminating against disabled students in public education. Instead, judicial decisions, statutes, and personal anecdotes collected by Congress' task force[112] indicating a general history of discrimination in public education are sufficient to support Congress' prophylactic legislation.

The final issue under *Lane* is whether Title II creates rights and remedies that are congruent and proportional to the constitutional rights it purports to enforce and Congress' record of constitutional violations.[113] This question must be answered as applied to a pattern of unequal treatment in public education. In deciding whether Congress' response is congruent and proportional, federal courts have generally asked what title II requires and prohibits, what potential harm it prevents, and how its requirements are ameliorated by its limitations.

Federal courts have stated that title II requires public schools and universities to (1) make reasonable modifications to their rules, policies, and practices to ensure that students with

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[110] See *Toledo, supra* note 66.

[111] *Id.*, 454 F.3d at 38-39.

[112] See *Garrett, supra* note 68, appendix C.

[113] See, e.g., *Bowers, supra* note 79; *Ass'n for Disabled Americans, supra* note 79.

disabilities can participate; and (2) remove accessibility barriers.[114] They have weighed these requirements against the potential harms that the ADA prevents.

Federal courts cite the important role education plays in exercising fundamental rights such as voting and participating in public programs and services.[115] But they are also concerned about the potential for hard-to-detect irrational disability discrimination in public education:

> In light of the long history of state discrimination against students with disabilities, Congress reasonably concluded that there was a substantial risk for future discrimination. Title II's prophylactic remedy acts to detect and prevent discrimination against disabled students that could otherwise go undiscovered and unremedied. By prohibiting insubstantial reasons for denying accommodation to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the actions of state officials exercising discretionary powers over disabled students.[116]

Moreover, following *Lane*, federal courts have consistently concluded that title II is a narrow remedy for discrimination in education when they considered important limitations on states' duties to accommodate disabled students.[117] First, title II protects only qualified individuals with disabilities.[118] Second, "[s]tates retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability."[119] Third, schools and universities cannot be required "'to undertake measures that would impose an undue financial or administrative burden, threaten historic

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[114] See, *Toledo, supra* note 66; *Constantine, supra* note 107.

[115] See, *Toledo, supra* note 66; *Ass'n for Disabled Americans, supra* note 79.

[116] *Ass'n for Disabled Americans, supra* note 79, 405 F.3d at 959.

[117] See, *Bowers, supra* note 79; *Toledo, supra* note 66; *Constantine, supra* note 107; *Ass'n for Disabled Americans, supra* note 79.

[118] See, *Bowers, supra* note 79; *Constantine, supra* note 107.

[119] *Ass'n for Disabled Americans, supra* note 79, 405 F.3d at 959. Accord, *Bowers, supra* note 79; *Constantine, supra* note 107.

preservation interests, or effect a fundamental alteration in the nature of the service.'"[120] Finally, title II "does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters."[121]

In sum, federal courts have weighed the limitations on the reasonable accommodation requirement against (1) the important role that education plays in exercising fundamental rights, such as voting and participating in public programs and services; and (2) the potential for future discrimination. They have concluded that title II's prophylactic measures are justified and reasonably targeted to prevent "the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination."[122]

[23] Because of the Supreme Court's evolving jurisprudence on this issue, we agree with these federal courts that Congress has validly abrogated the State's 11th Amendment immunity regarding title II claims under the ADA when a plaintiff alleges discrimination in public education. We conclude that the district court erred in dismissing Doe's title II claim against the Board, UNMC, and the UNMC faculty members for this reason.

(i) Doe's Allegations Were Sufficient to State a Title II Claim

Because the court determined that Doe's claim was barred by the State's 11th Amendment sovereign immunity, it did not consider whether Doe stated a valid title II claim. The defendants argue that he did not. We disagree.

Remember, to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient factual matter,

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[120] *Toledo, supra* note 66, 454 F.3d at 39, quoting *Lane, supra* note 66. Accord, *Bowers, supra* note 79; *Constantine, supra* note 107.

[121] *Toledo, supra* note 66, 454 F.3d at 40. Accord, *Ass'n for Disabled Americans, supra* note 79; *Constantine, supra* note 107.

[122] *Toledo, supra* note 66, 454 F.3d at 40. Accord *Ass'n for Disabled Americans, supra* note 79.

accepted as true, to state a claim to relief that is plausible on its face. In making this determination, we accept all factual allegations in the complaint as true and give the plaintiff the benefit of all reasonable inferences.

[24] A plaintiff seeking recovery for a title II violation under the ADA must allege the following: (1) The plaintiff has a disability; (2) the plaintiff is otherwise qualified to receive the benefits of a public service, program, or activity; and (3) the defendants excluded the plaintiff from participation in or denied the plaintiff the benefits of such service, program, or activity or otherwise discriminated against the plaintiff because of his or her disability.[123] A plaintiff is "qualified" if he or she is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[124]

Doe alleged that he suffers from major depressive disorder that interfered with one or more major life functions. He did not specifically allege that he sought an accommodation or that an accommodation would have allowed him to successfully complete medical school. But he did allege that he talked to Hill about the deterioration of his mental condition and that he requested psychiatric treatment during his family medicine clerkship. These allegations are sufficient to plausibly show the "reasonable accommodation" element of his claim: i.e., that his treatment was a reasonable accommodation which, if honored, would have permitted him to successfully complete medical school. And he has alleged that on other occasions also, he was treated differently from other students. He specifically claimed that these allegations showed that he was discriminated against because of his disability. Accepting his allegations as true and giving him the benefit of all reasonable inferences, we conclude that his allegations were sufficient to state a title II claim.

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[123] See *Constantine, supra* note 107. Accord *Bowers, supra* note 79.

[124] 42 U.S.C. § 12131(2).

[25] We note that our analysis has been shaped by our response to the district court's order. In general, however, courts should follow the Supreme Court's analytical framework set out in *Georgia* for determining abrogation of sovereign immunity in title II claims under the ADA.[125] There, the Court remanded for the lower courts to determine three things in the following order:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.[126]

For some claims, this framework will avoid unnecessary abrogation analysis. Under *Georgia*, if a plaintiff alleges irrational disability discrimination but not failure to make reasonable accommodations, Congress has unquestionably abrogated sovereign immunity for claims that allege conduct prohibited by the 14th Amendment.

(b) Rehabilitation Act

Doe alleged that the defendants violated § 504 of the Rehabilitation Act. It provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be denied the benefits of, or be subjected to discrimination under[,] any program or activity receiving Federal financial assistance . . . ."[127] Section 504 applies to postgraduate education programs that receive or benefit from Federal financial assistance.[128] The defendants concede that the district court incorrectly determined that they have immunity under § 504 of the Rehabilitation Act.[129] But

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[125] See *Georgia, supra* note 103.

[126] *Id.*, 546 U.S. at 159.

[127] 29 U.S.C. § 794(a).

[128] See *id.*

[129] See *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003).

they contend that Doe has not stated a valid claim under the Rehabilitation Act.

Section 504 does not require an educational institution to lower its standards for a professional degree, for example, by eliminating or substantially modifying its clinical training requirements.[130] "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[131] To avoid dismissal of his complaint, Doe must allege that he was disabled, otherwise qualified, and dismissed solely because of his disability.[132]

Doe alleges that he has been diagnosed with major depressive disorder, chronic and recurrent, in acute exacerbation. He alleges that he suffers from substantial limitations that include learning, thinking, concentrating, and sleeping. He further alleges that his condition makes him an "individual with a disability" as defined by the Rehabilitation Act.[133] So, as pled in his complaint, Doe appears to meet the first condition.

Doe does not specifically allege that despite his disability he was otherwise qualified to continue in medical school or that he was dismissed solely because of his disability. But, as previously mentioned, Doe alleged that he requested psychiatric treatment during his family medicine clerkship. Giving him the benefit of all inferences, his allegations, as a whole, are sufficient to plausibly support the "otherwise qualified" element of his claim: i.e., that had his request been honored, he would have successfully completed medical school. Doe also alleges that after he informed his professors of his disability, he received discriminatory evaluations. Furthermore, he also alleges that he was dismissed because of the discriminatory evaluations and, as such, that he was dismissed because of his disability. Again, giving Doe the benefit of all reasonable

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[130] See *Falcone v. University of Minn.*, 388 F.3d 656 (8th Cir. 2004).

[131] *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979). See, also, 45 C.F.R. § 84.44(a) (2009).

[132] See, *Falcone, supra* note 130; *Jeseritz v. Potter*, 282 F.3d 542 (8th Cir. 2002).

[133] 29 U.S.C. § 794(a). See, also, *Constantine, supra* note 107.

inferences, we conclude that these allegations are sufficient to plausibly support a claim that he was dismissed solely because of his disability.

6. Due Process Violations

Doe's third and fourth claims allege that the defendants violated his substantive and procedural due process rights. Because of the principles of sovereign immunity involved, we will address separately Doe's claims against the Board, UNMC, and the UNMC faculty members in their official capacities.

(a) Board and UNMC

The Board and UNMC contend that because they are agencies of the State, both 11th Amendment immunity and state sovereign immunity bar suit against them by private citizens for any kind of relief.

As discussed, whether the Board and UNMC have 11th Amendment immunity depends upon whether they are arms of the State. Federal courts generally consider state universities arms of the state,[134] and the Eighth Circuit has specifically held that the University of Nebraska and its instrumentalities are arms of the State for purposes of the 11th Amendment.[135] And the Board and UNMC are state agencies entitled to state sovereign immunity.[136] We conclude that the district court properly dismissed Doe's due process claims against the Board and UNMC.

(b) UNMC Faculty Members in Their Official Capacities

The 11th Amendment does not bar Doe's due process claims against state officials for prospective injunctive relief.[137] And state sovereign immunity does not bar an action against state officials to compel them to perform an action they are lawfully

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[134] See 13 Wright et al., *supra* note 37, § 3524.2.

[135] See *Becker v. University of Nebraska at Omaha*, 191 F.3d 904 (8th Cir. 1999).

[136] See *Catania, supra* note 51.

[137] See, *Verizon Md. Inc., supra* note 49; *Alden, supra* note 46.

required to do if that action would not require them to expend public funds. Doe argues that as a medical student, he had both a liberty and a property interest in completing his medical education, and that the defendants deprived him of those interests. He further argues that the defendants denied him the opportunity to be heard on all issues involving his dismissal from medical school.

[26] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[138] Whether a student who is subject to academic dismissal has a cause of action for the violation of his or her right to substantive due process remains an open question.[139] The U.S. Supreme Court has not held that pursuit of a postsecondary medical school education rises to a constitutionally protected interest.[140] Nor has it held that postsecondary education rises to a fundamental right.[141] In *San Antonio School District v. Rodriguez*,[142] the Court expressly declined the invitation to hold that education is a fundamental right under the Due Process Clause. The Court stated that education is "not among the rights afforded explicit protection" under the Constitution and that it could not "find any basis for saying it is implicitly so protected."[143]

Assuming that Doe has a liberty interest in his medical school education, the interest is not fundamental.[144] So, Doe has to show the UNMC faculty members acted arbitrarily or capriciously. He must show that the UNMC faculty members had no rational basis for their decision or that they dismissed him because of bad faith or ill will unrelated to academic

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[138] See *Rodriguez, supra* note 106.

[139] See *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985).

[140] *Id.*; *Galdikas v. Fagan*, 342 F.3d 684 (7th Cir. 2003), *abrogated on other grounds, Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004).

[141] See *Rodriguez, supra* note 106.

[142] *Id.*

[143] *Id.*, 411 U.S. at 35.

[144] *Id.*

performance.[145] "In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance."[146]

Here, Doe's complaint shows that he earned a near-failing grade in one clerkship and failed two other clerkships. The evaluation committee informed him that it was concerned about his academic performance and his ability to conduct himself in a professional manner. He was required to sign a contract informing him of the evaluation committee's concerns, and because he violated the terms of the contract, he was dismissed. We cannot say that his dismissal lacked a rational basis.

[27] But Doe also alleges that the defendants violated his right to procedural due process. Specifically, he alleges that the defendants violated his procedural due process rights during the proceedings that led to his dismissal. A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.[147] As stated before, if Doe's dismissal did deprive him of a liberty interest, we conclude that the defendants provided him with as much process as the 14th Amendment requires.

The U.S. Supreme Court has considered the quantum of due process owed by a state-run university to a dismissed medical student.[148] The Court distinguished between dismissals from educational institutions based on an "[a]cademic" rationale and those that may properly be characterized as "disciplinary."[149] The Court held that the dismissal of the medical student in

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[145] *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978); *Schuler v. University of Minnesota*, 788 F.2d 510 (8th Cir. 1986).

[146] *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 258, 329 N.W.2d 87, 92 (1983).

[147] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

[148] *Horowitz, supra* note 145.

[149] *Id.*, 435 U.S. at 89.

Board of Curators, Univ. of Mo. v. Horowitz[150] was "academic" rather than "disciplinary." The dismissal "rested on the academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor."[151] The Court further noted that an academic dismissal involves "a school's determination of whether a student will make a good medical doctor."[152] It stated that the school's consideration of a student's personal attributes may permissibly factor into this "academic" decision.[153]

We conclude that Doe's dismissal falls within the ambit of an academic dismissal. Doe acknowledged that he received a marginal grade in his pediatrics clerkship and failing grades in his obstetrics and gynecological clerkship and internal medicine clerkship. He also acknowledges that he received poor professionalism marks from one of his surgery clerkship professors. He does, however, allege that the professionalism evaluation was discriminatory and made in bad faith using information Doe provided to his professors about his disability. But Doe was clearly aware of the defendants' dissatisfaction with his academic performance, and he was given numerous opportunities to discuss these issues with the defendants. He was also aware of the professionalism clause of the academic contract that he signed to remain in medical school and aware that he could be dismissed from medical school if a professor gave him an unsatisfactory professionalism grade.

[28] As in *Horowitz*, this represents an academic judgment by school officials, officials that have expertise in evaluating whether Doe possessed the attributes necessary to adequately perform his clinical duties as a medical student.[154] In short, the record showed academic justification for Doe's dismissal. And, as discussed by the Court in *Horowitz*, procedural due process does not require a hearing, either before or after a dismissal

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[150] *Id.*, 435 U.S. at 89-90.

[151] *Id.*

[152] *Id.*, 435 U.S. at 91 n.6.

[153] *Id.*

[154] See *Horowitz, supra* note 145.

decision. For academic dismissals, due process is satisfied if the student was informed of the nature of the faculty's dissatisfaction and the potential for dismissal and if the decision to dismiss was careful and deliberate.[155]

Here, Doe plainly received adequate procedural due process. The UNMC faculty members allowed him to appeal his grades, and he was made aware of all the conditions in the academic contract that he signed, specifically the professionalism clause. He also received a postdismissal hearing before an academic committee and a subsequent administrative appeal. The district court properly dismissed Doe's claims of substantive and procedural due process violations against the UNMC faculty members in their official capacities.

7. Breach of Contract

In Doe's final claim, he alleged breach of contract. He did not, however, identify or provide the district court with a contract outlining the obligation breached. He alleges only that the Board's bylaws, which he claims provide an appeal procedure for academic evaluations, created an implicit contract between him and the Board, UNMC, and the UNMC faculty members in their official capacities. And, he claims, the defendants breached the alleged contract by not following the procedure and by discriminating against him based on his disability.

Even though Doe frames his claim as a breach of contract claim, he does not articulate a theory for breach of contract separate from his due process claims. He claims, generally, that the UNMC faculty members failed to follow a set procedure for grade appeals. But Doe admits that he appealed some of his grades and that he appealed his dismissal to the appeals board and to the dean of the medical school. So clearly, the defendants provided him the opportunity to discuss his concerns and appeal his dismissal. To the extent that his contract claim does not differ from his due process claim, it is also without merit. And because Doe has failed to point to an identifiable contractual promise that the defendants did not honor, he has not alleged a contract claim that plausibly entitles him to relief.

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[155] *Id.*

The district court did not err in dismissing Doe's breach of contract claim.

VI. CONCLUSION

We conclude that the district court erred in dismissing Doe's lawsuit against the UNMC faculty members in their individual capacities without determining whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit.

Regarding the remaining defendants—the Board, UNMC, and the UNMC faculty members in their official capacities—we conclude that Doe's claims of fraudulent concealment, violations of his due process rights, and breach of contract fail to state a claim for relief that is plausible on its face. But regarding his claims under the ADA and the Rehabilitation Act, we find that the district court erred in dismissing the claims against the Board, UNMC, and the UNMC faculty members in their official capacities.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. NORTH PLATTE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

788 N.W.2d 252

Filed August 27, 2010. No. S-09-727.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.

3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion.
6. **Actions: Parties: Standing.** A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.
7. ____: ____: ____. A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
8. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
9. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.
10. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
11. **Claims: Parties.** Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
12. **Standing: Proof.** To have standing, a litigant first must clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a qualitative and temporal sense.
13. **Complaints: Justiciable Issues.** A complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.
14. **Actions: Proof.** A litigant must show that its injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.
15. **Actions: Motions to Dismiss.** For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation.
16. **Pleadings: Proof.** A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.
17. **Actions: Waters: Words and Phrases.** A "harm" to a person entitled to the use of water implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object, or thing. Physical changes may be either beneficial, detrimental, or of no consequence to a person.

18. **Words and Phrases.** "Harm" is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person or in physical things.
19. **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.
20. **Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
21. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Michael C. Klein, Charles D. Brewster, and Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, for appellant.

Steven C. Smith and Lindsay R. Snyder, of Smith, Snyder & Pettit, and Peter W. Katt, Stephanie F. Stacy, and Derek C. Zimmerman, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

GERRARD, J.

The primary issue in this case is whether the appellant, a power and irrigation district that appropriates and stores surface water for the benefit of public users, may bring a judicial review proceeding under the Administrative Procedure Act (APA)[1] to challenge a natural resources district's ground water appropriation. Because we agree with the district court that the appellant lacks standing to do so, we affirm the court's dismissal of the appellant's complaint.

BACKGROUND

In 2008, the North Platte Natural Resources District (NRD) held a public hearing, pursuant to the Nebraska Ground Water

[1] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009).

Management and Protection Act (GWMPA),[2] regarding proposed rules and regulations for the Pumpkin Creek Basin Groundwater Management Sub-Area. The NRD proposed to lower the ground water allocation from 14 inches per acre to 12 inches per acre. Two people objected at the hearing: a representative of the Spear T Ranch, Inc. (Spear T), a Pumpkin Creek surface water irrigator, and the public relations manager of The Central Nebraska Public Power and Irrigation District (Central). Both objectors argued, generally, that a reduction to 12 inches per acre was insufficient to correct a significant decrease in surface water streamflow in the Pumpkin Creek basin. But the NRD decided to implement its proposed reduction.

Central filed a petition for judicial review pursuant to the APA.[3] Central alleged that it owns and operates a system of reservoirs, canals, and laterals used for several purposes, including irrigation, recreation, environmental protection, and powerplant cooling. Among other things, Central operates Lake McConaughy, a reservoir located on the North Platte River, and owns and operates hydroelectric facilities that use the waters of Lake McConaughy and the North Platte River. Central also stores and releases water to the Nebraska Public Power District for use in powerplant cooling, hydroelectric power generation, and the public power district's reservoirs and fishery. And Central alleged several other purposes for which the water it stores and releases is used, including streamflow and aquifer recharge.

Central alleged that ground water depletions in the NRD's jurisdiction had caused streamflow into Lake McConaughy to decline, substantially reducing the lake's level. Specifically, Central alleged that the NRD's ground water withdrawals were causing direct and substantial depletions of Pumpkin Creek, a tributary of the North Platte River—water which would, Central alleged, have been available for storage in Lake McConaughy. Central concluded that the NRD's ground water allocation was unreasonable and was causing harm to it and to the water uses it had described.

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[2] Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2004 & Cum. Supp. 2008).

[3] See §§ 46-750 and 84-917(1).

On that basis, Central asked the district court to enter an order reversing the NRD's ground water allocation and directing the NRD to adopt rules and regulations for ground water allocation in the Pumpkin Creek basin that would restore historic surface water flows to the North Platte River and its tributaries. The NRD moved the court to dismiss Central's petition pursuant to Neb. Ct. R. Pldg. § 6-1112. The NRD also moved for attorney fees because, according to the NRD, Central's petition was frivolous.[4]

The district court dismissed Central's petition. The court accepted the allegations of Central's petition as true, but found that Central was not a "'person aggrieved'" within the meaning of the APA.[5] The court reasoned that Central, because it was a surface water appropriator located entirely outside the NRD's jurisdiction, was not directly affected by the NRD's ground water appropriation. The court stated that under Central's allegations, the NRD's rules would adversely affect its surface water appropriations, "but would also adversely impact practically every irrigator, landowner, water user, recreationer, outdoorsman, and electric power consumer within the North Platte River Watershed between Wyoming and Iowa." On that basis, the court dismissed Central's petition for judicial review. But the court found that Central's petition was not frivolous and denied the NRD's motion for attorney fees. Central appeals, and the NRD cross-appeals.

ASSIGNMENTS OF ERROR

Central assigns that the district court failed to provide it with due process and erred in dismissing its petition for judicial review, because it has a real, direct, and substantial interest in the outcome of the litigation based, in part, upon its proprietary interest in, and the multitude of uses of, surface water. On cross-appeal, the NRD assigns that the district court erred by denying its motion for reasonable attorney fees and costs pursuant to § 25-824.

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[4] See Neb. Rev. Stat. § 25-824 (Reissue 2008).

[5] See §§ 46-750 and 84-917(1).

STANDARD OF REVIEW

[1-4] An appellate court reviews a district court's order granting a motion to dismiss de novo.[6] When reviewing a dismissal order, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[7] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, taken as true, to state a claim to relief that is plausible on its face.[8] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[9]

[5] On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion.[10]

ANALYSIS

STANDING

We turn first to the issue of standing. Pursuant to § 46-750, "Any person aggrieved by any order of [a natural resources] district, the Director of Environmental Quality, or the Director of Natural Resources issued pursuant to the [GWMPA] may appeal the order. The appeal shall be in accordance with the [APA]." And § 84-917(1) provides in part that "[a]ny person

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

[7] See *Doe v. Board of Regents, ante* p. 492, 788 N.W.2d 264 (2010). See, also, *In re Southern Scrap Material Co., LLC*, 541 F.3d 584 (5th Cir. 2008), *cert. denied* 556 U.S. 1152, 129 S. Ct. 1669, 173 L. Ed. 2d 1036 (2009).

[8] See *Doe, supra* note 7. See, also, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *In re Southern Scrap Material Co., LLC, supra* note 7.

[9] See *Doe, supra* note 7. See, also, *Twombly, supra* note 8; *In re Southern Scrap Material Co., LLC, supra* note 7.

[10] See, *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007); § 25-824.

aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA].” An irrigation district is a “person” within the meaning of § 46-750.[11] So, the first question we address in this appeal is whether Central was “aggrieved” by the NRD’s order within the meaning of §§ 46-750 and 84-917(1).

[6,7] Neither the APA nor the GWMPA defines “aggrieved,” but we have addressed the “aggrieved party” in terms of standing.[12] A party has standing to invoke a court’s jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.[13] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.[14] The “party aggrieved” concept must be given a practical rather than hypertechnical meaning.[15]

We have addressed standing in the specific context of water law several times in recent years. To begin with, in *Metropolitan Utilities Dist. v. Twin Platte NRD*,[16] we held that a natural resources district did not have standing to appeal from an order of the then Department of Water Resources removing it as an objector to an application to withdraw water from the Platte River. We noted that the district did not have a water right that would be adversely affected by the application and concluded that “the fact that the water rights of the constituents of a natural resources district may be affected by an application to appropriate waters does not

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[11] See § 46-706(1).

[12] See, *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Karnes v. Wilkinson Mfg.*, 220 Neb. 150, 368 N.W.2d 788 (1985).

[13] *In re Application of Metropolitan Util. Dist., supra* note 12.

[14] *Id.*

[15] *Id.*

[16] *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

confer standing upon such natural resources district to object to the application."[17]

Shortly thereafter, in *Ponderosa Ridge LLC v. Banner County*,[18] we held that neither a county nor a natural resources district had standing to object to an application to transfer ground water that, according to the objectors, could have resulted in wastewater pollution. We found that two of the objectors had water use interests to protect but that others did not, including the county and district. The county argued that it was appearing on behalf of its residents, and the district argued that it was appearing to protect the public interest, but we found those interests—unlike those of the objectors who actually had water use interests—to be insufficient to establish standing.[19]

We distinguished *Ponderosa Ridge LLC* in *Hagan v. Upper Republican NRD*,[20] in which the plaintiffs, irrigators in a natural resources district, challenged the natural resources district's agreement with two other residents which, in effect, permitted a variance allowing the use of additional underground water. The trial court dismissed the action on standing, reasoning that the plaintiffs' status was no different than all the members of the general public living in the district. On appeal, we affirmed the Court of Appeals' reversal of the judgment, noting that the plaintiffs had alleged that their water use interests would be harmed because there would be less water available for their irrigation needs. Those allegations, we concluded, were sufficient to distinguish the plaintiffs' injuries from those of the general public.[21]

Finally, in *Spear T Ranch v. Knaub*,[22] we rejected Central's attempt to intervene in ongoing litigation between Spear T and

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[17] *Id.* at 449, 550 N.W.2d at 912.

[18] *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[19] See *id.*

[20] *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

[21] See *id.*

[22] *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

a number of ground water irrigators over an alleged loss of surface water in Pumpkin Creek. The issue in that case was not standing, precisely; instead, it was whether Central had proved that it had the "direct and legal interest in the subject matter of the action" required to intervene.[23] We concluded that it had not, because it had no legal interest in the Spear T litigation. We explained that none of Central's interests in the alleged diversion of water from Pumpkin Creek were common to Spear T's interests, so we reasoned that

> Central's interests do not factor into this equation. Central would gain or lose nothing by a damage award in favor of Spear T or a judgment in favor of the defendants. Because any injunctive relief would be tailored to redress a specific injury proved by Spear T, Central has nothing more than an indirect, remote, or conjectural interest in one possible result of the litigation between Spear T and the defendants. Indeed, the factual allegations of Central's motion to intervene would introduce an entirely new subject matter into this action: a claim by Central that the actions of ground water users caused harm to its own interests for which it would be entitled to injunctive relief. While it is free to pursue this claim in a separate action, Central has not shown that it has a direct and legal interest in the subject matter of the action asserted by Spear T, which is a prerequisite to intervention . . . .[24]

[8-11] These cases represent fact-specific iterations of basic standing principles. Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.[25] Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the

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[23] *Id.* at 584, 713 N.W.2d at 494.

[24] *Id.*

[25] *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993), citing *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).

claim itself.[26] And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.[27] Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.[28]

[12-14] Specifically, a litigant first must clearly demonstrate that it has suffered an "'"injury in fact."'"[29] That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.[30] Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.[31]

The shortcoming in Central's petition is its failure to specifically allege how it has suffered an injury in fact. In this case, Central has alleged that it has water use interests (although its water uses primarily benefit others). And Central has alleged injuries that have occurred to its constituents in its jurisdiction from the use of ground water in the NRD's jurisdiction. But it has not connected the two. Specifically, Central has not alleged how its particular water use interests, to the extent it has any, have been injured by the NRD.

For instance, Central alleges that due to reduced water supply, only limited storage water from Lake McConaughy has been available for use by canal operators that contract with Central. And Central alleges that it has had to reduce the amount of water it delivers to irrigators. But those uses of

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[26] *Id.*

[27] See *id.*, citing *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

[28] *Id.*

[29] *Id.* at 569, 495 N.W.2d at 926, quoting *Whitmore, supra* note 25.

[30] See *id.*

[31] See *id.* See, also, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010).

water are quintessentially the legal rights or interests of third parties. Similarly, Central alleges that the NRD has caused Pumpkin Creek to run dry—but Central does not have a right to appropriate water from Pumpkin Creek. And while Central alleges that a percentage of Lake McConaughy's inflow is set aside to benefit endangered and threatened species, that interest is a public one and, in any event, is managed by the U.S. Fish and Wildlife Service, not Central.

Central's purported interests in water use are, for the most part, derivative of the interests of others. The interests at issue are actually those of the members of the public who use Lake McConaughy or rely on Central's distribution of water or production of power. While an irrigation district may hold a surface water appropriation in its own name, it holds that appropriation for the benefit of the owners of land to which the appropriation is attached.[32] In other words, generally speaking, Central is an agent for the purposes of diverting, storing, transporting, and delivering water,[33] and the injuries it has alleged are to the beneficiaries of those purposes, not Central's own interests. And it is well established, as discussed above, that Central cannot challenge the NRD's use of water based upon the interests of its constituents.

Nor, even in these instances, has Central consistently alleged particular injury. For example, even if we infer that less water is available to the U.S. Fish and Wildlife Service for endangered species, Central did not allege that the reduced amount of water fell short of what was required or even desirable for that purpose. Nor did Central allege that reduced water delivery to canal operators impaired the operation of their canals. Similarly, although Central alleges that it has its own interest in generating power with water from the North Platte River and Lake McConaughy, it did not allege that it was less able to generate power as a result of the NRD's conduct, nor did it allege that less power was available to its customers. It is axiomatic that any use of a limited resource necessarily results in

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[32] Neb. Rev. Stat. § 46-2,121 (Reissue 2004).

[33] See *Empire West Side Irrigation Dist. v. Lovelace*, 5 Cal. App. 3d 911, 85 Cal. Rptr. 552 (1970).

marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest.

[15,16] And the failure to allege particular facts supporting its claimed injuries is also fatal to Central's broader allegations that the ground water use permitted by the NRD is causing the "destruction of Lake McConaughy" and "unreasonably causing harm to Central, and to all of the uses described in the [petition]." This is a legal conclusion more than a factual allegation. For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation.[34] A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions.[35] Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.[36]

While Central's petition in this case contains pages of factual allegations, none of those allegations explain, particularly, how any water use interest of Central's has been harmed, as opposed to the water use interests of those on whose behalf Central manages water resources. And because all the facts supporting an allegation of an injury in fact to Central should already be known to Central, there is no basis to believe that discovery in this case, even if available in an APA judicial review proceeding, would reveal evidence of such an injury.

Nor is Central's allegation of the "destruction of Lake McConaughy" enough to "raise a right to relief above the speculative level."[37] To begin with, the more specific allegations in Central's pleading, while not benign, are inconsistent with Central's more apocalyptic rhetoric. The "destruction

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[34] See, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Twombly, supra* note 8.

[35] See *Twombly, supra* note 8.

[36] See, *Iqbal, supra* note 34; *Twombly, supra* note 8.

[37] See *Twombly, supra* note 8, 550 U.S. at 555.

of Lake McConaughy" is, while not inconceivable, more "'"conjectural"'" and "'"hypothetical"'" than "'actual or imminent.'"[38]

Central's allegation rests on the attenuated connection between the NRD's regulation, ground water use in the Pumpkin Creek basin, streamflows in Pumpkin Creek and the North Platte River, and the ultimate volume of Lake McConaughy. Harm to surface water irrigators on Pumpkin Creek could, potentially, be "'"fairly . . . traced"'" to the NRD's regulation.[39] Central's purported injury, however, is remote. There is no limiting principle on Central's expansive theory of causation of an injury in fact, which could conceivably involve the entire water cycle from the Continental Divide to the Gulf of Mexico.

We also note that while Central alleges that reduction of ground water use would increase the amount of water in Pumpkin Creek available to Lake McConaughy, any additional water in Pumpkin Creek would, first and foremost, be available to surface water irrigators in the Pumpkin Creek watershed. Central alleges on one hand that amending the NRD's regulations would avoid injury to the water use interests it represents, but concedes on the other hand that "an equitable reduction in ground water withdrawals in the Pumpkin Creek watershed cannot, in and of itself, prevent the ruination of [Lake McConaughy.]" Apart from the conjectural nature of the asserted injury, it is far from clear that any purported injury to Central is redressable by a favorable ruling.[40] And an unredressable injury does not support standing to seek a judicial determination.[41]

In arguing to the contrary, Central relies on our decision in *Spear T Ranch v. Knaub*,[42] in which we adopted the

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[38] See *Baltimore, supra* note 25, 242 Neb. at 569, 495 N.W.2d at 926.

[39] See *id.*

[40] See, *Monsanto Co., supra* note 31; *Whitmore, supra* note 25; *Baltimore, supra* note 25.

[41] See *Baltimore, supra* note 25.

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

Restatement (Second) of Torts to govern conflicts between users of hydrologically connected surface water and ground water.[43] Specifically, we held:

> "A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water."[44]

Central contends that it is "untenable" that a property right could exist for purposes of tort law, but not for purposes of APA review of the NRD's order.[45]

[17,18] But Central overlooks some important distinctions. First, as discussed above, Central's "right" to use water is based in interests of others, unlike the Pumpkin Creek surface water irrigators who were the plaintiffs in *Spear T Ranch*. And Central's reliance on *Spear T Ranch* is undermined by the same shortcomings in its petition that were discussed above. The Restatement makes clear that a "'harm'" to a person entitled to the use of water "implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes . . . may be either beneficial, detrimental, or of no consequence to a person."[46] Thus, "harm," under the Restatement, "is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things."[47] In other words, a change in streamflow, or the level of Lake McConaughy, is not necessarily a "harm" unless it has detrimental effects—and for standing purposes, those effects must be directly detrimental to Central's interests. And as explained above, Central's pleading is insufficient on that point.

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[43] See Restatement (Second) of Torts § 858 (1979).

[44] *Spear T Ranch, supra* note 42, 269 Neb. at 194, 691 N.W.2d at 132.

[45] Brief for appellant at 20.

[46] Restatement (Second) of Torts § 7, comment *b.* at 13 (1965).

[47] *Id.*

For the foregoing reasons, we conclude that Central did not allege injury to its water use interests, as opposed to the interests of others, sufficiently to confer standing to seek judicial review under the APA. Central's purported water use interests are actually public interests, and they are attenuated from the NRD's regulation. We also note, in passing, the claim in Central's assignment of error that "[t]he district court failed to provide Central with due process." Central's brief contains no separate due process argument, so we assume that any "due process" claim is subsumed in its more general standing argument. And, as explained above, we find that argument to be without merit. We also note that there is no suggestion, in the record or Central's brief on appeal, that Central should have been offered leave to replead. Thus, we affirm the district court's order dismissing Central's petition for judicial review.

Cross-Appeal

On cross-appeal, the NRD assigns that the district court erred in denying its motion for attorney fees. The NRD argues that Central's petition was frivolous.

[19-21] 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.[48] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[49] But any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[50]

Although Central has been a frequent visitor to this court,[51] we cannot say that the present proceeding was so wholly

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[48] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[49] *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003).

[50] *Id.*

[51] See, *Spear T Ranch, supra* note 22; *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 699 N.W.2d 372 (2005).

devoid of legal merit that the district court abused its discretion in concluding that the action was not frivolous. Thus, we find the NRD's assignment of error to be without merit.

CONCLUSION

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

AFFIRMED.

CINDY WILSON, A WIDOWED, UNREMARRIED PERSON, AND CINDY WILSON AS SUCCESSOR IN INTEREST TO THE ESTATE OF HER LATE HUSBAND, KENNY WILSON, APPELLEE, V. ALLAN FIELDGROVE, APPELLANT.

787 N.W.2d 707

Filed September 3, 2010. No. S-09-1053.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court reaches its conclusion independent of the trial court's conclusion.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Libel and Slander: Real Estate: Title.** An action for slander of title is based upon a false and malicious statement, oral or written, which disparages a person's title to real or personal property and results in special damage.
4. **Contracts.** Where the existence of a particular person is necessary for the performance of a contractual duty, the death of that person, or his or her loss of capacity to perform the duty, discharges the obligor's duty to perform.
5. **Landlord and Tenant: Leases.** Outside of contracts for personal services and tenancies at will (or when the common-law rule for sharecrop agreements has been abrogated), the death of the landlord or tenant in a year-to-year lease does not terminate the lease.
6. ____: ____. A leasehold interest in a tenancy for a term of years or a year-to-year tenancy is considered personal property.
7. **Decedents' Estates: Real Estate: Title.** In Nebraska, title to both real and personal property passes immediately upon death to a decedent's devisees or heirs, subject to administration, allowances, and a surviving spouse's elective share.
8. **Decedents' Estates: Leases.** Apart from tenancies at will or leases requiring the tenant's personal services, a tenant's rights and obligations in a leasehold interest survive the tenant's death and pass to his or her heirs, subject to the personal representative's right of possession.

9. **Landlord and Tenant: Notice: Time.** Under Nebraska law, a year-to-year tenancy can only be terminated by an agreement of the parties, express or implied, or by notice given, 6 months before the end of the current year in the year-to-year tenancy.
10. **Leases: Landlord and Tenant: Notice: Time.** In the absence of a different agreement, a yearly lease of farmland begins on March 1 and ends on February 28 of the following year, and the rent becomes due at the expiration of the term. In such a case, a landlord must give notice to terminate by September 1.
11. **Decedents' Estates: Landlord and Tenant: Leases: Notice.** When a year-to-year farm lease does not terminate upon the tenant's death, the landlord can only terminate the lease by giving notice to quit to the tenant's heirs or personal representative.
12. **Contracts: Notice: Time.** Absent a contract provision or statute to the contrary, a lease for a term of years terminates on the last day of the term without notice.
13. **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.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Affirmed.

Mark Porto and Ronald S. Depue, of Shamberg, Wolf, McDermott & Depue, for appellant.

Rodney M. Wetovick, of Wetovick Law Office, for appellee.

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

CONNOLLY, J.

The appellee, Cindy Wilson (Wilson), filed a declaratory judgment action against the appellant, Allan Fieldgrove. Wilson's deceased husband, Kenny Wilson (Kenny), had an oral year-to-year lease to farm Fieldgrove's land. Kenny died during the term of the lease. To unilaterally terminate a year-to-year lease, Nebraska law requires a landlord to give the tenant notice to quit 6 months before the end of the current year of the lease. Fieldgrove failed to give such notice.

Wilson sought a declaratory judgment to allow her to farm the land the following year. Fieldgrove counterclaimed to remove Wilson from the property and requested damages for slander of title.

This appeal presents an issue of first impression: Under a year-to-year lease, is a landlord required to give notice to a tenant's heirs if the tenant dies during the term of the lease? We conclude that because the tenant's death does not terminate the lease, notice to the tenant's heirs or personal representative is required. Because Fieldgrove failed to give Wilson notice to terminate, Wilson had a valid leasehold interest and thus could not have slandered Fieldgrove's title. We affirm.

BACKGROUND

Beginning about 1998, Fieldgrove leased farmland to Kenny under an oral year-to-year lease agreement, with an annual term from March 1 through the end of February each year. Rent was paid in cash. The most recent lease between Fieldgrove and Kenny ran from March 1, 2007, through February 29, 2008. Kenny died on August 4, 2007. Wilson was the sole beneficiary of Kenny's estate. Wilson and her sons continued farming the land after Kenny's death. On at least four occasions following Kenny's death, Wilson or her sons communicated to Fieldgrove their intention to continue farming the land in 2008. Both parties agree that Fieldgrove never gave written notice to any member of the Wilson family of his intention to terminate the farm lease before September 1, 2007.

Some time after Kenny's death, Fieldgrove prepared to sell the farm at public auction. Upon learning of the upcoming sale, Wilson again notified Fieldgrove that she intended to continue to farm the land in 2008. On January 16, 2008, Wilson recorded a document entitled "Notice of 2008 Leasehold Interest" with the county register of deeds, in which she claimed an interest in Fieldgrove's property. On January 18, Fieldgrove sold the property. On February 20, Fieldgrove notified Wilson that she and her family were prohibited from entering the property and would be treated as trespassers as of March 1. Wilson refused to vacate the property and filed a complaint against Fieldgrove on February 29 seeking a declaration that she was entitled to the leasehold interest. Fieldgrove counterclaimed, alleging slander of title, and he sought to have Wilson removed from the property through a forcible entry and detainer claim.

After a hearing on Fieldgrove's forcible entry and detainer claim, the court ruled for Wilson. It found that because

Fieldgrove failed to provide the required 6-month notice of his intention to terminate the lease, Wilson was entitled to possession of the farm until February 28, 2009. After the court dismissed Fieldgrove's claim for forcible entry and detainer, Fieldgrove amended the claimed damages under his slander of title claim. Wilson then sought summary judgment on Fieldgrove's slander of title claim. The court granted Wilson's motion for summary judgment. Fieldgrove appeals.

ASSIGNMENTS OF ERROR

Fieldgrove assigns that the district court erred in failing to find that the farm lease terminated on February 29, 2008, and in granting Wilson's motion for summary judgment on his slander of title claim.

STANDARD OF REVIEW

[1] The parties do not dispute the terms of the oral lease. The sole issue regarding the lease is whether a landlord is required to give notice of termination to the farm tenant's surviving heirs when the tenant dies before the deadline for notice. This issue presents a question of law. When reviewing questions of law, an appellate court reaches its conclusion independent of the trial court's conclusion.[1]

[2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

ANALYSIS

[3] Because the 2008 farming season has already passed, the court's ruling that Wilson had a valid leasehold interest for that year would be moot except that it is relevant to Fieldgrove's claimed damages under his slander of title claim. Neb. Rev. Stat. § 76-296 (Reissue 2009) provides in part that no person

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[1] See *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[2] See *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

shall use the privilege of filing notices for the purpose of slandering the title to real estate. An action for slander of title is based upon a false and malicious statement, oral or written, which disparages a person's title to real or personal property and results in special damage.[3] For slander of title claims, other jurisdictions have interpreted malice to require (1) knowledge that the statement is false or (2) reckless disregard for its truth or falsity.[4] So, to determine whether Fieldgrove had a valid slander of title claim, we first consider whether Wilson had a valid leasehold interest on the property. A valid interest would obviously defeat the slander of title claim because filing notice of a valid claim could not be considered either false or malicious.

Kenny's Leasehold Interest Survived His Death

Whether Wilson had a valid leasehold interest depends upon whether Fieldgrove was required to give her notice to quit after Kenny died but before the lease expired. The court found that Fieldgrove did not give Wilson notice to quit. Whether a landlord is required to give notice to quit to a tenant's surviving heir presents an issue of first impression.

[4] Fieldgrove argues that after Kenny died, the lease terminated at the end of the crop year without notice. It is true that "where the existence of a particular person is necessary for the performance of a contractual duty, the death of that person, or his or her loss of capacity to perform the duty, discharges the obligor's duty to perform."[5] Courts generally hold that sharecrop farm leases, under which the tenant pays the landlord a share of the crops raised, implicitly include an agreement for the tenant's particular farming skills in which the owner has confidence.[6] In a sharecrop lease agreement, the landlord's receipts directly depend upon the tenant's skills and industry.[7]

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[3] See *Norton v. Kanouff*, 165 Neb. 435, 86 N.W.2d 72 (1957).

[4] See 50 Am. Jur. 2d *Libel and Slander* § 531 (2006).

[5] *In re Estate of Sauder*, 283 Kan. 694, 704, 156 P.3d 1204, 1212 (2007), citing Restatement (Second) of Contracts § 262 (1981).

[6] See *id.* (citing cases).

[7] See *Crump v. Tolbert*, 210 Ark. 920, 198 S.W.2d 518 (1946).

So, under the common law, a sharecrop agreement is usually considered a personal services contract that does not survive the tenant's death and is not inheritable.[8]

But some courts have found this rule to be abrogated by their state statutes. For example, courts do not agree whether a statutory notice to quit requirement applicable to sharecrop agreements abrogates the common-law rule regarding termination of the lease upon a farm tenant's death.[9] Further, the Kansas Supreme Court has reasoned that the terminate-at-death rule for sharecrop agreements is abrogated under a state statute that subjects the administrator of a tenant's estate to the tenant's liabilities under a lease. Under this statute, the court held that "a lease, including an agricultural sharecrop lease, continues in effect upon the death of the tenant unless the parties have contracted otherwise, and the executor or administrator of the lessee's estate has the fiduciary obligation to see that the lessee's obligations are met."[10]

Nebraska does not have a statutory notice requirement, but we have judicially required a 6-month notice to quit for year-to-year farm tenancies.[11] And we have applied this rule to sharecrop lease agreements.[12] But we need not decide whether the common-law rule regarding termination upon the tenant's death of a sharecrop agreement is abrogated. The lease here is a cash lease agreement. Because Fieldgrove did not share in the fruits of Kenny's labor, we do not construe the lease as a contract for Kenny's personal services.

[5,6] Outside of contracts for personal services and tenancies at will (or when the common-law rule for sharecrop agreements has been abrogated), the death of the landlord or tenant

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[8] See, *Ames v. Sayler*, 267 Ill. App. 3d 672, 642 N.E.2d 1340, 205 Ill. Dec. 223 (1994); *Read v. Estate of Mincks*, 176 N.W.2d 192 (Iowa 1970); *In re Estate of Sauder, supra* note 5; 21A Am. Jur. 2d *Crops* § 48 (2008).

[9] Compare *Ames, supra* note 8, with *Read, supra* note 8.

[10] *In re Estate of Sauder, supra* note 5, 283 Kan. at 708, 156 P.3d at 1214.

[11] See, e.g., *Fisher v. Stuckey*, 201 Neb. 439, 267 N.W.2d 768 (1978), citing *Critchfield v. Remaley*, 21 Neb. 178, 31 N.W. 687 (1887).

[12] See *Fisher, supra* note 11.

in a year-to-year lease does not terminate the lease.[13] Instead, a leasehold interest in a tenancy for a term of years or a year-to-year tenancy is considered personal property.[14] And unless the contract provides otherwise, courts have held that a leasehold interest transfers by operation of law to the tenant's personal representative or heir.[15]

[7,8] A main reason for classifying a leasehold interest as personal property was that earlier laws of succession treated the devolution of personal property differently than real property.[16] But this distinction is less relevant today. Since 1974, in Nebraska,[17] title to both real and personal property passes immediately upon death to the decedent's devisees or heirs, subject to administration, allowances, and a surviving spouse's elective share.[18] But the point of these earlier cases is still relevant: Apart from tenancies at will or leases requiring the tenant's personal services, a tenant's rights and obligations in a leasehold interest survive the tenant's death and pass to his or her heirs, subject to the personal representative's right of possession.

For example, courts have held that the administrator or heir of a tenant's estate can (1) be liable for the tenant's obligation

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[13] *Read, supra* note 8; *In re Estate of Sauder, supra* note 5; *State Bank of Loretto v. Dixon*, 214 Minn. 39, 7 N.W.2d 351 (1943). See, also, *Von Seggern v. Freeland*, 200 Neb. 570, 264 N.W.2d 436 (1978); Robert S. Schoshinski, American Law of Landlord and Tenant § 10:3 (1980 & Cum. Supp. 2010); Annot. 42 A.L.R.4th 963 (1985).

[14] See *Hartman v. Drake*, 166 Neb. 87, 87 N.W.2d 895 (1958). See, also, *Pergament Norwalk Corp. v. Kaimowitz*, 4 Conn. App. 633, 496 A.2d 217 (1985).

[15] See, *Olson v. Frazer*, 154 Kan. 310, 118 P.2d 505 (1941); *Fowler v. Loughlin*, 183 Md. 48, 36 A.2d 671 (1944); *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 197 S.W. 42 (Mo. 1917); *Montana Consol. Mines Corp. v. O'Connell*, 107 Mont. 273, 85 P.2d 345 (1938); *Swan v. Bill*, 95 N.H. 158, 59 A.2d 346 (1948). See, also, *In re Estate of Logan*, 71 Ohio Law Abs. 391, 131 N.E.2d 454 (Ohio Prob. 1955).

[16] Schoshinski, *supra* note 13, § 1:2.

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

[18] See, Neb. Rev. Stat. § 30-2401 (Reissue 2008); *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

under the lease,[19] (2) seek a renewal of the lease,[20] (3) extend a lease by holding over,[21] (4) fulfill the tenant's farming obligations under a lease to trigger a landlord's duties,[22] and (5) rely on the landlord's obligation to give notice to quit under a year-to-year lease.[23] This court has similarly held that a special administrator could exercise the tenant's purchase option under a 5-year lease when the tenant died during the term.[24] And we have recognized the right of a tenant's administrator to convey the leasehold interest to a third party.[25]

Because the farm lease did not require Kenny's personal services, it did not terminate upon his death but passed immediately to his heirs. And the parties stipulated that Wilson was Kenny's sole heir. We conclude that the leasehold interest passed to Wilson upon Kenny's death.

Fieldgrove Was Required to Give Notice to Quit

[9,10] Under Nebraska law, a year-to-year tenancy can only be terminated by an agreement of the parties, express or implied, or by notice given, 6 months before the end of the current year in the year-to-year tenancy.[26] Generally, in the absence of a different agreement, a yearly lease of farmland begins on March 1 and ends on February 28 of the following year, and the rent becomes due at the expiration of the term.[27] In such a case, a landlord must give notice to terminate by

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[19] See, e.g., *Olson, supra* note 15; 49 Am. Jur. 2d *Landlord and Tenant* § 114 (2006).

[20] See, *Montana Consol. Mines Corp., supra* note 15; *Swan, supra* note 15.

[21] See *In re Estate of Logan, supra* note 15.

[22] *In re Estate of Sauder, supra* note 5.

[23] *Read, supra* note 8.

[24] See *Von Seggern, supra* note 13.

[25] See *Goetz Brewing Co. v. Robinson Outdoor Advertising Co.*, 156 Neb. 604, 57 N.W.2d 169 (1953).

[26] See, *Moudry v. Parkos*, 217 Neb. 521, 349 N.W.2d 387 (1984); *Fisher, supra* note 11; *Sempek v. Minarik*, 200 Neb. 532, 264 N.W.2d 426 (1978).

[27] *Stuthman v. Stuthman*, 245 Neb. 846, 515 N.W.2d 781 (1994); *Moudry, supra* note 26.

September 1.[28] Here, it is uncontested that neither Fieldgrove nor Wilson gave notice to quit.

In discussing notice requirements under year-to-year tenancies, the Minnesota Supreme Court held that the deceased landlord's estate was required to give the tenant the required notice of its intent to terminate the lease.[29] Absent such notice, the lease continued for the next year. Similarly, the Iowa Supreme Court found that the tenant's death did not terminate the lease agreement. Rather, "[a]bsent receipt of statutory termination of tenancy notice . . . the widow, as sole surviving beneficiary and executor of her deceased husband's estate, claimed a continuing right to possession and occupancy of the premises for the [next] crop year."[30]

[11] We believe that the reasoning of these cases applies here. We conclude that when a year-to-year farm lease does not terminate upon the tenant's death, the landlord can only terminate the lease by giving notice to quit to the tenant's heirs or personal representative. Fieldgrove failed to comply with this requirement. Wilson, who possessed Kenny's leasehold interest in the property and continued to farm it, was entitled to rely on that lack of notice.

But Fieldgrove relies on *Dobyns v. S.C. Dept. of Parks & Rec*.[31] In *Dobyns*, the tenant died during the term of a 10-year lease. The issue was whether his heirs could exercise his right to renew the lease. The South Carolina Supreme Court stated, "[A]lthough the lease does not terminate on a lessee's death, the lease passes to the estate or heirs only until the expiration of the current lease period."[32] The court in *Dobyns* also specifically found that because the lease was personal to the tenant, the right to renew the lease could not be assigned or transferred without consent of the landlord.

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[28] *Mathiesen v. Bloomfield*, 184 Neb. 873, 173 N.W.2d 29 (1969).

[29] *State Bank of Loretto, supra* note 13.

[30] *Read, supra* note 8, 176 N.W.2d at 192.

[31] *Dobyns v. S.C. Dept. of Parks & Rec.*, 325 S.C. 97, 480 S.E.2d 81 (1997).

[32] *Id.* at 101, 480 S.E.2d at 84.

[12] Neither of these rationales applies here. As stated, the lease was not personal to Kenny—i.e., it did not require his personal services. And absent a contract provision or statute to the contrary, a lease for a term of years terminates on the last day of the term without notice.[33] So even assuming that the holding in *Dobyns* is correct under a lease for a term of years—an issue we do not consider—here, we are concerned with a year-to-year tenancy which follows the notice rule stated above. As such, *Dobyns* provides little guidance.

Fieldgrove also relies on *Estate of Kiefer v. Gegg*.[34] He argues that under this Missouri case, Fieldgrove was not required to provide notice of his intent to terminate the lease after Kenny's death. In *Estate of Kiefer*, the tenant farmed property under a year-to-year tenancy and a statute required 60 days' notice to quit. The landlord did not give notice, and the tenant continued to farm the property the next year. After the landlord died during that year, his administrator leased the land to another tenant. The court determined that because no landlord-tenant relationship was established between the administrator and the first tenant after the landlord's death, the administrator could lease the property to another tenant. But this conclusion is contrary to the general rule that the death of the landlord or tenant does not terminate a year-to-year lease. We decline to follow *Estate of Kiefer*.

The district court did not err in finding that Wilson had a valid interest in the 2008 farming season.

Fieldgrove's Slander of Title Claim Fails Because Wilson Had Leasehold Interest

[13] Summary judgment is proper if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to

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[33] See, Schoshinski, *supra* note 13, § 2:9; 49 Am. Jur. 2d, *supra* note 19. Compare *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998).

[34] *Estate of Kiefer v. Gegg*, 622 S.W.2d 733 (Mo. App. 1981).

judgment as a matter of law.[35] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[36]

Here, the district court correctly found that Wilson had a valid leasehold interest. Thus, the claim Wilson filed against the property was not false or malicious. And the record lacks any evidence to suggest Wilson filed the claim to slander the title to the property. She believed, rightfully so, that she had a valid interest in the property. The district court did not err in granting Wilson's motion for summary judgment, as no genuine issue of material fact could be drawn from the facts presented.

CONCLUSION

The district court correctly determined that Wilson had a valid legal interest in the leased property. Fieldgrove was required to give at least 6 months' notice of his intention to terminate the lease and failed to do so. Therefore, the lease was renewed for an additional year commencing March 1, 2008. The district court did not err in granting Wilson's motion for summary judgment on Fieldgrove's slander of title claim.

AFFIRMED.

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[35] See, *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[36] *Bamford, supra* note 35; *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

STATE OF NEBRASKA, APPELLEE, V. ERIC T. MCGHEE, APPELLANT.

787 N.W.2d 700

Filed September 3, 2010. No. S-10-337.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.

2. **Effectiveness of Counsel: Appeal and 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.
3. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
5. **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, 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 and 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.
6. **Expert Witnesses.** The weight and credibility of an expert's testimony are a question for the trier of fact.
7. ____. Triers of fact are not required to take opinions of experts as binding upon them.
8. **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.
9. **Postconviction: Right to Counsel.** There is no federal or state constitutional right to an attorney in state postconviction proceedings.
10. ____: ____. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
11. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Eric T. McGhee, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

STEPHAN, J.

Following a jury trial, Eric T. McGhee was convicted of first degree murder and use of a weapon to commit a felony in the 2003 shooting death of Ezra Lowry. McGhee was sentenced to life imprisonment on the murder conviction and to 5 to 10 years' imprisonment on the use of a weapon conviction. We affirmed the convictions and sentences on direct appeal.[1] McGhee then filed a motion for postconviction relief in which he alleged that his defense counsel's performance was constitutionally ineffective at trial and on direct appeal. The district court for Douglas County denied the postconviction motion without an evidentiary hearing, and McGhee now appeals from that order. We affirm.

BACKGROUND

On March 11, 2003, the same day the information charging McGhee was filed, his attorney filed a motion to determine McGhee's competency to stand trial. Following a hearing, the district court determined that McGhee was not then competent to stand trial, but that there was a substantial probability that he would become competent in the foreseeable future. The court committed McGhee to the Lincoln Regional Center until such time as he became competent to stand trial, and ordered that institution to submit written reports to the court every 6 months.

Periodic review hearings were held. At a review hearing in late 2005, Dr. Bruce Gutnik testified for McGhee. Gutnik opined that McGhee remained incompetent to stand trial. Dr. Louis Martin testified for the State and opined that McGhee was then competent to stand trial. The court accepted Martin's testimony and found McGhee competent. McGhee's counsel

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[1] *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

then filed a notice that McGhee intended to plead not responsible by reason of insanity.

The events that led to the fatal shooting are set forth in detail in our opinion on direct appeal.[2] Briefly summarized, the shooting occurred at McGhee's home, where he, Lowry, and others had been drinking and smoking marijuana. As we noted in the direct appeal, McGhee did not contest that he shot Lowry; rather, his theory of defense was that his actions did not amount to first degree murder and that in any event, he was not responsible by reason of insanity.

Gutnik and Martin gave conflicting expert testimony at trial on the issue of McGhee's sanity at the time of the shooting. Gutnik diagnosed McGhee as suffering from paranoid schizophrenia with a history of alcohol and cannabis abuse and possible dementia. Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong at the time he shot Lowry. Martin testified that McGhee had been under his care for approximately 2 years, beginning with the initial commitment for the purpose of determining competency to stand trial. Martin testified that in his opinion, although McGhee suffered from a mental illness, McGhee nevertheless understood what he was doing when he shot Lowry and also understood that his actions were wrong. On direct appeal, we concluded that the jury must have believed Martin's testimony and that this testimony was "sufficient admissible evidence for the jury to conclude that McGhee was not insane at the time he shot Lowry."[3]

McGhee sought postconviction relief on grounds that his defense counsel was ineffective in (1) failing to acquire a third expert to evaluate and testify regarding his mental status with respect to the issues of competency and sanity, (2) failing to properly advise him regarding waiver of the privilege against self-incrimination and the advisability of testifying in his own behalf, (3) failing to impeach the testimony of one of the State's principal witnesses at trial, and (4) failing to preserve

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[2] *Id.*

[3] *Id.* at 669, 742 N.W.2d at 505.

and raise on direct appeal the issue of whether the trial court erred in receiving and permitting the jury to hear a recording of a conversation McGhee had with his sister during his pretrial incarceration. In response, the State filed a motion to deny postconviction relief. McGhee filed a reply. The district court concluded on the basis of McGhee's motion and the files and records of the case that McGhee was not entitled to postconviction relief and dismissed his motion without conducting an evidentiary hearing.

Although McGhee's postconviction motion and subsequent pleadings included in the record on this appeal were filed pro se, the district court at some point appointed counsel to represent McGhee in postconviction proceedings before that court. Counsel for McGhee appeared at the hearing which preceded the district court's decision to deny postconviction relief without conducting an evidentiary hearing. Following entry of its order, the district court denied McGhee's request for appointment of counsel to represent him on this appeal.

ASSIGNMENTS OF ERROR

McGhee contends, restated and summarized, that the district court erred in (1) denying postconviction relief without conducting an evidentiary hearing, (2) failing to appoint counsel to represent him on this appeal, and (3) failing to make a definitive ruling on the State's motion to deny postconviction relief.

STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[4] 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*,[5] an appellate court reviews such legal determinations independently of the lower court's decision.[6]

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[4] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010); *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

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

[6] *State v. McKinney, supra* note 4; *State v. Dunster, supra* note 4.

[3] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.[7]

ANALYSIS

[4] The principal issue presented in this appeal is whether the district court erred in denying postconviction relief without conducting an evidentiary hearing. An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[8] 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.[9]

Claims of Ineffective Assistance of Counsel

[5] McGhee was represented by the Douglas County public defender's office at trial and on direct appeal, so this postconviction proceeding is his first opportunity to raise claims of ineffective assistance of counsel.[10] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[11] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[12] 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.[13] The two

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[7] *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[8] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[9] *Id.*

[10] See, *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002); *State v. Soukharith, supra* note 7.

[11] *Strickland v. Washington, supra* note 5.

[12] *State v. McKinney, supra* note 4.

[13] *Id.*

prongs of this test, deficient performance and prejudice, may be addressed in either order.[14]

McGhee's principal argument is that defense counsel was ineffective in not obtaining a third expert to evaluate and testify concerning his competence to stand trial and his sanity at the time of the shooting. McGhee characterizes the conflicting expert testimony as a "stalemate,"[15] and he alleged in his postconviction motion that a third expert opinion would have broken the stalemate by providing additional support for either his expert, Gutnik, or the State's expert, Martin.

In assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, we have upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. For example, in *State v. Davlin*,[16] the defendant claimed that trial counsel was ineffective in failing to adduce the testimony of certain witnesses. We affirmed dismissal of the postconviction claim without an evidentiary hearing, reasoning that there was nothing in the postconviction motion or record to indicate the nature of any exculpatory evidence which the witnesses would have given if called. In *State v. Threet*,[17] we held that a postconviction allegation that defense counsel was ineffective in failing to procure witnesses favorable to the defendant was properly dismissed without an evidentiary hearing where the motion did not specifically identify the witnesses or the nature of their testimony. We stated that in the absence of specific allegations in this regard, "a trial court need not conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position."[18]

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[14] *Id.*

[15] Brief for appellant at 11.

[16] *State v. Davlin,* *supra* note 8.

[17] *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), *disapproved on other grounds, State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[18] *Id.* at 813, 438 N.W.2d at 749.

[6,7] McGhee's allegations are similarly lacking in specificity. He does not identify another expert who would have testified that he was incompetent to stand trial or legally insane at the time of the shooting. He alleges only that if another expert had been consulted, his or her opinions would have served to "break and mitigate the stalemate between Dr. Gutnik and Dr. Martin." Both McGhee's premise and his conclusion are incorrect. There was no "stalemate," only conflicting expert testimony on disputed issues. And even if a second expert had testified in support of McGhee's position, it does not follow that the competency and sanity determinations would necessarily or even probably have been different. The weight and credibility of an expert's testimony are a question for the trier of fact,[19] and triers of fact are not required to take opinions of experts as binding upon them.[20] Whether there had been one or two experts testifying in support of McGhee's claims of incompetency and insanity, the judge and jury would have been free to reject such testimony and accept the testimony of Martin with respect to these issues.[21] And on appeal, this court would have been required to give deference to the determination of the finders of fact on questions of weight and credibility of expert testimony, as we did in the direct appeal of this case.[22] We therefore conclude that McGhee did not allege facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different if his trial counsel had retained another psychiatric expert. Because McGhee's allegations are insufficient to satisfy the prejudice prong of the *Strickland* analysis, we need not consider his allegations with respect to the performance prong.

[8] For completeness, we note that the district court determined that McGhee's three other claims of ineffective assistance of counsel were also without merit. McGhee's assignments

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[19] *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[20] *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

[21] See *Bruno v. State*, 111 Neb. 715, 197 N.W. 612 (1924) (holding weight of testimony not determined by number of witnesses).

[22] See *State v. McGhee, supra* note 1.

of error are broad enough to encompass the disposition of these claims, but his brief includes no argument directed to them. 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.[23] Because McGhee makes no specific argument with respect to the district court's disposition of his remaining claims of ineffective assistance of counsel, we need not address them.

Denial of Motion to Appoint Counsel for Appeal

[9-11] McGhee contends that the district court erred in denying his motion for appointment of counsel to represent him in this postconviction appeal. There is no federal or state constitutional right to an attorney in state postconviction proceedings.[24] Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.[25] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[26] Having determined that McGhee's motion for postconviction relief presented no justiciable issues, the district court did not abuse its discretion in denying McGhee's motion for appointment of appellate counsel.

Disposition of State's Motion

We find no merit to McGhee's argument that the district court failed to clearly adjudicate the State's motion to deny postconviction relief. The district court's order concluded: "**IT IS, THEREFORE, ORDERED** that Defendant's Motion for Postconviction Relief is denied and Defendant is not entitled to

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[23] *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[24] *State v. Soukharith, supra* note 7.

[25] *State v. Vo, supra* note 8; *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[26] *Id.*

an evidentiary hearing." That order effectively disposed of all matters then pending before the court.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court dismissing McGhee's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

D & S REALTY, INC., APPELLANT, V. MARKEL INSURANCE COMPANY, A CORPORATION, APPELLEE.

789 N.W.2d 1

Filed September 10, 2010. No. S-09-642.

1. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
2. **Statutes.** The interpretation of a statute is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Equity: Estoppel.** Although a party can seek equitable estoppel in both legal and equitable actions, as its name implies, it is a judicial doctrine that is equitable in nature.
5. **Insurance: Contracts.** Insurance contracts, like other contracts, are to be construed according to the meaning of the terms which the parties have used.
6. ____: ____. When the terms of an insurance contract are clear, a court should not resort to rules of construction. Instead, the court will give the terms their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
7. ____: ____. In an insurance policy, conditions precedent are those which relate to the attachment of the risk, meaning whether the agreement is effective.
8. ____: ____. Conditions subsequent in an insurance policy are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those conditions which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect. Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent.
9. **Insurance: Contracts: Liability: Words and Phrases.** An exclusion in an insurance policy is a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage never applied.

10. **Insurance: Contracts.** Vacancy clauses in insurance policies are "increased hazard" provisions and function as conditions subsequent.
11. **Insurance: Contracts: Breach of Contract: Statutes.** Statutory provisions like Neb. Rev. Stat. § 44-358 (Reissue 2004) that limit an insurer's ability to avoid liability for breach of increased-hazard conditions exist because the conditions are often so broad that an insured's violation of them is not causally relevant to the loss.
12. **Insurance: Contracts: Case Overruled.** Regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage, overruling *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973), and *Krause v. Pacific Mutual Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942).
13. **Insurance: Contracts: Warranty.** To the extent that Nebraska law permits an insured's statements in the negotiation for a contract to be treated as warranties, the first sentence of Neb. Rev. Stat. § 44-358 (Reissue 2004) applies only to warranties that function as conditions precedent to the policy's being effective.
14. ____: ____: ____. Warranties that are relevant to an insurance policy's being effective are classified as "affirmative" warranties.
15. **Insurance: Contracts: Warranty: Breach of Contract.** The first and second sentences of Neb. Rev. Stat. § 44-358 (Reissue 2004) are mutually exclusive in their application, and the contribute-to-the-loss standard of the second sentence applies to breaches of conditions after the risk attaches and the insurance policy is effective. That is, the contribute-to-the-loss standard applies to breaches of conditions subsequent and continuing warranties that function as conditions subsequent.
16. **Insurance: Contracts: Warranty: Words and Phrases.** A promissory warranty is one by which the insured stipulates that something shall be done or omitted after the policy takes effect and during its continuance, and has the effect of a condition subsequent.
17. **Insurance: Contracts.** For insurance policies, the term condition subsequent comprises both preloss conditions, to which the contribute-to-the-loss standard applies, and postlost conditions, to which the standard does not apply.
18. **Insurance: Contracts: Warranty: Case Overruled.** The contribute-to-the-loss standard in the second sentence of Neb. Rev. Stat. § 44-358 (Reissue 2004) applies to preloss conditions subsequent and promissory warranties, overruling *Coppi v. West Am. Ins. Co*., 247 Neb. 1, 524 N.W.2d 804 (1994).
19. **Insurance: Contracts.** A vacancy clause in an insurance contract is not an exclusion; it is a condition subsequent to which the contribute-to-the-loss standard applies.
20. **Insurance: Contracts: Waiver: Equity: Estoppel.** Waiver and estoppel are distinct legal concepts, but Nebraska courts do not strictly apply the elements of equitable estoppel when an insured claims that an insurer has waived a policy provision.
21. **Insurance: Contracts: Waiver: Estoppel.** If the evidence shows that the insurer has waived a policy provision, it may be estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his or her detriment.

22. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
23. **Insurance: Contracts: Waiver.** An insurer may waive any provision of a policy that is for the insurer's benefit, including vacancy provisions.
24. **Waiver: Estoppel.** Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
25. **Contracts: Waiver.** A party may waive a written contract in whole or in part, either directly or inferentially.
26. **Contracts: Waiver: Proof.** A party may prove the waiver of a contract by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.
27. **Insurance: Contracts: Waiver.** Whether an insurer may waive an increased hazard condition does not depend upon whether the insured's breach of the condition occurred before or after the risk attached.
28. **Insurance: Contracts: Warranty: Breach of Contract: Liability.** When an insurer knows of a breach of condition or warranty that permits it to treat the policy as void, and the insurer continues to accept premiums, its conduct shows its intent to treat the policy as valid despite the breach. But waiver does not apply when the insured's breach of an increased hazard provision did not result in an absolute forfeiture of the policy and the insurer continues to be liable for loss from other covered causes.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Charles F. Gotch, James D. Garriott, and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Richard J. Gilloon and Heather Veik, of Erickson & Sederstrom, P.C., for appellee.

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

CONNOLLY, J.

I. SUMMARY

Appellant, D & S Realty, Inc. (D&S), owned a building known as the North Tower, located in Omaha, Nebraska. Markel Insurance Company (Markel) insured the building. After the building incurred water damage, Markel denied liability. Markel claimed that D&S violated a policy clause which

provided that Markel would not be liable for water damage if the insured property had been vacant for more than 60 consecutive days before the loss or damage occurred.

At the heart of D&S' breach of contract action is the interpretation and application of Neb. Rev. Stat. § 44-358 (Reissue 2004). Section 44-358, in part, precludes an insurer from denying liability for an insured's breach of a warranty or condition unless the breach existed at the time of the loss and contributed to the loss. Before trial, D&S argued that the contribute-to-the-loss standard applied to its alleged breach of the vacancy provision. It alleged the breach did not contribute to the loss. Markel countered that the statute did not apply. The court agreed with Markel.

At trial, the court found as a matter of law that the policy was in effect and that the building was vacant for more than 60 days. The court also refused to instruct the jury on, or to allow D&S to argue, the following: (1) § 44-358 prevented Markel from denying liability based upon the vacancy clause; or (2) Markel waived the provision or was estopped from denying liability because it had accepted premiums after learning that the building was vacant.

The only issues before the jury were whether Markel had wrongfully denied coverage or whether the policy terms excluded D&S' loss. The jury returned a verdict for Markel.

We conclude that the court erred in ruling that § 44-358 did not apply to the vacancy clause. Because it applied, the court should have allowed the jury to decide whether D&S' breach of the vacancy clause contributed to the loss. But we conclude that the court did not err in refusing to instruct the jury on D&S' claim of waiver and estoppel.

II. BACKGROUND

In January 2003, in preparation for renovations, a D&S employee turned off the heating system. But he did not drain the pipes or put in antifreeze to prevent damage. Three days later, the pipes burst and the building sustained water damage.

D&S claimed the loss under its insurance policy. The policy provided coverage for damage to the North Tower and personal

property resulting from covered causes of loss, subject to various conditions and exclusions. The "Loss Conditions" section contained a "Vacancy" clause. It provided that "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before loss or damage occurs," Markel would not pay for any loss caused by listed items, including water damage, "even if they are Covered Causes of Loss." The vacancy clause separately defined "vacant" for owners of buildings: "(b) . . . Such building is vacant when 70% or more of its square footage: (i) Is not rented; or (ii) Is not used to conduct customary operations. (2) Buildings under construction or renovation are not considered vacant."

And a Nebraska endorsement to the policy provided, in relevant part, that "[a] breach of warranty or condition will void the policy if such breach exists at the time of loss and contributes to the loss."

When D&S sought recovery under the policy, it represented that the North Tower was 60-percent vacant. But Markel determined that when the loss occurred, the North Tower had only a 5-percent occupancy and had less than a 30-percent occupancy for more than 60 days before the loss. Markel denied D&S' claim.

D&S sued for breach of the insurance contract. It alleged that Markel breached its obligations in denying coverage for the water damage. Markel denied that it breached any obligations. It affirmatively alleged that the policy did not cover D&S' loss because D&S failed to comply with the vacancy clause. It also claimed that D&S' loss was not covered under a limitation provision.

After Markel filed its answer, D&S moved for leave to file a reply.[1] In its proposed reply, D&S alleged that waiver and estoppel barred Markel's vacancy clause defense. D&S also claimed that § 44-358 barred Markel's vacancy clause defense because D&S' alleged breach of the condition had not contributed to the loss.

In ruling on the reply, the court permitted D&S to file it, but limited the reply to D&S' waiver and estoppel claims.

[1] See Neb. Ct. R. Pldg. § 6-1107.

It sustained Markel's objection to D&S' § 44-358 claim. Later, D&S moved for leave to file an amended reply. But the court reaffirmed its earlier order striking D&S' § 44-358 claim. It determined that the statute did not apply. The court did not state whether the vacancy clause was a condition or exclusion.

At trial, the evidence showed that in October 2002, 3 months before the loss, Markel's inspection revealed that the following parts of the building were occupied: the 10th floor of the building, the penthouse, two apartments on the 9th floor, one apartment on the 8th floor, one commercial office on the 3rd floor, and one commercial office on the 1st floor. The inspector concluded that the building was 80-percent unoccupied. The inspector also reported that 85 percent of the interior of the North Tower was "unfinished," or under construction. D&S, however, claimed that Markel knew of the building's percentage of occupancy before the loss, but had not informed D&S of the possible insurance consequences. D&S argued that because of this, Markel had waived the vacancy provision or should be estopped from asserting it to deny liability.

Markel moved for a directed verdict on several issues. The court determined, as a matter of law, that the insurance policy was in effect when the loss occurred and that the North Tower was more than 70-percent vacant for more than 60 days preceding the loss. In addition, the vacancy clause contained an exception for buildings under construction or renovation. The court ruled that whether the North Tower was under construction or renovation when the loss occurred was a fact question for the jury. And it took under advisement whether waiver and estoppel applied. But after Markel rested, the court ruled that they did not apply and that D&S could not argue waiver or estoppel to the jury. The court also ruled that § 44-358 did not apply to D&S' breach of the vacancy clause. It refused to instruct the jury on whether § 44-358 precluded Markel from avoiding liability and on waiver and estoppel. The jury returned a verdict for Markel.

D&S moved for judgment notwithstanding the verdict and for a new trial. The court denied both motions.

III. ASSIGNMENTS OF ERROR

D&S argues that the district court erred in refusing to submit to the jury whether (1) under § 44-358, the breach of the vacancy clause existed at the time of the loss and contributed to the loss; (2) Markel waived the provisions of the policy regarding occupancy; and (3) Markel was estopped from raising the policy provisions regarding occupancy as a defense. D&S also alleges that the court erred in denying its motion for judgment notwithstanding the verdict and its motion for a new trial.

IV. STANDARD OF REVIEW

[1-3] The interpretation of an insurance policy is a question of law[2]; the interpretation of a statute is also a question of law.[3] And we review questions of law independently of the lower court's conclusion.[4]

[4] Although a party can seek equitable estoppel in both legal and equitable actions, as its name implies, it is a judicial doctrine that is equitable in nature.[5] It is true that a jury in an equitable action serves only in an advisory role.[6] And we have stated that when the jury's role is advisory only, the trial court cannot commit reversible error in the giving or refusing of instructions.[7] But here the trial court ruled as a matter of law that waiver or estoppel did not apply to these facts. So we also review that ruling as a question of law.

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[2] *Copple Constr. v. Columbia Nat. Ins. Co.*, 279 Neb. 60, 776 N.W.2d 503 (2009).

[3] See *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010).

[4] See *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[5] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007); 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) (2d ed. 1993); 28 Am Jur. 2d *Estoppel and Waiver* § 1 (2000).

[6] See *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). But see *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W. 2d 478 (2000).

[7] See *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982), citing *Peterson v. Estate of Bauer*, 76 Neb. 652, 107 N.W. 993 (1906).

V. ANALYSIS

D&S does not contest the district court's conclusion that the building was more than 70-percent vacant for more than 60 days preceding the loss. Nor does D&S contest the jury's implicit finding that the building was not under construction or renovation. D&S only argues that the court erred in failing to instruct the jury on whether under § 44-358, the breach of the vacancy clause contributed to the loss, and on whether the doctrines of waiver or estoppel prevented Markel from denying liability based upon the vacancy clause.

1. Applicability of § 44-358

D&S argues that the vacancy clause is a condition under the policy and, therefore, § 44-358 applies. It argues that because § 44-358 applies, whether its breach of the condition contributed to the loss was an issue for the jury. The second sentence of § 44-358 imposes a contribute-to-the-loss standard for breaches of insurance warranties and conditions:

> The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

Markel views the matter differently. It argues that § 44-358 does not apply. Although Markel included the vacancy clause in the "Loss Conditions" section of the policy, it argues that this label is not determinative. It contends that we should look to the language of the clause to determine the parties' intent. Markel contends that the vacancy clause functions as an exclusion; thus, § 44-358 does not apply.

[5,6] We agree that we must determine the vacancy clause's purpose and function from the plain language of the policy. Insurance contracts, like other contracts, are to be construed according to the meaning of the terms which the parties have used. Yet, when the terms of an insurance contract are clear, we should not resort to rules of construction. Instead, we will give the terms their plain and ordinary meaning as a reasonable person in the insured's position would

understand them.[8] Neither party contends that the policy was ambiguous.

Whether the contribute-to-the-loss standard under § 44-358 applies depends on the vacancy clause's purpose and function. And the purpose and function of an insurance provision can only be determined with an understanding of the relevant terms.

(a) A Vacancy Clause Is a Condition Subsequent, Not an Exclusion

[7,8] A notable insurance treatise divides insurance policy conditions into "conditions precedent" and "conditions subsequent."[9] In an insurance policy, "[c]onditions precedent are those which relate to the attachment of the risk," meaning whether the agreement is effective.[10] Examples include conditions that the applicant satisfy the requirements of the insurability, be in good health for life and health policies, and pay the required premium. In addition, an applicant must "answer all questions in the application to the best of the applicant's knowledge and belief."[11] In contrast, conditions subsequent in an insurance policy

> are those which pertain to the contract of insurance after the risk has attached and during the existence thereof; that is, those conditions which must be maintained or met after the risk has commenced, in order that the contract may remain in full force and effect. Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, are not conditions precedent, but conditions subsequent and are matters of defense to be pleaded and proved by insurer.[12]

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[8] See, *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009); *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

[9] See 6 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 81:19 at 81-34 (2006).

[10] See *id.*

[11] *Id.*, § 81:20 at 81-35.

[12] *Id.*, § 81:19 at 81-34.

Markel concedes that the vacancy clause is not a condition precedent. But relying on our definition of an exclusion, Markel argues that the clause is an exclusion and not subject to § 44-358. We have defined an exclusion as "a provision which eliminates coverage where, were it not for the exclusion, coverage would have existed."[13] Markel argues that the vacancy clause is an exclusion because it does not set forth a condition that D&S must fulfill to trigger Markel's duty to pay the loss. We disagree.

Here, the vacancy clause does not provide that there is no coverage for water damage. Instead, the clause was clearly intended to permit Markel to suspend or avoid coverage for water damage while D&S failed to maintain a specified occupancy level. That level of occupancy was the condition that D&S was required to comply with to maintain coverage. The clause itself does not eliminate coverage unless the insured breaches the condition. These types of provisions are distinct from exclusions:

> A condition subsequent is to be distinguished from an exclusion from the coverage: the breach of the former is to terminate or suspend the insurance, while the effect of the latter is to declare that there never was insurance with respect to the excluded risk. Accordingly, the suicide clause in a life insurance policy is not a condition subsequent, but rather suicide is simply not a risk insured against.[14]

[9] So, it is more precise to define an exclusion in an insurance policy as a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage *never* applied.[15]

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[13] *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 11, 524 N.W.2d 804, 813 (1994); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976).

[14] See 6 Couch on Insurance 3d, *supra* note 9, § 81:19 at 81-34 to 81-35.

[15] See, also, 17 Samuel Williston, A Treatise on the Law of Contracts § 49:111 (Richard A. Lord ed., 4th ed. 2000).

[10] In contrast, vacancy clauses in insurance policies are "increased hazard" provisions.[16] These provisions allow insurers to suspend or avoid coverage upon the occurrence of an "increased hazard."[17] And, as explained above, "Clauses which provide that a policy shall become void or its operation defeated or suspended, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing or omission to do some act, [are] conditions subsequent . . . ."[18] We conclude that vacancy clauses function as conditions subsequent; they are not exclusions.

(b) Our Earlier Cases Failed to Properly Distinguish Conditions Subsequent From Exclusions

We concede that some of our earlier cases could be read to support Markel's position that the vacancy clause is an exclusion. Markel relies on *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*,[19] and *Krause v. Pacific Mutual Life Ins. Co.*[20] But we conclude that we misunderstood the function of the contract provisions in those cases.

In *Omaha Sky Divers Parachute Club, Inc.*, an aircraft insurer denied coverage for loss or damage to the aircraft while in motion. The declarations page provided that only pilots holding valid pilot and medical certificates with required ratings would operate the plane. And a clause in the exclusions section provided that the policy did not apply to "'any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots'" set forth in the

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[16] See 6A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 94:102 (2006).

[17] See, *id.*, § 94:1; 10A Lee R. Russ et al., Couch on Insurance 3d § 148:73 (2006).

[18] 6 Couch on Insurance 3d, *supra* note 9, § 81:19 at 81-34.

[19] *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973).

[20] *Krause v. Pacific Mutual Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942).

declarations page.[21] The plane was damaged because a brake failed. The pilot's medical certificate had expired but was renewed 2 days after the accident. We stated that the pilot's lack of a valid medical certificate had not contributed to the accident. But we rejected the plaintiff's argument that these provisions constituted a warranty or condition, the breach of which was subject to the contribute-to-loss standard under § 44-358. We concluded that the exclusion of coverage was clear and unambiguous.

Similarly, in *Krause v. Pacific Mutual Life Ins. Co.*, the plaintiff's decedent was killed in an airplane crash while he was covered under an accident policy. But a clause in the policy provided that it did not provide coverage for bodily injury sustained while riding in an airplane unless the following conditions were met:

> "[T]he insured (1) is actually riding as a fare-paying passenger (2) in a licensed commercial aircraft (3) provided by an incorporated common carrier for passenger service, (4) and while such aircraft is operated by a licensed transport pilot (5) and is flying in a regular civil airway between definitely established airports."[22]

The insurer denied liability on the sole ground that the decedent was not a fare-paying passenger.

Although the decedent had paid a nominal fee for a "trip pass," we concluded that air travel was "a strictly excluded risk, save and except when it is carried out in compliance with the words framing the exception."[23] We further concluded that fare-paying passengers included only those who had paid the full legal fare. On this reasoning, we concluded that the precursor to § 44-358[24] did not apply: "What we have here is not a

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[21] *Omaha Sky Divers Parachute Club, Inc., supra* note 19, 189 Neb. at 612, 204 N.W.2d at 163.

[22] *Krause, supra* note 20, 141 Neb. at 848, 5 N.W.2d at 231.

[23] *Id.* at 846-47, 5 N.W.2d at 230-31.

[24] See Comp. Stat. § 44-322 (1929).

forfeiture of a policy upon conditions broken, but an excepted risk never assumed by the insurer."[25]

We believe that these cases provide little guidance for determining whether a policy clause operates to define the insured risk or to condition coverage on the doing or omission of some act after the risk has attached. And we have struggled with the chameleon-like terms "conditions" and "exclusions." But in *Krause*, there was no meaningful difference between that policy, which excluded coverage for air travel unless specified conditions were met, and one that would provide coverage for air travel if specified conditions were met. Either policy would allow the insurer to avoid liability—after the risk of loss had attached—because the insured failed to satisfy preloss conditions for coverage of bodily injury sustained while riding in an airplane.

Such "exclusions," as in *Krause* and *Omaha Sky Divers Parachute Club, Inc.*, do not define the insured risk in the same sense as a suicide clause in a life insurance policy that unconditionally excludes coverage for that risk. The insurer in *Krause* clearly would have been liable if the decedent had paid the full legal fare for his transportation. *Krause* provides an example of a policy that conditions coverage for a loss rather than unconditionally excluding that loss from the insured risk.

The insured risk in *Krause* was bodily injury sustained while riding in an airplane. The conditions permitted the insurer to avoid liability if the insured failed to act in a manner that would avoid an increased hazard during air travel. Similarly, property insurance policies commonly terminate or avoid the policy if the insured acts or fails to act in a way that increases the hazard to which the insured property is exposed or changes the nature of the risk.[26] But a fire policy condition regarding an increase in hazard "is not an exclusion, but is a condition

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[25] *Krause, supra* note 20, 141 Neb. at 850, 5 N.W.2d at 232.

[26] 6A Couch on Insurance 3d, *supra* note 16, § 94:1.

subsequent."[27] And we had specifically held in cases preceding *Krause* that failure to comply with policy conditions related to increased physical hazards were subject to the statutory contribute-to-the-loss standard.[28]

[11] In 1907, before the Legislature enacted § 44-358, this court strictly enforced a vacancy clause that forfeited coverage by allowing the insurer to treat the policy as void upon breach of the condition, even though the breach was unrelated to the loss.[29] Statutory provisions like § 44-358 that limit an insurer's ability to avoid liability for breach of increased hazard conditions exist because the conditions are often so broad that an insured's violation of them is not causally relevant to the loss.[30] But in *Krause*, we nullified the purpose of § 44-358 because we accepted the insurer's characterization of the policy provision as an exclusion of coverage for air travel except under its specified conditions.

Omaha Sky Divers Parachute Club, Inc. presented a similar classification problem. The certification provision excluded coverage unless the pilot possessed the necessary medical certification, which was proof of the pilot's medical fitness. The proof was intended to protect the insurer from the increased hazard of a pilot with health problems flying the plane.[31] And other courts have interpreted the same provision as imposing a condition for coverage.[32] And further confusing the distinction,

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[27] *Id.*, § 94:3 at 94-12, citing *Knoff v. United States Fidelity and Guaranty Co.*, 447 S.W.2d 497 (Tex. Civ. App. 1969).

[28] See, *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N.W. 197 (1931); *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N.W. 404 (1924).

[29] See *Farmers & Merchants Ins. Co. v. Bodge*, 76 Neb. 35, 110 N.W. 1018 (1907) (on rehearing).

[30] See Robert Works, *Insurance Policy Conditions and the Nebraska Contribute to the Loss Statute: A Primer and A Partial Critique*, 61 Neb. L. Rev. 209 (1982).

[31] See *id.*

[32] See, e.g., *Global Aviation Ins. Managers v. Lees*, 368 N.W.2d 209 (Iowa App. 1985), *abrogated on other grounds, Schneider Leasing v. U.S. Aviation Underw.*, 555 N.W.2d 838 (Iowa 1996).

even insurers have argued that increased hazard provisions were not exclusions when state law put the burden on insurers to prove exclusions.[33] Insurers have often, as in this policy, included vacancy clauses as conditions "'suspending or restricting insurance'"[34] or voiding the policy upon the insured's breach.[35] And we have specifically treated vacancy provisions as conditions for coverage that the insurer may enforce, but not as exclusions of coverage.[36]

[12] These cases illustrate that insurers have couched increased hazard provisions as both conditions and exclusions. But we do not believe that the application of § 44-358 should hinge upon the policy's labeling. We conclude that regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage. To the extent that *Omaha Sky Divers Parachute Club, Inc.* and *Krause* can be read to hold that increased hazard provisions are exclusions, they are overruled.

(c) Our Decision in *Coppi v. West Am. Ins. Co.* Incorrectly Held That the Contribute-to-the-Loss Standard Does Not Apply to Promissory Warranties

Markel argues that even if the vacancy provision is a condition or warranty, it is a "'promissory warranty'" to which § 44-358 does not apply.[37] Markel relies on our decision in *Coppi v. West Am. Ins. Co.*,[38] but we conclude that *Coppi* was also incorrectly decided.

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[33] See, *Stortenbecker v. Pottawattamie Mutual Ins. Ass'n*, 191 N.W.2d 709 (Iowa 1971); *AIG Aviation, Inc. v. Holt Helicopters*, 198 S.W.3d 276 (Tex. App. 2006).

[34] See *Zweygardt v. Farmers Mut. Ins. Co.*, 195 Neb. 811, 814, 241 N.W.2d 323, 325 (1976).

[35] See *Farmers & Merchants Ins. Co. v. Bodge*, 76 Neb. 31, 106 N.W. 1004 (1906), *vacated on other grounds, Bodge, supra* note 29.

[36] See, *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43, 144 N.W. 1044 (1914); *Bodge, supra* note 29; *Bodge, supra* note 35; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N.W. 936 (1899).

[37] Brief for appellee at 24.

[38] *Coppi, supra* note 13.

In *Coppi*, a business owner's policy, which covered loss by theft up to $10,000, contained an "iron-safe" clause. The clause required the business to keep record from which losses could be determined. The issue on appeal was whether the trial court erred in failing to rule that § 44-358 prevented the insurer from denying coverage. We held the insured could not rely on § 44-358 because his breach of the recordkeeping provision was a promissory warranty to which the contribute-to-the-loss standard did not apply. We set out the following definitions regarding warranties, promissory warranties, and conditions precedent:

> A warranty has been defined as a statement or promise the untruthfulness or nonfulfillment of which in any respect renders the policy voidable by the insurer. . . . It enters into and forms a part of the contract itself, defining the precise limits of the obligation, and no liability can arise except within those limits. . . . That is to say, a warranty serves to establish a condition precedent to an insurer's obligation to pay. . . . A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises. . . .
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> A warranty may be express or implied, and affirmative or promissory. . . . A "promissory" or "executory" warranty is one in which the insured undertakes to perform some executory stipulation, as that certain acts shall or will be done, or that certain facts shall or will continue to exist. . . . A promissory warranty requires certain action or nonaction on the part of the insured after the policy has been entered into in order that its terms shall not thereafter be breached.[39]

Consistent with what other courts had held, we concluded that the recordkeeping provision was a promissory warranty. We recognized that we had previously held that § 44-358 cannot apply to the breach of postloss conditions, those "terms of

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[39] *Id.* at 8, 524 N.W.2d at 811 (citations omitted).

a policy which could arise only after the loss has occurred."[40] We explained that postloss conditions include notice of loss provisions and proof of loss provisions.[41] We also recognized that the recordkeeping provision was not a postloss condition. Yet we concluded that

> § 44-358 deals with warranties which are conditions precedent to the very existence of an insurance contract, *not with promissory warranties the fulfillment of which are conditions precedent to recovery* under an insurance contract which has come into being. Thus, § 44-358 has no application to the situation at hand . . . .[42]

Upon further analysis, we were wrong. Before *Coppi*, we had already implicitly held that the contribute-to-the-loss standard does not apply to warranties that function as conditions precedent to the existence of a contract (i.e., fraudulent statements in an application for insurance).[43] The plain language of the statute compels this conclusion.

Section 44-358 has two sentences. The first sentence provides:

> No oral or written misrepresentation or warranty *made in the negotiation for a contract or policy* of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, *or prevent its attaching*, unless such misrepresentation or warranty deceived the company to its injury.[44]

[13,14] By its terms, the first sentence applies only to warranties made in the negotiations for a contract of insurance,

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[40] See *id.* at 9, 524 N.W.2d at 812, citing *First Security Bank v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989); *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974), *abrogated on other grounds, Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998); and *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942).

[41] See *Coppi, supra* note 13.

[42] *Id.* at 9-10, 524 N.W.2d at 812 (emphasis supplied).

[43] See *Gillan v. Equitable Life Assurance Society*, 143 Neb. 647, 10 N.W.2d 693 (1943).

[44] § 44-358 (emphasis supplied).

i.e., those that relate to whether the contract is effective. So, to the extent that Nebraska law permits an insured's statements in the negotiation for a contract to be treated as warranties, the first sentence of § 44-358 applies only to warranties that function as conditions precedent to the policy's being effective.[45] Warranties that are relevant to an insurance policy's being effective are classified as "affirmative" warranties:

> An affirmative warranty is one which asserts an existing fact or condition, and appears on the face of the policy, or is attached thereto and made a part thereof. As a general rule, it is in the nature of a condition precedent to the validity of the policy, and if broken in its inception the policy never attaches.[46]

[15] In contrast to misrepresentations and affirmative warranties, the second sentence of § 44-358 applies only to the breach of warranties and conditions that exist *at the time of the loss*. But an insurer can rescind a policy for breach of an affirmative warranty or condition precedent to the policy's being effective as soon as it learns of the relevant facts, regardless of whether a loss has occurred; its failure to act until a loss occurs will result in a waiver of the defense if it has continued to accept premiums with knowledge of the facts constituting a breach.[47] So, the Legislature clearly did not intend the second sentence of § 44-358 to apply to conditions precedent or affirmative warranties (e.g., statements relevant to insurability). Instead, as we have previously recognized, the first and second sentences of § 44-358 are mutually exclusive in their application, and the contribute-to-the-loss standard of the second sentence applies to breaches of conditions after the risk attaches and the policy is effective.[48] That is, the contribute-to-the-loss standard applies

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[45] See, *Gillan, supra* note 43; Neb. Rev. Stat. § 44-502(4) (Reissue 2004).

[46] See 6 Couch on Insurance 3d, *supra* note 9, § 81:13 at 81-27 to 81-28. Compare *Coryell v. Old Colony Ins. Co.*, 118 Neb. 303, 224 N.W. 684 (1929), *vacated on other grounds* 118 Neb. 312, 229 N.W. 326 (1930).

[47] See, e.g., *Lowry v. State Farm Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988).

[48] See, *Gillan, supra* note 43; *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 187 N.W. 787 (1922).

to breaches of conditions subsequent and continuing warranties that function as conditions subsequent.

[16] In *Coppi*, we correctly characterized a promissory warranty as a stipulation that the insured will act or refrain from acts to maintain a term of the policy.[49] But we failed to recognize that a promissory warranty is a continuing warranty that functions as a condition subsequent for coverage: "A promissory warranty is one by which the insured stipulates that something shall be done or omitted after the policy takes effect and during its continuance, and has the effect of a condition subsequent."[50]

In *Sanks v. St. Paul Fire & Marine Ins. Co.*,[51] we held that the contribute-to-the-loss standard applied to a provision that we characterized as a promissory warranty. It is true that *Sanks* arguably involved a postloss warranty or condition to which we have since held that § 44-358 does not apply.[52] But as stated, we have also specifically held that the contribute-to-the-loss standard applies to provisions that function as conditions subsequent.[53]

Moreover, if our conclusion in *Coppi* were correct—that the contribute-to-the-loss standard does not apply to promissory warranties—then the second sentence does not apply to any warranty in an insurance policy. This result is obviously contrary to the statutory interpretation principles and the Legislature's intent. It appears that we got off track in *Coppi* because we failed to recognize how the term "condition subsequent" is applied to insurance policies.

As noted, in *Coppi*, we classified the recordkeeping provision as a promissory warranty, which functions as a condition precedent to the insurer's obligation to pay. But we jumped from that principle to our holding that the contribute-to-the-loss standard

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[49] See 6 Couch on Insurance 3d, *supra* note 9, § 81:14.

[50] *Id.* at 81-29.

[51] *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936).

[52] See *First Security Bank, supra* note 40.

[53] See, *Johnson, supra* note 28; *Mayfield, supra* note 28; *Hannah, supra* note 28.

applies only to "warranties which are conditions precedent to the very existence of an insurance contract" (e.g., insureds' insurability statements).[54] In *Coppi*, we failed to distinguish between conditions precedent and conditions subsequent or to recognize that a breach of either type of condition (or related warranty) will avoid the insurer's liability absent statutory intervention.[55]

Any warranty that must be strictly satisfied will serve as a condition precedent to an insurer's obligation to pay. Warranties are effectively policy stipulations that function as conditions on an insurer's obligation to pay a loss.[56] But in insurance law, we believe it is more precise to refer to any condition that must be satisfied after the risk of loss attaches as a "condition subsequent" to distinguish it from a condition precedent to the policy's being effective.

[17] Using the term "condition subsequent" to refer to any insurance policy condition that applies after the risk of loss has attached is different from its meaning in a noninsurance context. Conditions subsequent are less common in noninsurance contracts because they can permit a party to avoid its obligation *after its duty to perform* has been triggered.[57] A true condition subsequent is the equivalent of a postloss condition in an insurance policy: e.g., after a loss has occurred, an insured's failure to comply with a notice of loss provision may result in the insurer's avoidance of liability.[58] But for insurance policies, the term condition subsequent comprises both preloss conditions (e.g., keep records), to which the contribute-to-the-loss standard applies, and postloss conditions (e.g., provide notice of loss), to which the standard does not apply.

[18] In *Coppi*, we did not recognize this use of the term condition subsequent. So we failed to recognize that the

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[54] *Coppi, supra* note 13, 247 Neb. at 9, 524 N.W.2d at 812.

[55] See 6 Couch on Insurance 3d, *supra* note 9, § 83:30.

[56] See *id.*, § 81:10.

[57] See *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

[58] See *Herman Bros., supra* note 40.

contribute-to-the-loss standard in the second sentence of § 44-358 applies to preloss conditions subsequent and promissory warranties. To the extent that *Coppi* holds the contribute-to-the-loss standard does not apply to promissory warranties and applies only to conditions precedent to the existence of an insurance contract, it is overruled.

[19] In sum, we determine that a vacancy clause in an insurance contract is not an exclusion; it is a condition subsequent to which the contribute-to-the-loss standard applies. We conclude that the court erred in refusing to permit D&S to argue that § 44-358 precluded Markel from denying liability.

2. Waiver and Estoppel Do Not Apply

The court refused to instruct the jury on waiver and estoppel. It concluded that even if Markel knew about the level of occupancy, it had no duty to inform D&S of the coverage implications. D&S contends that Markel has waived the vacancy provision or should be estopped from denying liability. D&S argues that Markel waived the vacancy provision because it accepted premiums after it knew the building's occupancy was below the required level.

[20,21] Initially, we note that waiver and estoppel are distinct legal concepts.[59] But we do not strictly apply the elements of equitable estoppel when an insured claims that an insurer has waived a policy provision.[60] Instead, if the evidence shows that the insurer has waived a policy provision, it may be "estopped from denying liability where, by its course of dealing and the acts of its agent, it has induced the insured to pursue a course of action to his detriment."[61]

[22,23] A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be

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[59] See 17 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 239:96 (2006).

[60] See *Kuhlman, supra* note 36. See, also, 44A Am. Jur. 2d *Insurance* § 1543 (2003).

[61] *Keene Coop. Grain & Supply Co. v. Farmers Union Ind. Mut. Ins. Co.*, 177 Neb. 287, 291, 128 N.W.2d 773, 777 (1964).

demonstrated by or inferred from a person's conduct.[62] We have long held that an insurer may waive any provision of a policy that is for the insurer's benefit,[63] including vacancy provisions.[64]

[24-26] Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.[65] A party may waive a written contract in whole or in part, either directly or inferentially.[66] A party may prove the waiver by (1) a party's express declarations manifesting the intent not to claim an advantage or (2) a party's neglecting and failing to act so as to induce the belief that it intended to waive.[67]

[27] An insurer is precluded from asserting a forfeiture when, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness.[68] But we have also stated that this rule is most applicable where the breach or ground for forfeiture is of such character as to render the policy void from its inception.[69] And we have specifically held that an insurer may waive conditions that void the policy if it becomes vacant or unoccupied, or be estopped from relying on those conditions as a defense to an

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[62] *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001).

[63] See *id.*, quoting *Schoneman v. Insurance Co.*, 16 Neb. 404, 20 N.W. 284 (1884).

[64] *Zweygardt, supra* note 34; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N.W. 1106 (1899), *overruled on other grounds, Gillan, supra* note 43.

[65] *Daniels, supra* note 62.

[66] See, *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010); *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989).

[67] *Id.*

[68] See, *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982); *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951).

[69] *Id.*

action upon the policy.[70] Although in that case, the agent had knowledge that the building was vacant when the policy was issued, we have recognized waiver of a vacancy provision when the vacancy occurred after the policy became effective.[71] We have similarly held an insurer waived other types of increased hazard conditions after the risk attached when it had knowledge of the breach before the loss occurred and failed to take steps to cancel the policy.[72] So whether an insurer may waive an increased hazard condition does not depend upon whether the insured's breach of the condition occurred before or after the risk attached.

But Markel argues that these cases are distinguishable because the insured's breach of the condition resulted in a forfeiture of the policy—whereas D&S' breach did not. As stated, we have held that an insurer may waive any provision in a policy[73] and that an insurance contract may be waived in whole or in part.[74] These rules are obviously broad enough to include any defense to an action to enforce a policy, not just claims that the policy is void or forfeited. And that is the rule in other jurisdictions.[75] But there is a critical distinction between forfeiture of the policy and forfeiture of a particular coverage in determining whether waiver can be shown solely by an insurer's continued acceptance of premiums.

[28] When an insurer knows of a breach of condition or warranty that permits it to treat the policy as void, and the

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[70] *Zweygardt, supra* note 34.

[71] *Hunt v. State Ins. Co.*, 66 Neb. 125, 92 N.W. 921 (1902) (on rehearing); *Kuhlman, supra* note 36. See, also, *Rochester Loan & Banking Co. v. Liberty Ins. Co.*, 44 Neb. 537, 62 N.W. 877 (1895). Accord, *North River Insurance Co. v. Rawls*, 185 Ky. 509, 214 S.W. 925 (Ky. App. 1919); *Security Ins. Co. v. Cook*, 99 Okla. 275, 227 P. 402 (1924); *Republic Ins. Co. v. Dickson*, 69 S.W.2d 599 (Tex. Civ. App. 1934).

[72] See, *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610, 178 N.W. 182 (1920); *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N.W. 483 (1897); *Grand Lodge v. Brand*, 29 Neb. 644, 46 N.W. 95 (1890).

[73] See *Daniels, supra* note 62.

[74] See *Jelsma, supra* note 66.

[75] See 17 Couch on Insurance 3d, *supra* note 59, § 239:93.

insurer continues to accept premiums, its conduct shows its intent to treat the policy as valid despite the breach.[76] The insurer's acceptance of premiums is inconsistent with treating the breach as voiding the policy. But waiver does not apply when the insured's breach of an increased hazard provision does not result in an absolute forfeiture of the policy and the insurer continues to be liable for loss from other covered causes.[77]

It is true that the Nebraska endorsement to the policy permitted Markel to treat the breach as voiding the policy "if such breach exists at the time of loss and contributes to the loss." Markel certainly knew that *if* a loss occurred during the period of a breach that contributed to the loss, it could treat the policy as void. But it could not have treated the policy as void until a loss occurred and Markel had reason to believe that the breach of the vacancy condition contributed to the loss. And until that time, Markel was liable for any other covered losses. A loss was entirely speculative when Markel had the building inspected. Thus, Markel's continued acceptance of premiums is insufficient to show that it intended to abandon a defense based on D&S' breach. We conclude that the court did not err is refusing to instruct the jury on D&S' waiver and estoppel theory.

VI. CONCLUSION

We conclude that the district court erred in refusing to permit D&S to instruct the jury, or permit D&S to argue, that the contribute-to-the-loss standard under § 44-358 applied to preclude Markel from denying liability for its loss. But we conclude that the court was correct in refusing to instruct the jury on Markel's alleged waiver and estoppel. The evidence was insufficient to show that Markel intended to abandon a defense based on D&S' breach of the vacancy condition. Accordingly, we remand the cause for further proceedings limited to the

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[76] See *id.*, § 239:121.

[77] See, *Crites v. Modern Woodmen of America*, 82 Neb. 298, 117 N.W. 776 (1908); *Modern Woodmen of America v. Talbot*, 76 Neb. 621, 107 N.W. 790 (1906).

issue of whether D&S' breach of the vacancy condition contributed to the loss.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT KREMER, APPELLANT, V. RURAL COMMUNITY INSURANCE COMPANY, A CORPORATION, APPELLEE.

GARY MOODY, APPELLANT, V. RURAL COMMUNITY INSURANCE COMPANY, A CORPORATION, APPELLEE.

788 N.W.2d 538

Filed September 17, 2010. Nos. S-09-900, S-09-901.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Final Orders: Arbitration and Award.** Motions to compel arbitration invoke a specific statutory remedy that is neither an action nor a step in an action. As such, the statutory remedy is a special proceeding under Neb. Rev. Stat. § 25-1902(2) (Reissue 2008).
5. **Actions: Statutes.** Special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions.
6. ____: ____. Regardless of a statutory remedy's location within Nebraska's statutes, actions and special proceedings are mutually exclusive.
7. **Federal Acts: Arbitration and Award: States: Appeal and Error.** The Federal Arbitration Act's preemptive effect does not extend to state procedural rules for appeals that do not defeat the act's objectives.
8. **Arbitration and Award: Appeal and Error.** The list of appealable arbitration orders under Neb. Rev. Stat. § 25-2620 (Reissue 2008) is not exclusive.
9. **Judgments: Arbitration and Award.** An order compelling arbitration and staying judicial proceedings is a final determination of arbitrability.
10. **Final Orders: Appeal and Error.** An order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.

11. **Final Orders: Arbitration and Award.** An order compelling arbitration or staying judicial proceedings pending arbitration is a final order under the second category of Neb. Rev. Stat. § 25-1902 (Reissue 2008): It affects a substantial right in a special proceeding.
12. **Insurance: Contracts: Arbitration and Award.** With certain exceptions, under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008), agreements to arbitrate future controversies concerning an insurance policy are invalid.
13. **Federal Acts: Contracts: Arbitration and Award: States.** The Federal Arbitration Act, 9 U.S.C. § 2 (2006), preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions in contracts evidencing a transaction involving commerce.
14. **Federal Acts: Insurance: States.** Under the federal McCarran-Ferguson Act, state law regulating the business of insurance preempts federal law that does not specifically govern insurance.
15. ____: ____: ____. Under the McCarran-Ferguson Act, there are three elements for determining whether a state law controls over (reverse preempts) a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.
16. ____: ____: ____. The primary concern for disputes under the first clause of 15 U.S.C. § 1012(b) (2006) is whether the state law regulates the core components of the business of insurance: the contractual relationship between the insurer and insured; the type of policy that can be issued; and its reliability, interpretation, and enforcement.
17. **Statutes: Insurance: Contracts: Arbitration and Award.** A statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship. Thus, it regulates the business of insurance.
18. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The Federal Arbitration Act does not preempt Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008).
19. **Insurance: Agriculture: Corporations.** The Federal Crop Insurance Corporation is a wholly owned government corporation within the U.S. Department of Agriculture, established to regulate the crop insurance industry.
20. ____: ____: ____. The Federal Crop Insurance Corporation's regulations require applicants to apply on one of the corporation's prescribed policy forms, which contain arbitration provisions for all policies reinsured by the corporation.
21. **Constitutional Law: Federal Acts: States.** Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.
22. **Federal Acts: States: Intent.** Federal law preempts state law when it conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an intent to preempt state law. Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims.
23. **Federal Acts: Insurance: Agriculture: Corporations: States.** The Federal Crop Insurance Act and the Federal Crop Insurance Corporation's regulations express an intent to preempt state law that conflicts with the corporation's regulations.

24. **Insurance: Agriculture: Corporations: Statutes: Contracts: Arbitration and Award.** The Federal Crop Insurance Corporation's regulations requiring arbitration and the preclusion of arbitration agreements under Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008) conflict because they cannot both be enforced.
25. **Federal Acts: Insurance: Agriculture: Statutes: Contracts: Arbitration and Award.** Under the McCarran-Ferguson Act, Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008) does not reverse preempt federal law under the Federal Crop Insurance Act because the Federal Crop Insurance Act specifically relates to the business of insurance.
26. **Federal Acts: Insurance: Agriculture: Corporations: Contracts: Agents.** An agent's or loss adjuster's statement cannot bind the Federal Crop Insurance Corporation when the statement is inconsistent with governing federal law.

Appeals from the District Court for Hamilton County: MICHAEL J. OWENS, Judge. Affirmed.

Kent E. Rauert, of Svehla, Thomas, Rauert & Grafton, P.C., for appellants.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., and Jeffrey S. Dilley, of Henke-Bufkin, P.A., for appellee.

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

CONNOLLY, J.

I. SUMMARY

Robert Kremer and Gary Moody, two insureds, appeal from the district court's decisions in their actions to enforce compromise and settlement agreements with their crop insurer, Rural Community Insurance Company (RCIC). In each case, the insured alleged that RCIC's adjuster agreed to pay specified amounts to the insureds. In both cases, RCIC moved to dismiss the action or, alternatively, to compel arbitration and stay the proceedings. In both cases, the court compelled arbitration and stayed judicial proceedings.

We are asked to decide two issues: Whether this court has jurisdiction to review an order that stays judicial proceedings and compels arbitration; and whether federal law preempts Neb. Rev. Stat. § 25-2602.01(f)(4) (Reissue 2008), which precludes arbitration agreements for future controversies relating

to insurance policies. We conclude that the orders are final and that we have jurisdiction. We also conclude that federal regulations under the Federal Crop Insurance Act (FCIA)[1] preempt § 25-2602.01(f)(4). Thus, the district court did not err in compelling the insureds to arbitrate their disputes with RCIC.

II. BACKGROUND

The court found that RCIC issued the "Multiple Peril Crop Insurance" (MPCI) policies under the FCIA and that the Federal Crop Insurance Corporation is the reinsurer for all MPCI policies. The court determined that all MPCI policies contain a dispute resolution provision like the following paragraph from the policies at issue:

> 20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.
>
> (a) If you and we fail to agree on any determination made by us except those specified in section 20(d), the disagreement may be resolved through mediation . . . . If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by [the Federal Crop Insurance Corporation] for this purpose.

(Emphasis omitted.)

The court rejected the insureds' argument that they were attempting to enforce their settlement agreement instead of seeking relief under the policy. The court declined to decide whether their alleged agreement with the adjuster was enforceable. It determined that their claim was directly attributable to their policy and therefore within the scope of their arbitration provision. In each case, it sustained RCIC's motion to compel arbitration and issued a stay of judicial proceedings pending arbitration.

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[1] 7 U.S.C. § 1501 et seq. (2006).

III. ASSIGNMENTS OF ERROR

The insureds assign that the court erred in (1) sustaining RCIC's motions to compel arbitration and stay the proceedings because their dispute does not fall within the scope of the arbitration provisions and (2) not deciding whether the parties had reached enforceable compromise and settlement agreements.

IV. STANDARD OF REVIEW

[1,2] Arbitrability presents a question of law.[2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3] And when reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[4]

V. ANALYSIS

1. Jurisdiction

RCIC contends that an order that compels arbitration and stays judicial proceedings is not a final order. The insureds disagree. They contend that the district court's decision in each case was a final order issued in a special proceeding. Relying on *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*,[5] they argue that a trial court's ruling on a motion to compel arbitration affects a substantial right whether the court grants or denies the motion.

Neb. Rev. Stat. § 25-2620 (Reissue 2008) explicitly authorizes appeals from judicial orders denying an application to compel arbitration or granting an application to stay arbitration. But § 25-2620 is silent as to whether a party may appeal an order granting an application to compel arbitration or to stay judicial proceedings. In that circumstance, we look to our

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[2] See, *Good Samaritan Coffee Co. v. LaRue Distributing*, 275 Neb. 674, 748 N.W.2d 367 (2008); *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998).

[3] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[4] See *Eikmeier v. City of Omaha, ante* p. 173, 783 N.W.2d 795 (2010).

[5] *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

general final order statute to determine whether the order is final and appealable.[6] Next, we determine whether permitting an appeal under state procedural rules would undermine the goals and policies of the Federal Arbitration Act (FAA).[7]

(a) Arbitrability Hearings Are Special Proceedings

[3,4] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) an order affecting a substantial right made during a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[8] In *Webb v. American Employers Group*,[9] we held that motions to compel arbitration invoke a specific statutory remedy that is neither an action nor a step in an action. As such, the statutory remedy is a special proceeding under § 25-1902(2).[10]

But RCIC contends that this case is distinguishable from our earlier arbitration cases because here, the district court stayed judicial proceedings instead of dismissing the action. So RCIC argues that each proceeding was merely a step within the overall action under the first category of final orders and not a special proceeding. And because the orders did not have the effect of determining the action and preventing a judgment, RCIC argues that they are not final.

We recognize that *State ex rel. Bruning*[11] provides some support for RCIC's argument. There, we did focus on the relief

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[6] See *id.*

[7] 9 U.S.C. § 1 et seq. (2006). See *State ex rel. Bruning, supra* note 5, citing *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[8] See *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[9] *Webb, supra* note 7.

[10] See *id.*

[11] *State ex rel. Bruning, supra* note 5.

granted in the proceeding invoked by the defendants' motion to compel arbitration. Because the court granted the motion and dismissed the judicial proceeding, we concluded that the order was final under the first category of § 25-1902: an order affecting a substantial right in an action that, in effect, determines the action and prevents a judgment. On further reflection, however, we conclude that our focus on the remedy was incorrect. By focusing on the relief granted, the order lost its characterization as a special proceeding order and became an order within an action.

[5,6] A proceeding's characterization cannot hinge upon the remedy because it cannot be both a special proceeding and a step within an action. As we have often stated, special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions.[12] This statement does not mean that statutory remedies within the civil procedure statutes are never special proceedings because, as *Webb*[13] illustrates, they sometimes are located within those statutes. But regardless of a statutory remedy's location within Nebraska's statutes, actions and special proceedings are mutually exclusive.[14] Thus, we determine whether an order issuing a stay of judicial proceedings in a proceeding to compel arbitration is a final, appealable order under the special proceeding category of final orders.

(b) FAA Rules on Appealable Orders Do Not Preempt State Procedural Rules for Appeals

We recognize that a federal court order compelling arbitration is not appealable under the FAA unless the trial court dismissed the underlying court action. Section 16 of the FAA provides that "(a) [a]n appeal may be taken from . . . (3) a final decision with respect to an arbitration that is subject to this

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[12] See, e.g., *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[13] *Webb, supra* note 7.

[14] See *id.*

title."[15] In *Green Tree Financial Corp.-Ala. v. Randolph*,[16] the U.S. Supreme Court stated that § 16(a)(3) "preserves immediate appeal of any 'final decision with respect to an arbitration,' regardless of whether the decision is favorable or hostile to arbitration." The Court held that under § 16(a)(3), when a federal district court "has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final.'"[17]

Further, this rule applies whether the party seeking arbitration moves to compel arbitration after the opposing party has commenced a court action or initiates an independent proceeding solely to compel a party to arbitrate.[18] The Court concluded that applying different rules of finality based on this distinction was unsupported by the legislation.

It is true that the Court also pointed out that a federal court order entering a stay of judicial proceedings, instead of a dismissal, is not appealable under § 16(b)(1) of the FAA.[19] Since 1988, § 16(b) has precluded an appeal from an interlocutory order granting a stay pending arbitration or compelling arbitration.[20] But the FAA's § 16(b) does not preempt our appellate procedural rules.

[7] In *Webb*, we concluded that the FAA's preemptive effect does not extend to state procedural rules for appeals that do not defeat the FAA's objectives: "'There is no federal policy favoring arbitration under a certain set of procedural rules and the federal policy is simply to ensure the enforceability of private agreements to arbitrate.'"[21] Many other state courts have

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[15] 9 U.S.C. § 16.

[16] *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 86, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

[17] *Id.*, 531 U.S. at 89.

[18] See *id.*

[19] See *id.* See, also, 9 U.S.C. § 16(b).

[20] See 15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.17 (2d ed. 1992).

[21] *Webb, supra* note 7, 268 Neb. at 481, 684 N.W.2d at 40-41. See, also, *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

reached the same conclusion.[22] And the U.S. Supreme Court has never held that §§ 3 and 4[23] of the FAA, which are procedural sections, apply to state courts.[24]

But the law is torn in two directions. A substantial split of authority exists among state courts over whether a party may appeal from an order compelling arbitration.[25] Some state courts have held that under their state procedural rules, orders compelling arbitration and staying judicial proceedings are interlocutory and not appealable. These courts reason that a party adversely affected by an order compelling arbitration can raise the issue in an appeal from an order confirming the arbitrator's award.[26] Other courts have reasoned that their state statute that specifically lists the arbitration orders that a party may appeal is exclusive and does not include an order compelling arbitration.[27]

[8] In contrast, other courts hold that their state legislatures' silence in such statutes does not mean the list of appealable orders is exclusive.[28] We agree. In *State ex rel. Bruning*,[29] we

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[22] See, e.g., *So. Cal. Edison Co. v. Peabody Western Coal*, 194 Ariz. 47, 977 P.2d 769 (1999); *Muao v. Grosvenor Properties Ltd.*, 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131 (2002); *Simmons v. Deutsche Financial Services*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Wells v. Chevy Chase Bank*, 363 Md. 232, 768 A.2d 620 (2001); *Clayco Const. Co. v. THF Carondelet Dev.*, 105 S.W.3d 518 (Mo. App. 2003); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647 (N.D. 1998); *Toler's Cove Homeowners v. Trident Construction Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

[23] See 9 U.S.C. §§ 3 and 4.

[24] See *Volt Info. Sciences, supra* note 21.

[25] See Annot., 6 A.L.R.4th 652 (1981).

[26] See, *Chem-Ash, Inc. v. Ark. Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988); *Muao, supra* note 22; *Lane v. Urgitus*, 145 P.3d 672 (Colo. 2006); *Weston Securities Corp. v. Aykanian*, 46 Mass. App. 72, 703 N.E.2d 1185 (1998); *Toler's Cove Homeowners, supra* note 22.

[27] See, e.g., *So. Cal. Edison Co., supra* note 22; *Muao, supra* note 22; *Weston Securities Corp., supra* note 26; *Toler's Cove Homeowners, supra* note 22.

[28] See, e.g., *Wein v. Morris*, 194 N.J. 364, 944 A.2d 642 (2008); *Gilliland v. Chronic Pain Associates*, 904 P.2d 73 (Okla. 1995).

[29] *State ex rel. Bruning, supra* note 5.

implicitly concluded that the list of appealable arbitration orders under § 25-2620 is not exclusive.

Other state courts also hold that a party resisting arbitration may appeal an order compelling arbitration regardless of whether the trial court's order also dismissed the court action.[30] These courts reason that an order compelling arbitration (1) completely disposes of all the issues before the court in that proceeding, leaving nothing for the parties to litigate; and (2) removes the trial court's jurisdiction over the underlying dispute. They also conclude that permitting appeals from both dismissals and stays creates more certainty and uniformity in their state appellate process.[31]

We recognize that an order issuing a stay within an action or proceeding is usually interlocutory and not appealable absent a statute or court rule permitting an interlocutory appeal.[32] Yet, we have recognized that a stay which is tantamount to a dismissal of an action or has the effect of a permanent denial of the requested relief should be appealable as a final order.[33]

We believe that reasoning applies here. Under Nebraska's Uniform Arbitration Act, whether a court dismisses or stays the court action, the order has the same effect: The parties cannot litigate their dispute in state courts because by enforcing the arbitration agreement, the order divests the court of

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[30] See, *Dewart v. Northeastern Gas Transmission Co.*, 139 Conn. 512, 95 A.2d 381 (1953); *Simmons, supra* note 22; *Evansville-Vanderburgh Sch. v. Teachers Ass'n*, 494 N.E.2d 321 (Ind. App. 1986); *Iowa Mgmt. & Consultants v. Sac & Fox Tribe*, 656 N.W.2d 167 (Iowa 2003); *Wells, supra* note 22; *Sawyers v. Herrin-Gear Chevrolet Co., Inc.*, 26 So. 3d 1026 (Miss. 2010); *Wein, supra* note 28; *Lyman v. Kern*, 128 N.M. 582, 995 P.2d 504 (N.M. App. 1999); *Okla. Oncology & Hematology v. US Oncology*, 160 P.3d 936 (Okla. 2007).

[31] See, e.g., *Sawyers, supra* note 30; *Wein, supra* note 28.

[32] See, e.g., *Department of Children and Families v. L.D.*, 840 So. 2d 432 (Fla. App. 2003); *Cole v. Cole*, 971 So. 2d 1185 (La. App. 2007); *Washington v. FedEx Ground Package System*, 995 A.2d 1271 (Pa. Super. 2010).

[33] *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992), quoting *Carpenter v. Carpenter*, 326 Pa. Super. 570, 474 A.2d 1124 (1984).

jurisdiction to hear their dispute.[34] In either case, the only other proceedings authorized by the act are initiated by separate applications to the court: an application to confirm an arbitration award,[35] an application to vacate an award,[36] or an application to modify or correct an award.[37] Our arbitration statutes allow these proceedings even if the parties never disputed arbitrability because they are related to the enforceability of an arbitration award.

[9] As the U.S. Supreme Court recognized in *Green Tree Financial Corp.-Ala.*, while the FAA provides separate proceedings related to enforcing an arbitration award, "the existence of [an enforcement proceeding as a] remedy does not vitiate the finality of" a court's resolution of the parties' preliminary dispute over arbitrability.[38] Obviously, a court would not revisit its decision from an earlier proceeding that the dispute was arbitrable. So we agree with courts that hold that an order compelling arbitration and staying judicial proceedings is a final determination of arbitrability. But our analysis is not complete: Under our final order statute, an order must also affect a substantial right.

[10] We have often stated that an order affects a substantial right if the order affects the subject matter of the litigation, such as diminishing a claim or defense that the appellant had before the court entered the order.[39] Just as an order refusing to compel arbitration diminishes a party's claim that it is entitled to arbitrate,[40] so does an order compelling arbitration diminish

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[34] See *Wein, supra* note 28.

[35] Neb. Rev. Stat. § 25-2612 (Reissue 2008).

[36] Neb. Rev. Stat. § 25-2613 (Reissue 2008).

[37] Neb. Rev. Stat. § 25-2614 (Reissue 2008).

[38] *Green Tree Financial Corp.-Ala., supra* note 16, 531 U.S. at 86. See, also, *Daginella v. Foremost Ins. Co.*, 197 Conn. 26, 495 A.2d 709 (1985); *Matter of Hosiery Mfrs. Corp. v. Goldston*, 238 N.Y. 22, 143 N.E. 779 (1924).

[39] See, e.g., *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[40] See *Webb, supra* note 7.

a party's claim that it is entitled to litigate in court.[41] These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do.[42] As the Maryland Court of Appeals stated, "The policy against delay must be weighed against the more fundamental principle that a party who has not agreed to arbitrate a particular dispute cannot be compelled to arbitrate it."[43]

[11] More important, an order that disposes of all the issues presented in an independent special proceeding obviously affects the subject matter of the litigation. By "independent special proceeding," we mean one that is separate from the issues raised in any underlying dispute and is not a phase in a protracted special proceeding with interrelated phases (as in juvenile cases, for example). We conclude that an order compelling arbitration or staying judicial proceedings pending arbitration is a final order under the second category of § 25-1902: It affects a substantial right in a special proceeding.

As noted, after determining whether an arbitration-related order is final under § 25-1902, we determine whether permitting an appeal from the order undermines the FAA's goals and objectives. We determine that it does not. As the U.S. Supreme Court has stated, "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[44] And other courts have concluded that state appellate procedures only affect the timing of an appeal; they neither preclude the enforcement of a valid arbitration agreement nor interfere with the parties' substantive rights.[45] Further, permitting an appeal is consistent with the

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[41] See *Evansville-Vanderburgh Sch., supra* note 30. Compare *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[42] See, e.g., *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[43] *Wells, supra* note 22, 363 Md. at 249, 768 A.2d at 629, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). See, also, *State ex rel. Bruning, supra* note 5.

[44] *Volt Info. Sciences, supra* note 21, 489 U.S. at 477.

[45] See, *Simmons, supra* note 22 (citing cases); *Weston Securities Corp., supra* note 26.

Supreme Court's holding in *Green Tree Financial Corp.-Ala.*[46] that a party may appeal from a final decision on the arbitrability of a dispute. Having determined that an order compelling arbitration and staying judicial proceedings is a final order on arbitrability, we have jurisdiction. Having disposed of the jurisdictional issue, we come at last to the merits of the court's order to arbitrate.

2. The FAA Does Not Preempt Nebraska's Preclusion of Agreements to Arbitrate Future Controversies in Insurance Policies

As noted, the court found that RCIC issued the MPCI policies under the FCIA and that all MPCI policies contain a provision requiring mediation or arbitration. But the parties fail to recognize that the arbitration provision in each policy is invalid under Nebraska law because it required arbitration of future controversies related to an insurance policy.

[12] Section 25-2602.01 addresses two types of arbitration agreements: (1) agreements to arbitrate existing controversies[47] and (2) agreements to arbitrate future controversies.[48] The statute provides that such agreements are valid and enforceable except in specified circumstances. But under § 25-2602.01(f)(4), agreements to arbitrate future controversies concerning an insurance policy are invalid, with certain exceptions that are not applicable here. So unless federal law preempts § 25-2602.01, the arbitration provisions in these insurance policies were invalid.

[13,14] "Under the FAA, written provisions for arbitration are 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[49] Section 2[50] of the FAA preempts inconsistent state laws that apply solely to the enforceability of arbitration

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[46] See *Green Tree Financial Corp.-Ala., supra* note 16.

[47] See § 25-2602.01(a).

[48] See § 25-2602.01(b).

[49] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 703, 757 N.W.2d 205, 209 (2008), quoting 9 U.S.C. § 2.

[50] 9 U.S.C. § 2.

provisions in contracts "evidencing a transaction involving commerce."[51] Because of the U.S. Supreme Court's expansive interpretation of this phrase, the FAA governs whether an arbitration provision in a contract touching on interstate commerce is enforceable.[52] But under the federal McCarran-Ferguson Act,[53] state law regulating the business of insurance preempts federal law that does not specifically govern insurance.

Subsection (a) of 15 U.S.C. § 1012 provides that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Section 1012(b) sets out the state law exemptions:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*: *Provided*, That [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

(Emphasis supplied.) (Emphasis in original.)

Congress passed the McCarran-Ferguson Act to overturn a U.S. Supreme Court decision under the Commerce Clause that threatened the continued supremacy of states to regulate "the activities of insurance companies in dealing with their policyholders."[54] The U.S. Supreme Court has interpreted the second clause of § 1012(b) to provide an exemption to an insurer from antitrust scrutiny if its challenged practices constitute the "business of insurance" and are regulated by state law.[55] The first clause, which is at issue here, shields state regulation of the insurance business from federal preemption under

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[51] See *Hunan, Inc., supra* note 49.

[52] See *id.* See, also, *Smith v. Pacificare Behavioral Health of CA*, 93 Cal. App. 4th 139, 113 Cal. Rptr. 2d 140 (2001).

[53] See 15 U.S.C. §§ 1011 through 1015 (2006).

[54] *SEC v. National Securities, Inc.*, 393 U.S. 453, 459, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969).

[55] See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979).

Congress' Commerce Clause authority, whether dormant or exercised, unless the federal statute specifically relates to the business of insurance.[56]

[15] Under the McCarran-Ferguson Act, federal courts have set out three elements for determining whether a state law controls over (reverse preempts) a federal statute: (1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.[57] Applying this test, the only question for determining whether Nebraska law controls over the FAA is whether Nebraska's restriction of arbitration agreements in insurance policies regulates the business of insurance.

In *SEC v. National Securities, Inc.*,[58] the Court first interpreted the McCarran-Ferguson Act in a dispute under the first clause of § 1012(b). It explained that in enacting the McCarran-Ferguson Act,

> Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, *the type of policy which could be issued*, its reliability, interpretation, *and enforcement*—these were the core of the "business of insurance." . . . But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."[59]

In examining the act, the Court held that a state law that protected insurance stockholders from inequitable mergers

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[56] *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003).

[57] *American Bankers Ins. Co. of Florida v. Inman*, 436 F.3d 490 (5th Cir. 2006); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001).

[58] *National Securities, Inc., supra* note 54.

[59] *Id.*, 393 U.S. at 460 (emphasis supplied).

was not a regulation of the insurance business: "The crucial point is that here the State has focused its attention on stockholder protection; *it is not attempting to secure the interests of those purchasing insurance policies*."[60] The Court recognized that the state had approved the merger at issue under a statute that also required it to find that the merger would not reduce the security of or services to policyholders. That part of the statute was a regulation of the insurance business and exempt from preemption by federal law. But to the extent the statute protected shareholders, it did not regulate the insurance relationship.

Later, in *Department of Treasury v. Fabe*,[61] the Court held that a state priority statute for insurer liquidations was not preempted by a federal priority statute for bankruptcy obligations. To the extent that the state statute protected policyholders by giving their claims a higher priority than the federal government's claims, it regulated the business of insurance.

[16] In *Fabe*, the Court reemphasized its holding in *National Securities, Inc.* that the primary concern for disputes under the first clause of § 1012(b) is whether the state law regulates the core components of the business of insurance: the contractual relationship between the insurer and insured; the type of policy that can be issued; and its reliability, interpretation, and enforcement. It determined that the phrase "business of insurance" has a broader meaning under the first clause of § 1012(b) than under the second clause: "The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance."[62]

Every federal appellate court to address this issue has held that state laws restricting arbitration provisions in insurance contracts regulate the business of insurance and are not

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[60] *Id.* (emphasis supplied).

[61] *Department of Treasury v. Fabe*, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993).

[62] *Id.*, 508 U.S. at 505.

preempted by the FAA.[63] These courts have reasoned that such state laws regulate core components of the insurance business by legislating how disputed claims can be resolved.[64] Applying factors that the Supreme Court set out under the second clause of § 1012(b),[65] these courts have also asked whether the law has the effect of transferring or spreading a policyholder's risk. They have reasoned that a state's restriction of arbitration clauses affects the transfer of risk by (1) placing limits on the parties' agreement to spread risk[66] or (2) introducing the possibility of a jury verdict into the process for resolving disputed claims.[67] Alternatively, they have simply stated that any contract of insurance is an agreement to spread risk.[68]

Reasonable people might disagree whether statutes restricting arbitration agreements in insurance policies affect the transfer of risk. But we do not consider this issue dispositive. First, even for disputes under the second clause of § 1012(b), no factor is dispositive in itself whether an insurer's practice constitutes the "business of insurance."[69] More important, the Court in *Fabe* explained that these factors were intended to define

> the scope of the antitrust immunity located in the second clause of § [101]2(b). We deal here with the first clause, which is not so narrowly circumscribed. . . . To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself

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[63] See, *Inman, supra* note 57; *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854 (11th Cir. 2004); *West, supra* note 57; *Stephens v. American Intern. Ins. Co.*, 66 F.3d 41 (2d Cir. 1995); *Mutual Reinsurance Bureau v. Great Plains Mut.*, 969 F.2d 931 (10th Cir. 1992). See, also, *Smith, supra* note 52.

[64] See *West, supra* note 57; *Mutual Reinsurance Bureau, supra* note 63.

[65] See *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982).

[66] See *Mutual Reinsurance Bureau, supra* note 63.

[67] *Inman, supra* note 57; *West, supra* note 57.

[68] See, *Stephens, supra* note 63; *Mutual Reinsurance Bureau, supra* note 63.

[69] See *Pireno, supra* note 65.

> . . . would be to read words out of the statute. This we refuse to do.[70]

[17,18] We conclude that under *Fabe*, the *National Securities* test[71] is the more relevant test for disputes under the first clause of § 1012(b). Applying that test, we conclude that a statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship. Thus, it regulates the business of insurance. So we agree with federal courts that the FAA does not preempt such statutes. Specifically, we hold that the FAA does not preempt Nebraska's § 25-2602.01(f)(4). But we are not done. The FAA is not the only federal law that we consider in determining whether § 25-2602.01(f)(4)'s preclusion of agreements to arbitrate future controversies in crop insurance policies is preempted.

3. Federal Regulations Under the FCIA Preempt Nebraska's Prohibition Against Agreements to Arbitrate Future Controversies in a Crop Insurance Policy Reinsured by the Federal Crop Insurance Corporation

As noted, the district court found that RCIC issued this crop insurance policy under the FCIA and that the Federal Crop Insurance Corporation (the Corporation) is the reinsurer for all MPCI policies. The court further determined that all MPCI policies contain the same alternative dispute resolution provision.

[19] The Corporation is a wholly owned government corporation within the U.S. Department of Agriculture, established to regulate the crop insurance industry.[72] "Private insurance companies offer crop insurance and are then reinsured (and regulated) by the [Corporation]."[73] Subsections (e) and (l) of 7 U.S.C. § 1506 authorize the Corporation to adopt rules and regulations necessary to conduct its business. Subsection (a)(1)

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[70] *Fabe, supra* note 61, 508 U.S. at 504 (emphasis omitted).

[71] See *National Securities, Inc., supra* note 54.

[72] *Acceptance Ins. Companies, Inc. v. U.S.*, 583 F.3d 849 (Fed. Cir. 2009).

[73] *Id.* at 851.

of 7 U.S.C. § 1508 authorizes the Corporation to "insure, or provide reinsurance for insurers of, producers of agricultural commodities . . . under 1 or more plans of insurance determined by the Corporation to be adapted to the agricultural commodity concerned."

[20] Under this authority, the Corporation has promulgated regulations prescribing the terms for common crop insurance policies.[74] The Corporation's regulations specifically require applicants to apply on one of the Corporation's prescribed policy forms.[75] Those forms contain arbitration provisions for all policies reinsured by the Corporation.[76]

Also, 7 U.S.C. § 1506(l) provides in part:

> State and local laws or rules shall not apply to contracts, agreements, or regulations of the Corporation or the parties thereto to the extent that such contracts, agreements, or regulations provide that such laws or rules shall not apply, or to the extent that such laws or rules are inconsistent with such contracts, agreements, or regulations.

Under its statutory authority to regulate private crop insurance contracts, the Corporation has also promulgated regulations providing that state and local governments cannot pass laws or promulgate rules that affect or govern its agreements or contracts.[77] And the regulations specifically preclude state and local governments from exercising approval authority over the policies it issues.[78]

[21,22] Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.[79] Federal law preempts state law when it conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an

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[74] See 7 C.F.R. part 457 (2010).

[75] See § 457.8(a).

[76] See § 457.8(b).

[77] See 7 C.F.R. § 400.352(a) (2010).

[78] See § 400.352(b)(3).

[79] *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

intent to preempt state law.[80] Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims.[81]

[23-25] We conclude that the FCIA and the Corporation's regulations express an intent to preempt state law that conflicts with the Corporation's regulations. Further, the Corporation's regulations requiring arbitration and the preclusion of the arbitration agreement under § 25-2602.01(f)(4) conflict because they cannot both be enforced. And because the FCIA and the Corporation's regulations specifically deal with insurance, they invoke the exception under the McCarran-Ferguson Act's § 1012(b). That is, under the McCarran-Ferguson Act, Nebraska's § 25-2602.01(f)(4) does not reverse preempt federal law under the FCIA because the FCIA specifically relates to the business of insurance.[82] Because the McCarran-Ferguson Act does not apply, the Corporation's regulations requiring arbitration preempt state law and are enforceable.

[26] Moreover, the insureds cannot evade the arbitration requirement by claiming that they are enforcing their settlement agreement with the adjuster. An agent's or loss adjuster's statement cannot bind the Corporation when the statement is inconsistent with governing federal law.[83] And each crop insurance policy's arbitration provision is clearly broad enough to cover disputes over adjustment actions: "If you and we fail to agree on any determination *made by us*," the disagreement must be resolved through mediation or arbitration. (Emphasis supplied.) We conclude that the district court did not err in determining that the insureds' dispute is subject to arbitration.

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[80] See, *In re Interest of Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (2009); *Zannini, supra* note 79. See, also, *Fidelity Federal Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

[81] See *Zannini, supra* note 79.

[82] See, *In re 2000 Sugar Beet Crop Ins. Litigation*, 228 F. Supp. 2d 992 (D. Minn. 2002); *IGF Ins. Co. v. Hat Creek Partnership*, 349 Ark. 133, 76 S.W.3d 859 (2002).

[83] See, *OPM v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947).

VI. CONCLUSION

We determine that an arbitration order which directs the parties to arbitrate their dispute and stays the underlying judicial action is a final, appealable order in a special proceeding under the second category of § 25-1902. We determine that § 25-2602.01(f)(4), which precludes provisions to arbitrate future controversies in insurance contracts, is not preempted by the FAA. Under the McCarran-Ferguson Act, § 25-2602.01(f)(4) regulates the business of insurance and reverse preempts the FAA. But § 25-2602.01(f)(4) is preempted by the FCIA and its implementing regulations, which require arbitration. The McCarran-Ferguson Act does not apply because the FCIA specifically relates to the business of insurance. Finally, we conclude that the arbitration provision in each crop insurance policy requires the parties to arbitrate disputes over adjustment actions. The district court did not err in ordering arbitration.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAMONT RUFFIN, ALSO KNOWN AS LAMONT ROLAND, APPELLANT.

789 N.W.2d 19

Filed September 17, 2010. No. S-09-972.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Jurisdiction: Affidavits: Fees: Appeal and Error.** A poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal, and an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and a proper affidavit of poverty.
3. **Affidavits: Good Cause: Appeal and Error.** Generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge. Judgment of Court of Appeals affirmed.

Mitchel L. Greenwall, of Yeagley, Swanson & Murray, L.L.C., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

The Nebraska Court of Appeals dismissed the appeal of Lamont Ruffin, also known as Lamont Roland, for lack of jurisdiction. Ruffin filed a petition for further review, which we granted. We ordered the case submitted without oral argument under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008). We conclude that because the poverty affidavit filed in this appeal was signed by his attorney rather than by Ruffin and good cause for not signing the poverty affidavit is not evident in the record, the appellate courts were not vested with jurisdiction over this appeal. On further review, we conclude that the Court of Appeals' ruling which dismissed the appeal was correct and consistent with *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). We therefore affirm the order of the Court of Appeals which dismissed the appeal.

STATEMENT OF FACTS

Ruffin was convicted in 2004 of first degree sexual assault and was sentenced to imprisonment for 18 to 40 years. Ruffin's conviction and sentence were affirmed by the Court of Appeals in 2004. See *State v. Ruffin*, No. A-04-313, 2004 WL 2792466 (Neb. App. Dec. 7, 2004) (not designated for permanent publication). Ruffin filed a motion for postconviction relief on December 31, 2008. The district court for Buffalo County denied the motion on September 3, 2009, without an evidentiary hearing. It is the postconviction action which gives rise to the current case.

On October 1, 2009, Ruffin filed a notice of intent to appeal the denial of his motion for postconviction relief. On that day, he also filed in the district court an application to proceed in

forma pauperis and a poverty affidavit that was signed by his attorney. On October 2, the district court granted the application and ordered that Ruffin be allowed to proceed in forma pauperis.

Following a jurisdictional review, the Court of Appeals issued an order to show cause why Ruffin's appeal should not be dismissed for lack of jurisdiction. The Court of Appeals noted in the order that although Ruffin timely filed his notice of appeal, the poverty affidavit, filed in lieu of the statutory docket fee, was signed by Ruffin's attorney rather than by Ruffin himself. The Court of Appeals cited *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003), and *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990), for the proposition that absent good cause evident in the record, a poverty affidavit signed by an appellant's counsel is not sufficient to vest an appellate court with jurisdiction.

In his response to the show cause order in which he asserted that the Court of Appeals had jurisdiction, Ruffin relied on *Dallmann, supra*. Ruffin argued that if an application to proceed in forma pauperis on appeal has been filed and granted by the trial court, an appellate court acquires jurisdiction when the notice of appeal is filed regardless of who signed the poverty affidavit. Ruffin also asserted that because he was incarcerated at the Nebraska State Penitentiary, a maximum security facility, it was impossible for him to meet with his attorney anywhere other than at the penitentiary, and therefore good cause existed to allow his attorney to sign the poverty affidavit.

The Court of Appeals rejected Ruffin's arguments and showing of cause and dismissed the appeal for lack of jurisdiction. We granted Ruffin's petition for further review and ordered the case submitted without oral argument.

ASSIGNMENT OF ERROR

Ruffin asserts that the Court of Appeals erred by dismissing his appeal for lack of jurisdiction.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent

conclusion irrespective of the decision of the court below. *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

ANALYSIS

Ruffin claims that the Court of Appeals erred when it concluded that it lacked jurisdiction and dismissed this appeal. As an initial matter, Ruffin notes that he was granted in forma pauperis status for purposes of appeal in the district court. He asserts that the Court of Appeals had jurisdiction under the reasoning in *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Ruffin maintains that an appellate court acquires jurisdiction regardless of the condition of the poverty affidavit when the notice of appeal is timely filed if the application to proceed in forma pauperis has been filed and granted by the trial court. Ruffin also asserts that good cause existed as to why his attorney should have been allowed to sign the poverty affidavit. Ruffin points to the fact that he was incarcerated at a maximum security facility and that it was therefore impossible for him to meet with his attorney anywhere other than at the penitentiary. We conclude that Ruffin misreads *Dallmann* and that under *Dallmann* and the controlling civil procedure statutes, and given the absence of good cause, the Court of Appeals did not err when it dismissed this appeal.

We take this opportunity to discuss the proper reading of *Dallmann*. In *Dallmann*, for reasons explained therein, we excused the failure of the poverty affidavit to include statements of the nature of the action, defense, or appeal, and the belief that the affiant is entitled to redress. *Dallmann* does not excuse a poverty affidavit which is untimely filed, not properly notarized, or signed by an attorney rather than a party.

[2] Neb. Rev. Stat. § 25-1912 (Reissue 2008), applicable to civil and criminal appeals, generally provides that an appeal may be taken by filing a notice of appeal and depositing the required docket fee with the clerk of the district court. We have noted that a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal and that an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and a proper affidavit of poverty. See *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d

638 (2006). See, generally, Neb. Rev. Stat. § 25-2301 et seq. (Reissue 2008).

[3] In *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990), we noted that the poverty affidavits filed in the appeals were not signed by the appellants but instead by their attorneys. In *In re Interest of T.W. et al.*, we stated that under § 25-2301 (Reissue 1989), "the impoverished appellant, not her or his attorney, [must] execute the affidavit which substitutes for the payment of fees and costs and the posting of security." 234 Neb. at 967, 453 N.W.2d at 437. We therefore stated that "an affidavit of poverty executed by a party's attorney does not suffice." *Id*. In *In re Interest of T.W. et al.*, for reasons in addition to the statutory requirement, we disapproved the practice of an attorney's signing the affidavit, stating:

> The practice of an attorney's filing an affidavit on behalf of his client asserting the status of that client is not approved, inasmuch as not only does the affidavit become hearsay, but it places that attorney in a position of a witness thus compromising his role as an advocate.

234 Neb. at 967-68, 453 N.W.2d at 437. We therefore stated in *In re Interest of T.W. et al.* that "generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis." 234 Neb. at 968, 453 N.W.2d at 437.

At the time *In re Interest of T.W. et al.* was decided, § 25-2301, upon which we relied, provided as follows:

> Any court of the State of Nebraska, except the Nebraska Workers' Compensation Court, or of any county shall authorize the commencement, prosecution, or defense of any suit, action, or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay such costs or give security. Such affidavit shall state the nature of the action, defense, or appeal and affiant's belief that he or she is entitled to redress. An appeal may not be taken in forma pauperis if the trial court certified in writing that it is not taken in good faith.

After an amendment in 1999, the relevant language was transferred to § 25-2301.01 and provides:

> Any county or state court, except the Nebraska Workers' Compensation Court, may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. An application to proceed in forma pauperis shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

In the earlier version of § 25-2301, applicable to civil and criminal appeals, the language relative to the requirement that the party execute the affidavit read that "a person . . . makes an affidavit that he or she is unable to pay such costs or give security." Section 25-2301.01, applicable to civil and criminal appeals, now requires the filing of "an affidavit stating that the affiant is unable to pay the fees and costs." It is obvious that it is the financial condition of the party as affiant and not the financial wherewithal of the attorney that is relevant. Because the current statute refers to "the affiant" making statements regarding his or her financial condition, it is clear that § 25-2301.01 still requires that the party, rather than the party's attorney, sign the affidavit.

Contrary to the foregoing statutory analysis, Ruffin argues that based on our decision in *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000), an appellate court acquires jurisdiction when the trial court has granted an application for in forma pauperis status on appeal, regardless of whether there is a deficiency in the poverty affidavit. Ruffin misreads *Dallmann*.

In *Dallmann*, the appellant signed an affidavit that included a statement that he was unable to pay the cost of the appeal but did not include other statements listed in § 25-2301.01, namely, a statement as to the nature of the action and a statement that he believed he was entitled to redress. The State challenged appellate jurisdiction on the basis that the poverty affidavit did not include the statutorily indicated statements. We rejected the State's challenge and held that

> if a request to proceed in forma pauperis is granted by the district court, this court obtains jurisdiction when the

> notice of appeal is timely filed, and any failure of the affidavit to state the nature of the action or that the affiant is entitled to redress under § 25-2301.01 will not divest this court of jurisdiction.

260 Neb. at 948, 621 N.W.2d at 97. Our decision in *Dallmann* referred to the in forma pauperis statutes applicable to civil and criminal cases. We noted in *Dallmann* that § 25-2301.02 provides that an application to proceed in forma pauperis shall be granted unless a timely objection regarding the merits of the claim of poverty or the merits of the case is made on the basis that the applicant either has sufficient funds to pay costs, fees, or security or is asserting legal positions which are frivolous or malicious. We stated that § 25-2301.02 "makes clear that challenges to the ability of a defendant to proceed in forma pauperis are to occur in the district court and that the district court is charged with the responsibility of granting or denying the motion to proceed in forma pauperis." *Dallmann*, 260 Neb. at 947, 621 N.W.2d at 96. We further stated:

> It is not a function of this court to determine whether an affidavit to proceed in forma pauperis contains specific language stating the nature of the case and that the affiant is entitled to redress. These determinations must be made by the district court. Thus, any objection that the poverty affidavit fails to state the nature of the action, defense, or appeal, and the belief that the affiant is entitled to redress, must also be raised in the district court.

Id. at 948, 621 N.W.2d at 96-97. For completeness, we now observe that § 25-2301.02 permits an appeal to be reviewed de novo on the record where a party objects to a ruling by the trial court denying in forma pauperis status.

A reading of the opinion in *Dallmann* shows that it was concerned with a poverty affidavit which failed to include statements of the nature of the action, defense, or appeal, and the belief that the affiant is entitled to redress. These purported failures raised for the first time on appeal were overlooked by this court for the reasons indicated in *Dallmann*. Ruffin attempts to expand the holding in *Dallmann* to forgive any deficiency in the poverty affidavit where the trial court has granted an application to proceed in forma pauperis. Ruffin's reading of *Dallmann* is too broad.

In that case, this court noted that we had "never addressed whether all the exact requirements of the [in forma pauperis statutes] had to be met in order to vest this court with jurisdiction over an appeal." *State v. Dallmann*, 260 Neb. 937, 946, 621 N.W.2d 86, 95 (2000). In *Dallmann*, we recognized that in prior cases, we had "dismissed for lack of jurisdiction when the appellant failed to properly sign the poverty affidavit under oath," and we did not disapprove of these cases. 260 Neb. at 946, 621 N.W.2d at 96. See, *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990); *State v. Hunter*, 234 Neb. 567, 451 N.W.2d 922 (1990); *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989). With this recognition in mind, and in view of the statutory role played by the trial court in assessing the merits of the claim of poverty upon an objection raised under § 25-2301.02, we circumscribed our holding in *Dallmann*. We limited the forgiveness in *Dallmann* to the failure to include in the poverty affidavit statements of the nature of the action, defense, or appeal, and the belief that the affiant is entitled to redress in those cases in which in forma pauperis status had been granted by the trial court without objection.

We note that *Dallmann* did not change other requirements related to the filing of poverty affidavits by persons seeking in forma pauperis status, such as the requirement that "a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit," see *In re Interest of K.D.B.*, 233 Neb. at 372, 445 N.W.2d at 622, and the requirement that in order to vest the appellate courts with jurisdiction, a poverty affidavit must be filed within the time that the docket fee would otherwise have been required to be deposited, see *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). An affidavit is a document with certain required characteristics, and we believe that the Legislature's use of the word "affidavit" in the in forma pauperis statutes was deliberate and that the "affidavit" in § 25-2301.01 continues to require the hallmarks of an affidavit such as the signature of the affiant and a certificate of an authorized officer. *Dallmann* is thus limited and does not change the requirement that the poverty affidavit must be

properly signed under oath by the party, rather than the party's attorney, in order to serve as a substitute for the payment of the docket fee and to vest an appellate court with jurisdiction. See *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003). Ruffin did not sign the poverty affidavit, and such failure is not excused under *Dallmann*.

Because *Dallmann* did not change the requirement that the appellant rather than the appellant's attorney must sign the poverty affidavit, we must consider whether good cause is evident in the record as to why Ruffin could not sign the affidavit and it was necessary that his attorney sign it. Ruffin cites no authority for his argument that his confinement to a maximum security prison was good cause for the poverty affidavit to be signed by his attorney. Our reasoning relative to good cause is reflected in *In re Interest of T.W. et al.*, in which we concluded therein that "[m]ere absence from the jurisdiction of the court from which the appeal is being taken, without more, does not show good cause for a party's failure to sign a poverty affidavit." 234 Neb. at 968, 453 N.W.2d at 438. We recognize that incarceration makes it inconvenient for Ruffin's attorney to obtain Ruffin's signature on the poverty affidavit, but we believe that such circumstance does not make it "an incredible, if not impossible, burden," as Ruffin asserts in his memorandum brief filed with this court. Good cause is not evident in the record, and we cannot agree with Ruffin that it was necessary that his poverty affidavit be signed by his attorney rather than by Ruffin himself. The Court of Appeals did not err when it determined that Ruffin failed to show good cause why his appeal should not be dismissed for lack of jurisdiction.

CONCLUSION

Notwithstanding the fact that the trial court granted in forma pauperis status for purposes of appeal, *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000), does not eliminate the requirement that the appellant, rather than the appellant's attorney, must sign the poverty affidavit filed in support of in forma pauperis status on appeal. In this case, Ruffin did not sign the affidavit and Ruffin did not show good cause evident in the record why it was necessary that the poverty affidavit

be signed by Ruffin's attorney. Jurisdiction did not vest in the appellate courts. Therefore, on further review, we affirm the order of the Court of Appeals which dismissed this appeal for lack of jurisdiction.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. THOMAS J. LINDMEIER, RESPONDENT.

788 N.W.2d 555

Filed September 17, 2010. No. S-09-1079.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

David J. Cullan for respondent.

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

PER CURIAM.

INTRODUCTION

Respondent, Thomas J. Lindmeier, was admitted to the practice of law in the State of Nebraska on July 2, 1976. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On October 30, 2009, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of two counts against respondent. In the first count, it was alleged that by his conduct in July and August 2008 with respect to a client matter, respondent violated his oath of office as an attorney and various provisions of the Nebraska Rules of Professional Conduct. In the second count, it was alleged that by his conduct in August and September 2008 with respect to a different client matter, respondent violated his oath of office as an attorney and two provisions of the Nebraska Rules of

Professional Conduct. Respondent filed an answer in which he admitted some and denied other allegations included in the formal charges.

This court appointed a referee, who conducted an evidentiary hearing and issued a report including findings of fact, conclusions of law, and a recommended sanction. On count I, the referee found by clear and convincing evidence that respondent had violated his oath of office and Neb. Ct. R. of Prof. Cond. §§ 3-501.5(e)(2) (fees), 3-501.15(c) (safekeeping property), and 3-508.4(a) (misconduct). The referee further determined that the evidence did not establish a violation of § 3-501.4(b) (communications), as alleged in the formal charges. On count II, the referee found by clear and convincing evidence that respondent had violated his oath of office and §§ 3-501.15(a), (b), and (c) (safekeeping property) and 3-508.4(a) (misconduct). As a sanction for these violations, the referee recommended that respondent's license to practice law should be suspended for a period of 6 months and that, upon reinstatement, he should be on probation for a period of 2 years during which time he must retain, at his expense, an accountant to audit his trust account every 6 months, for a period of 2 years, and submit the results of those audits to the Counsel for Discipline.

Respondent filed exceptions to the referee's report in which he requested that the report of the referee be amended to provide for a suspension of no more than 3 months, together with the other terms and conditions recommended by the referee. Before the matter was argued and submitted, respondent filed a conditional admission under Neb. Ct. R. § 3-313 in which he stated that he knowingly did not challenge or contest the facts as found by the referee and waived all proceedings against him in connection therewith in exchange for a judgment of discipline identical to that recommended by the referee. The proposed conditional admission included a declaration by the Counsel for Discipline stating that the sanction recommended by the referee was appropriate and requesting this court to enter an order of suspension and probation as recommended by the referee and requested by the respondent. Upon due consideration, the court approves the conditional admission.

FACTS

COUNT I

The referee found that the following facts pertaining to count I of the formal charges were established by clear and convincing evidence: In July and August 2008, respondent had a personal checking account and a client trust account at an Omaha bank, but he had no separate business checking account. Respondent was the only person authorized to write checks and make withdrawals from his trust account. He wrote checks for personal expenses on both the trust account and the personal checking account, and he occasionally deposited his own funds in the trust account to prevent an overdraft.

In July 2008, respondent was contacted by a couple regarding possible representation of their son in a criminal matter. Respondent testified that he told the couple that he would do some initial research, but because he was inexperienced in criminal law, he would refer the case to an experienced criminal defense attorney and would work with that attorney on the case. Respondent initially requested a $10,000 fee to represent the couple's son, but accepted $4,000 on July 28 when the couple signed a fee agreement. The agreement did not mention the retention of cocounsel or address the division of the $4,000 advanced fee between respondent and the other attorney.

On the same day the $4,000 advanced fee was received, respondent deposited $2,000 of the advanced fee into his personal account and the remaining $2,000 into his trust account. This resulted in a trust account balance of $2,312.83 at the end of that day. On July 29, 2008, respondent withdrew $802.98 from his trust account, leaving a balance of only $1,509.85. And on August 3, respondent gave the attorney with whom he said he would work on the criminal matter a $2,000 check drawn on the trust account. At the time he received this check, the attorney had not yet earned a fee in that amount.

Respondent testified that he deposited $2,000 of the advanced fee into his personal account because he had already earned at least $2,000 at the time he received the check. But this testimony was refuted by respondent's own billing statement dated August 4, 2008. The billing statement did not reflect the $2,000

payment to the other attorney and indicated that $986.60 of the advanced fee remained in the trust account. On the date of the statement, however, only $331.97 remained in respondent's trust account.

The referee found that (1) respondent did not obtain the clients' written consent to the fee-division agreement with the other attorney; (2) respondent failed to deposit the entire $4,000 advanced fee into the client trust account and withdraw funds only as fees were earned; and (3) respondent paid the other attorney $2,000 before he had earned that amount in fees. From these facts, the referee concluded that respondent violated §§ 3-501.5(e)(2), 3-501.15(c), and 3-508.4(a) and (c). The referee found that the evidence did not establish a violation of § 3-501.4(b), as alleged in count I of the formal charges, because respondent sufficiently explained to his clients his lack of experience in criminal law and the role the other attorney would play in the criminal case.

Count II

In 2007 and 2008, respondent was separately retained by a husband and wife to represent them with respect to personal injury and property damage claims arising from a motor vehicle accident. Both clients signed fee agreements stating that respondent would receive a 33⅓-percent contingency fee on all moneys received from settlement before filing suit. Respondent negotiated a settlement of the wife's claim for $1,222. Of this amount, a $158 subrogation claim was paid directly by the settling party, and the remaining $1,064 was paid by a check dated August 7, 2008, payable to respondent and his client. Pursuant to the fee agreement, respondent was entitled to $407.33 of this amount and his client was entitled to the remaining $656.67.

At various times during August and September 2008, respondent's trust account balance fell below the amount due his client from the settlement. During this same period, respondent deposited personal funds in his trust account and paid personal expenses from that account. From these facts, the referee concluded that respondent violated §§ 3-501.15(a), (b), and (c), and 3-508.4(a).

ANALYSIS

Section 3-313, which is a component of our rules governing attorney disciplinary proceedings, 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 findings of the referee with respect to the formal charges, which we now deem to be established facts. We further determine that by his conduct with respect to count I of the formal charges, respondent violated §§ 3-501.5(e)(2), 3-501.15(c), and 3-508.4(a) and (c), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Further, we determine that by his conduct with respect to count II of the formal charges, respondent violated §§ 3-501.15(a), (b), and (c) and 3-508.4(a), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith, and upon due consideration, the court approves the conditional admission.

CONCLUSION

Respondent is suspended from the practice of law for a period of 6 months, effective 30 days after the filing of

this opinion. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent 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. 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.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. W. CRAIG HOWELL, RESPONDENT.

788 N.W.2d 559

Filed September 17, 2010. No. S-10-627.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, W. Craig Howell. The court accepts respondent's surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska.

Respondent is currently under investigation by the office of the Counsel for Discipline of the Nebraska Supreme Court

based on a grievance filed by respondent's former law partner. In the grievance, the former partner alleged that respondent mishandled the partnership's finances in a variety of ways, including mishandling funds held in the partnership's trust account. Respondent's former partner also alleged that respondent took steps to cover up any wrongdoing with respect to the alleged mishandling of the law partnership's trust account.

On June 25, 2010, the Counsel for Discipline filed with this court a motion to accept respondent's voluntary surrender. Attached to the motion is a notarized document signed by respondent surrendering his license to practice law in the State of Nebraska. Also attached to the motion is the grievance filed by respondent's former law partner. In respondent's document, respondent does not challenge or contest the truth of the allegations made against him. In addition to surrendering his license, respondent consents to the entry of an order of disbarment and waives his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he knowingly does not challenge or contest the truth of the allegations against him that he mishandled funds held in his law firm's trust account and that he took steps to conceal his actions. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGEMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
DARREN J . DRAHOTA, APPELLANT.
788 N.W.2d 796

Filed September 24, 2010. No. S-08-628.

1. **Constitutional Law: Criminal Law.** Whether speech that leads to a criminal conviction is protected by the First Amendment is a question of law.
2. ____: ____. The First Amendment limits a state's ability to prosecute certain criminal offenses.
3. **Constitutional Law.** The First Amendment protects wide swaths of speech, but its protections are not absolute.
4. **Constitutional Law: Libel and Slander: Obscenity: Criminal Law.** The First Amendment does not apply to libel, obscenity, incitements to imminent lawlessness, true threats, and fighting words.
5. **Constitutional Law: Disturbing the Peace.** A state may constitutionally regulate epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.
6. ____: ____. To fall within the First Amendment exception for fighting words, speech must be shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

7. **Constitutional Law.** Words must do more than offend, cause indignation, or anger the addressee to lose the protection of the First Amendment.
8. **Constitutional Law: Criminal Law: Statutes.** The State cannot constitutionally criminalize speech under Neb. Rev. Stat. § 28-1322 (Reissue 2008) solely because it inflicts emotional injury, annoys, offends, or angers another person.
9. **Constitutional Law.** In determining whether "fighting words" are unprotected speech under the First Amendment, it is the tendency or likelihood of the words to provoke violent reaction that is the touchstone of the test under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), and both the content and the context of the speech are relevant considerations to that determination.
10. **Constitutional Law: Disturbing the Peace.** Even when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of the peace, they are protected by the First Amendment.
11. **Constitutional Law.** The First Amendment affords the broadest protection to political expression in order to assure the unfettered interchange of ideas for bringing about political and social changes desired by the people.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Eugene Volokh, of Mayer Brown, L.L.P., and Gene Summerlin, of Ogborn, Summerlin & Ogborn, P.C., for appellant.

Darren J. Drahota, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

G. Michael Fenner and Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Bruce Adelstein, of Law Office of Bruce Adelstein, for amici curiae current and former elected officials.

William Creeley and Azhar Majeed for amicus curiae Foundation for Individual Rights in Education.

David G. Post, of Beasley School of Law, Temple University, for amici curiae law professors.

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

CONNOLLY, J.

SUMMARY

The State convicted the appellant, Darren J. Drahota, of a breach of the peace based on two e-mails he sent to William Avery, his former political science professor and a candidate for the State Legislature. The e-mails—laced with provocative and insulting rhetoric and with the Iraq war as a background—suggested that Avery was a traitor and that he sympathized with Al Qaeda, a terrorist organization.

We are asked to decide whether Drahota's e-mails were protected speech under the First Amendment. The Court of Appeals determined that the First Amendment did not protect Drahota's speech because the e-mails were "fighting words," an exception to free speech protection.[1] We disagree. Drahota's rants, although provocative and insulting, were not fighting words. We reverse, and remand because the First Amendment protects Drahota's speech.

BACKGROUND

In January 2006, Drahota began an e-mail correspondence with Avery, who was then a political science professor at the University of Nebraska. Drahota sent the e-mails to Avery's university-issued e-mail account. Although the correspondence between the two consisted of 20 e-mails, we emphasize that the State convicted Drahota only on the last two e-mails. But we discuss the previous e-mails to put the last two in context.

It is clear from the record that Drahota and Avery shared a passion for politics. At the time, Avery was running for the Nebraska Legislature, and he is now a member of that body. The first 18 e-mails between the two dealt with current issues in politics, including the war on terrorism, the Bush presidency, and the Clinton impeachment. Drahota's tone was provocative and confrontational. For example, Drahota asserted, among other things, that those who support liberal causes

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[1] *State v. Drahota*, 17 Neb. App. 678, 772 N.W.2d 96 (2009).

have a mental disease and that liberals desire the destruction of America.

In early February 2006, the exchange came to a head. Drahota sent Avery a lengthy e-mail suggesting that indiscriminately massacring those living in the Middle East would save American lives after first suggesting that Democrats, including Avery, were full of hate. Avery responded:

> I am tired of this shit. You have accused me of being anti-American, unpatriotic, and having a mental disorder, among other things. I find this offensive and I will not engage in anymore of this with you. I served my country in uniform honorably for four years. How many have you served? Since you are so pure, so pro-American, so absolutely correct, and wonderfully patriotic, I suggest you sign-up for duty in Iraq right away and put all your claims to the test. But, of course, you will not do that. You, Michael Savage, and the "Chicken Hawks" in the Bush Administration don't have the guts!!

Drahota responded:

> Fuck you! You don't know me one bit. You are a liberal American coward. If it were up to you, you would imprison Bush before bin Laden because you have such a fascination with it. I am tired of your brainwashing students who are in the process of molding their minds. I spent 18 months in Pensacola Florida before I was honorably discharged for a neck injury. You can go fuck yourself if you are going to get that way. I'd kick your ass had you said that right in front of me, but YOU don't have the guts to say that. If you think you do, just try me. You have done nothing for this country, but bad things in recent years. Once again, if you have the courage to say that to my face, I'll let you do it, but don't you EVER talk anything about the military with me. We call you people turncoats and I'll be dammed if I'm going to take that kind of disrespect from someone who is so clueless as to my military background. As long as we're on the topic, how many years did your hero Clinton serve? You contradict yourself so much that I want to puke. Your website is

> also a farce. You lie so much and don't show the true you. I guess, you're a politician.
>
> You've really pissed me off[.]

Drahota later sent Avery an apology. Avery, unmoved by the apology, asked Drahota not to contact him again. He warned Drahota that he would contact the police if he received anything else of that nature.

Four months later, in June 2006, Avery received two anonymous e-mails from the address "averylovesalqueda@yahoo.com." The State convicted Drahota based on these e-mails. The subject line of the first e-mail was "Al-Zarqawi's dead. . . ." The e-mail read:

> Does that make you sad that the al-queda leader in Iraq will not be around to behead people and undermine our efforts in Iraq? I would guess that a joyous day for you would be Iran getting nukes? You, Michael Moore, Ted Kennedy, John Murtha, and the ACLU should have a token funeral to say goodbye to a dear friend of your anti-american sentiments.

Two days later, Avery received a second e-mail from the same address. The subject line was "traitor." It read:

> I have a friend in Iraq that I told all about you and he referred to you as a Benedict Arnold. I told him that fit you very well. GO ACLU!!!!!!!!!!!!!!! GO MICHAEL MOORE, GO JOHN MURTHA!!!!!!!!!!!! By the way, I am assuming you are a big fan of Murtha's, and anti-marine like him, but being a big liberal, don't you support those Marines that are being jailed without charges at Camp Pendleton. Oh, I forgot, they are not Al Queda members so you and the ACLU will not rush to their defense. I'd like to puke all over you. People like you should be forced out of this country. Hey, I have a great idea!!!!!!!!!!!!!!!!!! Let's do nothing to Iran, let them get nukes, and then let them bomb U.S. cities and after that, we will just keep turning the other cheek. Remember that Libs like yourself are the lowest form of life on this planet[.]

After receiving these e-mails, Avery contacted the Lincoln Police Department. The police traced the e-mails to a computer owned by a woman with whom Drahota was living. When contacted by the police, Drahota admitted sending the e-mails.

The State charged Drahota in Lancaster County Court with disturbing the peace.[2] After a bench trial, the court found him guilty and fined him $250. After an unsuccessful appeal to the district court, Drahota appealed to the Court of Appeals.

In rejecting Drahota's First Amendment challenge and affirming his conviction, the Court of Appeals determined that Drahota's speech constituted unprotected "fighting words." We granted Drahota's petition for further review.

ASSIGNMENTS OF ERROR

Drahota asserts that the Court of Appeals erred in finding (1) that his e-mails constituted a breach of the peace and (2) that they were not protected by the First Amendment.

STANDARD OF REVIEW

[1] Whether speech that leads to a criminal conviction is protected by the First Amendment is a question of law.[3]

ANALYSIS

[2] Drahota argues that the First Amendment protects his e-mails. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."[4] The First Amendment limits the state's ability to prosecute certain criminal offenses.[5]

[3,4] The First Amendment protects wide swaths of speech, but its protections are not absolute.[6] Historically, the Supreme

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[2] Neb. Rev. Stat. § 28-1322 (Reissue 2008).

[3] See *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997).

[4] U.S. Const. amend. I.

[5] See, e.g., *U.S. v. Popa*, 187 F.3d 672 (D.C. Cir. 1999); *Tollett v. United States*, 485 F.2d 1087 (8th Cir. 1973); *McKee, supra* note 3; *State v. Suhn*, 759 N.W.2d 546 (S.D. 2008); *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989).

[6] *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Court has held that the First Amendment does not to apply to certain categories of speech. These categorical exceptions include libel,[7] obscenity,[8] incitements to imminent lawlessness,[9] true threats,[10] and fighting words.[11] As noted, the Court of Appeals determined that the First Amendment did not protect Drahota's speech because it fell within the exception for fighting words.

Offensive Speech Does Not Lose Its Constitutional Protection

In concluding that Drahota's speech constituted fighting words, the Court of Appeals relied on our decision in *State v. Broadstone*.[12] In *Broadstone*, we affirmed the defendant's breach of the peace conviction under the fighting words exception to First Amendment protection. We quoted the U.S. Supreme Court's decision in *Chaplinsky v. New Hampshire*[13] to explain that fighting words are unprotected speech:

> "'[F]ighting' words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the

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[7] *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[8] *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

[9] *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

[10] *Black, supra* note 6; *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

[11] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942).

[12] *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989).

[13] *Chaplinsky, supra* note 11.

> Constitution, and its punishment as a criminal act would raise no question under that instrument.'. . ."[14]

Within this quote from *Chaplinsky*, there are two descriptions of fighting words. The first refers to words whose "'very utterance inflict[s] injury.'" The other refers to words which "'tend to incite an immediate breach of the peace.'"

[5] But in *Chaplinsky*, the state court had construed the statute—which prohibited speaking offensive words to a person in a public place—to apply only to speech likely to provoke retaliation. So although the Supreme Court defined fighting words in the alternative, it only upheld the statute's constitutionality as limited by the state court.[15] Specifically, the Court held that a state may constitutionally regulate epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.[16]

We recognize that some of our statements in *Broadstone* could be read to permit a broader application of the fighting words exception. But we decline to interpret our holding broadly because the Supreme Court has largely abandoned *Chaplinsky*'s "inflict injury" standard.

The Seventh Circuit has recently summarized the case law and legal commentary on this issue:

> In later cases, the Court has either dropped the "inflict-injury" alternative altogether or simply recited the full *Chaplinsky* definition without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace. . . .
>
> Although the "inflict-injury" alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace. . . . The justification for "plac[ing] fighting

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[14] *Broadstone, supra* note 12, 233 Neb. at 600, 447 N.W.2d at 34.

[15] See *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008).

[16] *Chaplinsky, supra* note 11.

> words outside the protection of the First Amendment" is not their capacity to inflict emotional injury—many words do that—but their tendency "to provoke a violent reaction and hence a breach of the peace."[17]

[6] In fact, it was only 7 years after *Chaplinsky* that the Court began to retreat from the "inflict injury" part of the definition. In *Terminiello v. Chicago*,[18] the Court stated that a conviction could not rest on the grounds that the speech merely "stirred people to anger, invited public dispute, or brought about a condition of unrest." To fall within the First Amendment exception for fighting words, speech must be "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[19]

[7] Similarly, in *Gooding v. Wilson*,[20] the Court held that a breach of the peace statute was overbroad because it was not limited to fighting words. The Court reasoned that because the statute could be applied "to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that [the statute is not limited] to 'fighting' words defined by *Chaplinsky*."[21] In effect, the *Gooding* Court read the "inflict injury" prong out of the definition. Lower courts have followed the Supreme Court's lead.[22] "It is now clear that words must do more than offend, cause indignation or anger the addressee to lose the protection of the First Amendment."[23]

[8] We agree. We hold that the State cannot constitutionally criminalize speech under § 28-1322 solely because it inflicts

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[17] *Purtell, supra* note 15, 527 F.3d at 623-24.

[18] *Terminiello v. Chicago*, 337 U.S. 1, 5, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

[19] *Id.*, 337 U.S. at 4.

[20] *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

[21] *Id.*, 405 U.S. at 528.

[22] See, e.g., *Purtell, supra* note 15. See, also, *Brooks v. N.C. Dept. of Correction*, 984 F. Supp. 940 (E.D.N.C. 1997).

[23] *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir. 1976).

emotional injury, annoys, offends, or angers another person. Accordingly, we cannot affirm Drahota's conviction merely because Avery found it offensive.

Drahota's Speech Was Not Likely to Provoke an Immediate Breach of the Peace

The U.S. Supreme Court in *Chaplinsky* held that a state could regulate speech that tends to incite an immediate breach of the peace. Although the Supreme Court has not upheld such a conviction since *Chaplinsky*,[24] other courts, including this court, have done so.[25] In upholding such convictions, we have stressed that the right to use abusive epithets of "'slight social value'" is outweighed by the State's strong "'interest in order.'"[26]

[9] Indeed, "[i]t is the *tendency* or *likelihood* of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test . . . ."[27] And both the content and the context of the speech are relevant considerations to that determination.[28]

As noted, we upheld a disturbing the peace conviction in *Broadstone*. But we do not believe the facts in *Broadstone* support the Court of Appeals' conclusion that Drahota's speech constituted fighting words. In *Broadstone*, the defendant was standing outside an elementary school, shouting obscenities in the presence of children who were leaving school. A man waiting for his daughter crossed the street and asked him what he was doing. The defendant replied that it was none of his

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[24] Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 Harv. L. Rev. 1129 (1993).

[25] E.g., *Broadstone, supra* note 12; *State v. Robinson*, 319 Mont. 82, 82 P.3d 27 (2003); *State v. Szymkiewicz*, 237 Conn. 613, 678 A.2d 473 (1996); *In re Alejandro G.*, 37 Cal. App. 4th 44, 43 Cal. Rptr. 2d 471 (1995); *State v. Creasy*, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

[26] *Broadstone, supra* note 12, 233 Neb. at 600, 447 N.W.2d at 34, quoting *Chaplinsky, supra* note 11.

[27] *Lamar v. Banks*, 684 F.2d 714, 718 (11th Cir. 1982).

[28] See, *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978); *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973).

"'fucking business'"[29] and then began shaking a stick in the man's direction. The defendant continued to yell obscenities. The man then pushed the defendant against a fence and apparently held him there. After he was released, the defendant ran away, yelling back to the man, "'Your wife is a whore. Your daughter is a whore. Your whole family's a whore. I fucked her last night.'"[30] We upheld the defendant's conviction. We determined that it fell within the definition of fighting words in *Chaplinsky*. We did not parse the definition to determine whether the defendant's words were fighting words because they inflicted injury or because they were likely to incite an immediate breach of the peace. But the facts showed that the defendant's words were not only the type likely to provoke an immediate retaliation, but in fact did so.

We conclude that Drahota's e-mails are not fighting words and are distinguishable from *Broadstone*. The context of Drahota's speech was an ongoing political debate, not random obscenities directed at small children, which could likely provoke a response from nearby adults. Here, Drahota and Avery had corresponded for months on political issues. And both had made provocative statements during that dialog without incident. The First Amendment encourages robust political debate, particularly the right to criticize public officials and measures:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." . . . We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[31]

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[29] *Broadstone, supra* note 12, 233 Neb. at 598, 447 N.W.2d at 32.

[30] *Id.* at 598, 447 N.W.2d at 33.

[31] *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988) (citation omitted).

[10] By the time Drahota sent the e-mails at issue, Avery was running for office. And we have stated that "[t]he steadfast rule is that '"in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."'"[32] So even when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of the peace, they are protected by the First Amendment. To hold otherwise would obstruct the free exchange of ideas.

Yet, we do not hold that political speech can never constitute fighting words. It is not difficult to imagine insults virulent enough to provoke a breach of the peace in a political debate. But here, even if a fact finder could conclude that in a face-to-face confrontation, Drahota's speech would have provoked an immediate retaliation, Avery could not have immediately retaliated. Avery did not know who sent the e-mails, let alone where to find the author. We conclude that the State has failed to show that Drahota's political speech constituted fighting words.

The State's Other Arguments

At oral argument, the State put forward two other arguments for affirming the conviction. First, it argues that under the U.S. Supreme Court's decision *Rowan v. Post Office Dept.*,[33] Avery had a right to be let alone after he asked Drahota to stop e-mailing him. Second, it argues that Drahota was being prosecuted not on the content of his speech, but instead for the conduct of speaking at all.

We note that because the State omitted these arguments from its briefs and raised them for the first time at oral argument, we are under no duty to consider them.[34] But the district court's

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[32] *McKee, supra* note 3, 253 Neb. at 106, 568 N.W.2d at 564, quoting *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994).

[33] *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

[34] See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

order could be read as applying this reasoning, so we address them. We do not, however, view these arguments as substantively different. Both arguments depend upon the State's claim that after Avery had asked Drahota to quit sending further e-mails, Drahota's act of sending the e-mails—regardless of the content—constituted a breach of the peace.

The State relies on *Rowan v. Post Office Dept.*[35] *Rowan* involved a federal statute that allowed a homeowner to request that a vendor remove his name from the mailing list and stop all future mailings if the homeowner found the mailings erotically arousing or sexually provocative. After weighing a person's "right . . . 'to be let alone' [against] the right of others to communicate,"[36] the Court ruled that a vendor has no right to send unwanted material to the home of another.[37] Crucial to the Court's holding was the absoluteness and finality of the homeowner's decision; the government had no role in determining whether the materials were objectionable.

We find *Rowan* distinguishable. First, we note the absence of a statute like the one in *Rowan*. The statute in *Rowan* gave the homeowner absolute and final discretion over what was objectionable. Under the statute, the government merely enforced the homeowner's preference and had no part in deciding what was objectionable. In the present case, the discretion is left to the prosecutor whether to charge Drahota with breach of the peace. This element of government action undermines the State's *Rowan*-based argument.

[11] Because the State is an actor here, our concern is not focused on balancing Avery's right to be let alone against Drahota's right to communicate. But even if it were, the scales would tip in Drahota's favor. First, *Rowan* dealt with commercial speech aimed at private citizens. In contrast, this case deals with political speech directed at a candidate for public office. Second, the discussion of political issues is not the equivalent of mass advertisements in balancing free speech against

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[35] *Rowan, supra* note 33.

[36] *Id.*, 397 U.S. at 736.

[37] *Rowan, supra* note 33.

privacy. "'The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . .'"[38] The ability of a constituent to voice his concerns and opinions to his elected representatives, and to those who wish to become his representatives, is the cornerstone of republican government. We reject the State's contention that Drahota's mere sending of an e-mail constituted a breach of the peace because Avery had previously asked Drahota not to communicate again.

But that does not mean a person's right to speak will always trump another's right to be let alone. While Avery, as a political candidate, had diminished privacy rights trumped by a potential constituent's First Amendment rights, we recognize that balancing free speech rights against the privacy rights of a private citizen may yield a different result.

Obviously, Drahota is not a wordsmith, and his bumper sticker rhetoric was certainly provocative. But it did not rise to the level of fighting words under these facts. If the First Amendment protects anything, it protects political speech and the right to disagree.

Here, Drahota and Avery had an ongoing, bareknuckle political dialog that germinated in a political science course at the University of Nebraska. Avery, to his credit, permitted the university forum to be a marketplace for the free flow of ideas. But Drahota stopped their dialog upon Avery's request and did not e-mail Avery again until Avery was running for political office.

In closing, the hallmark of free speech protection is to allow the "'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[39] To criminalize Drahota's speech would impede the free flow

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[38] *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 743, 605 N.W.2d 440, 444 (2000), quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

[39] *Black, supra* note 6, 538 U.S. at 358, quoting *Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

of those ideas and political discussion between the people and their representatives. This we refuse to do.

CONCLUSION

We conclude that the State cannot criminalize speech under the fighting words exception solely because it inflicts emotional injury, annoys, offends, or angers another person. And we reject the State's argument that the First Amendment does not protect Drahota's speech because it constituted an invasion of Avery's privacy. The State does not contend that any other exception applies. Because no exception applies, the First Amendment protects Drahota's speech. We reverse his conviction and remand the cause to the Court of Appeals with directions to the district court for further remand to the county court for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V.
LUCAS J. PETERSON, APPELLEE.
788 N.W.2d 560

Filed September 24, 2010. No. S-09-462.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Criminal Law: Contracts.** A cooperation agreement is neither a plea agreement nor a grant of immunity but arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation.
3. ____: ____. Cooperation agreements are contractual in nature and subject to contract law standards.
4. **Criminal Law: Contracts: Due Process.** The basis for enforcing a cooperation agreement is the Due Process Clause of the 14th Amendment.
5. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Criminal Law: Contracts.** The language in a cooperation agreement is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.
7. **Criminal Law: Contracts: Proof.** Once a cooperation agreement is shown to exist, the State has the burden to show that the defendant did not perform his or her part of the agreement.

8. ____: ____: ____. The government bears the burden of proving that a defendant failed to comply with a cooperation agreement.
9. **Criminal Law: Contracts: Immunity: Due Process: Proof.** An immunity agreement invokes the same constitutional due process concerns as a plea agreement, and therefore, the breach of such an agreement must be proved by a preponderance of the evidence.
10. **Criminal Law: Contracts: Appeal and Error.** The district court's findings of fact regarding whether a defendant complied with a cooperation agreement and whether the defendant detrimentally relied upon that agreement should be upheld unless the findings are clearly erroneous.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Reversed and remanded for further proceedings.

Jon Bruning, Attorney General, and James D. Smith for appellant.

James R. Mowbray, Jeffery A. Pickens, and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Lucas J. Peterson was charged with intentional child abuse resulting in the death of a child, in violation of Neb. Rev. Stat. § 28-707(6) (Reissue 2008), a Class IB felony, and unlawful burial, in violation of Neb. Rev. Stat. § 28-1301 (Cum. Supp. 2006), a Class IV felony. The Seward County District Court determined that Peterson had performed his understanding of his part of a cooperation agreement with the State. The court ordered the State to honor the cooperation agreement by amending the information to charge Peterson only with concealing the death of another person, in violation of Neb. Rev. Stat. § 28-1302 (Reissue 2008), a Class I misdemeanor. The State refused, and the court dismissed the case against Peterson without prejudice. The State appeals.

SCOPE OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent

conclusion irrespective of the decision of the court below. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

FACTS

Disappearance of Child

Trista M. Peterson (Trista) was born on January 28, 2006, to Jennifer Williams and Peterson. Although Williams and Trista lived separately from Peterson for some time, the family later moved in together, first with a relative and then in their own apartment. When Williams began serving a 1-year sentence in the Nebraska Correctional Center for Women in December, Trista was left in Peterson's care.

On January 24, 2007, Peterson's mother filed a missing persons report with the Seward County sheriff's office. Neither Peterson's mother nor Williams' parents had seen Peterson or Trista for a few weeks. When contacted in prison, Williams said she had not heard from Peterson. Williams' mother reported on January 26 that Peterson had left a message stating that he and Trista were at a friend's house in Omaha.

Peterson's Arrest and Statements—March 25 Through 31, 2007

Seward police received a report on March 25, 2007, that someone had broken into a towing business' premises and driven a vehicle out through the gate. The missing vehicle had been towed to the lot on January 19 after the driver fled the scene of a traffic stop. At that time, the driver was identified as Peterson, but police were unable to locate him. On March 28, police located Peterson, and he was arrested.

On the day of the arrest, Seward County Deputy Sheriff Christina Matulka, who had taken the missing persons report, contacted Peterson to ask about Trista. Peterson initially refused to tell Matulka where Trista was, but then he stated that Trista was safe and with a good family that had four other children. Peterson's mother also talked to him, but he refused to give her any information about Trista. Matulka told Peterson he could face legal charges of child abandonment or neglect if he had abandoned Trista. He still refused to provide any information about Trista's whereabouts.

On March 29, 2007, Peterson made his first appearance in court on charges of obstructing a police officer, possession of marijuana and drug paraphernalia, and child abandonment and abuse. Counsel was appointed to represent him. Based on an affidavit prepared by Matulka, the court found probable cause to charge Peterson with child abuse and child abandonment of Trista. Bond was set at $50,000. A condition of the bond was that Peterson disclose Trista's location and give physical custody of her to local authorities.

The next day, a Seward County corrections officer made a routine check on Peterson. She knew there was concern about Trista's whereabouts and asked Peterson if he had reported Trista's location to Williams. Peterson said that he would tell Williams when she was released from prison in June 2007. The corrections officer became frustrated with Peterson and continued asking about Trista. Peterson then stated that he owed money for drugs and that some men came to his house, beat him, and kidnapped Trista. The corrections officer convinced Peterson to talk to a deputy sheriff.

At the corrections officer's request, Daniel Hejl, chief deputy sheriff of Seward County, interviewed Peterson and advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Peterson stated that he owed money for drugs to a black man named "Junior" and that Junior had kidnapped Trista. Junior was reportedly from Lincoln and drove a black vehicle. Hejl and Scott Walton, another deputy sheriff, returned to talk to Peterson about 2 hours later, and Peterson provided additional details about Junior and the vehicle. The next day, Peterson was shown a photographic array of six black males, and he identified one of the photographs as being of Junior.

Investigation—April 2 Through 11, 2007

On April 2, 2007, Walton again met with Peterson, who continued to state that Junior had kidnapped Trista. The following day, Seward County Attorney Wendy Elston questioned Peterson about Trista's disappearance. During the interview, Elston asked Peterson whether Trista deserved a proper funeral if she was dead.

Sheriff Joseph Yocum visited Peterson on April 4, 2007. During their conversation, Peterson said he hoped law enforcement officials were doing everything they could to find Trista. Deputy Sheriff Michael Vance also interviewed Peterson and tried to build rapport with him to obtain additional information about Junior. Peterson admitted that he had told some lies because he was scared. Peterson said he "let someone take" Trista.

On April 10, 2007, Elston, Hejl, and other officers met to discuss the investigation into Trista's disappearance. By the conclusion of the meeting, it was the consensus that Peterson was lying about Trista's whereabouts. It was decided to ask Peterson to submit to a polygraph examination. The following day, when Walton asked Peterson to take the examination, Peterson said he was "done talking to" law enforcement officers. Peterson stated that he had told the officers everything he had to say and that he was not going to help anymore. Walton testified that Peterson "flat out stated he was done talking."

April 12, 2007, Interview

On April 12, 2007, Hejl told Elston that he and Vance were going to interview Peterson again. They agreed that the most important issue was to find Trista. Hejl testified that Elston gave the officers permission to offer Peterson a "deal" in order for him to divulge Trista's location.

When Hejl and Vance interviewed Peterson, he was not advised of his *Miranda* rights and counsel was not present. The transcription of the interview includes the following:

> [Vance]: [Hejl] has talked to [Elston], if you'll help us find this baby, find Trist[a], it's marked in the book that we'll just charge you with a first degree misdemeanor.
>
> [Hejl]: [Elston] said as long as it was accidental. And I'm not saying you're responsible. As long as it was accidental, she's willing to take, she's willing to do away with felony charges, that includes the current ones too.
>
> [Vance]: All of them.
>
> [Peterson]: I ain[']t worried about it. I know that I told you all everything.

> [Vance]: We know you haven't, [Peterson], that's [t]he hard part.
>
> . . . .
>
> [Vance]: Like I said, you may not be afraid to go to prison but I know you don't want to. Nobody want[s] to go to prison. [Hejl] is offering you a way to make it all go away. And I don't know how much time you got you probably have to serve six months on, on like a misdemeanor. At least all of your felonies would disappear.
>
> [Hejl]: You don't have any felony convictions yet. . . .
>
> [Peterson]: . . . and I ain't gonna.
>
> [Hejl]: Life with a felony is a tough life, it's hard to get a decent job.
>
> [Peterson]: I know.
>
> . . . .
>
> [Vance]: [Hejl] went to bat for you today. He got a deal that I never thought was possible.
>
> [Hejl]: [Elston] gets paid, the County Attorney gets paid to make sure that people are brought to justice and it was kind of a hard sell. She says if [Peterson is] responsible he has to pay for it[,] will have to own up to what he did[,] and I said [yeah] but accidents happen. So she had me pull up that statute right there just to make sure it was a misdemeanor. Misdemeanor doesn't [expletive] you out of jobs.

The interview continued for another 20 or 30 minutes, but the remainder was not recorded because neither of the officers noticed that the tape had run out. After the tape ran out, Peterson agreed to take them to where he had buried Trista. The conversation in the vehicle on the way to the location was not recorded. Hejl testified that Peterson directed Hejl to drive north into Butler County to find an area he described as a farmstead.

Peterson eventually recognized the area and directed Hejl to stop the vehicle near a shelterbelt. He told the officers they would need a shovel and led them into the shelterbelt, where he pointed to a particular location and said, "'She's buried right there.'"

Hejl contacted Yocum and Elston, and Yocum notified the Nebraska State Patrol's major crime unit. The unit brought its van to the scene, and Trista's body was found in the spot Peterson had indicated. The officers returned Peterson to the county jail.

Legal Proceedings

On May 11, 2007, Peterson was charged by information with intentional child abuse resulting in the death of a child, a Class IB felony, and unlawful burial, a Class IV felony. An autopsy of Trista indicated that the cause of death was severe multiple blunt force trauma to the head, neck, and trunk. The injuries included two recent skull fractures on the right side and three fractures on the left side of the occipital bone, which were contemporaneous with marked swelling of the brain from a subarachnoid hemorrhage around the time of death. The multiple injuries to Trista's chest and abdomen resulted in acute hemorrhaging inside the chest wall that also occurred around the time of death.

Prior to trial, Peterson moved to suppress certain evidence and statements, claiming a violation of his right to counsel and his *Miranda* rights. The district court held an evidentiary hearing on three issues: the admissibility of prior uncharged acts under Neb. Rev. Stat. § 27-404 (Reissue 2008), the suppression of evidence and statements made by Peterson, and the enforcement of the cooperation agreement between the State and Peterson.

The district court generally granted Peterson's motions to suppress. The State appealed from the suppression order to a single judge of the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. §§ 29-116 and 29-824 (Reissue 2008). In its briefs, the State claimed the district court erred in suppressing statements Peterson made to law enforcement officers on March 28 and April 12, 2007, in suppressing certain evidence on the basis that Williams was acting as an undercover law enforcement agent, and in suppressing Peterson's statements and actions in leading law enforcement to Trista's body.

In a memorandum opinion filed December 12, 2008, in case No. A-08-262, the Court of Appeals reversed the district

court's suppression of Peterson's statements to Matulka during their March 28, 2007, conversation. The appellate court also determined that Williams was not an undercover agent of law enforcement. Thus, Peterson's statements to Williams during their March 29 and April 17 telephone calls and all of Peterson's letters to Williams written after the March 29 telephone call should not be suppressed and could be used as evidence. The Court of Appeals affirmed the suppression of Peterson's statements to police on April 12 and the fruits of Peterson's suppressed statements.

Current Appeal

This appeal involves the Seward County District Court's order regarding the cooperation agreement. In a motion to enforce the agreement, Peterson alleged that he had entered into a cooperation agreement with Seward County law enforcement officers on April 12, 2007, which agreement provided that he would be charged with only one misdemeanor count related to the death of Trista.

Peterson further alleged that any felonies already charged were to be reduced to misdemeanors if he led officers to Trista's body and if he could prove that Trista's death was accidental. He claimed that he had performed his part of the agreement and had acted to his detriment and prejudice in reliance upon the agreement. Peterson requested that the district court dismiss the felony charges and order the State to amend the information to charge him with only one misdemeanor.

The district court found that Peterson had performed his understanding of the agreement, and it ordered the State to charge Peterson with concealing the death of another person, a Class I misdemeanor, and to dismiss the felony charges. The State refused to amend the charges, and the court entered an order dismissing the case without prejudice. The State filed an application to docket error proceedings, and the district court granted the application.

ASSIGNMENTS OF ERROR

The State admits the existence of the cooperation agreement but claims the district court erred in (1) not finding that

the agreement included the condition that Trista's death was accidental, (2) finding that Peterson performed his part of the cooperation agreement and acted to his detriment or prejudice, and (3) dismissing the case.

ANALYSIS

Our first review of a cooperation agreement was in *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). In discussing the government's obligation regarding such agreements, we stated:

> "[A]s a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government."

Copple, 224 Neb. at 688, 401 N.W.2d at 153, quoting *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982).

The Court of Appeals labeled a similar agreement a "cooperation agreement" in *State v. Howe*, 2 Neb. App. 766, 773, 514 N.W.2d 356, 362 (1994). It noted that other courts have recognized the enforceability of such agreements, see *United States v. Minnesota Min. & Mfg. Co.*, 551 F.2d 1106 (8th Cir. 1977), and it concluded that a cooperation agreement is enforceable on equitable grounds if (1) the agreement was made, (2) the defendant has performed whatever the defendant promised to perform, and (3) in performing, the defendant acted to his or her detriment or prejudice. *State v. Howe, supra*.

[2-4] In *State v. Wacker*, 268 Neb. 787, 688 N.W.2d 357 (2004), we adopted the above principle for enforcement of such agreements. We stated that "a cooperation agreement is neither a plea agreement nor a grant of immunity" but "arises when the State agrees to limit the prosecution in some manner in consideration for the defendant's cooperation." *Id*. at 792, 688 N.W.2d at 362. Cooperation agreements are contractual in nature and subject to contract law standards. *U.S. v. Johnson*, 861 F.2d 510 (8th Cir. 1988); *State v. Howe, supra*. The basis for enforcing

a cooperation agreement is the Due Process Clause of the 14th Amendment. See *State v. Wacker, supra*, citing *State v. Sturgill*, 121 N.C. App. 629, 469 S.E.2d 557 (1996).

In the case at bar, the terms of the cooperation agreement were not reduced to writing but are contained in the transcription of Peterson's interview with Hejl and Vance on April 12, 2007. The relevant portions of the transcription have been set forth in our statement of facts above. The State claims the agreement required that Trista's death be shown to have been accidental. Peterson argues that he performed his part of the agreement. The district court agreed, finding that Peterson led authorities to Trista's body and concluding that the language regarding whether Trista's death was accidental was ambiguous.

[5,6] As our review of the cooperation agreement is the same as the review of a contract, we must determine as a matter of law whether the agreement is ambiguous. See *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008). Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Whether a document is ambiguous is a question of law initially determined by a trial court. *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996). Generally speaking, the language in a cooperation agreement "'is to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.'" *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986), quoting *United States v. Irvine*, 756 F.2d 708 (9th Cir. 1985).

The district court concluded that the cooperation agreement was ambiguous as to Peterson's obligations. We disagree and conclude there was no ambiguity as to the requirements placed on Peterson. His obligations were twofold: to show authorities the location of Trista's body and to prove that Trista's death was accidental.

Peterson's understanding of his obligations was set forth in his motion to enforce the cooperation agreement. In it,

he alleged that Elston, the county attorney, had agreed to charge Peterson with one misdemeanor count related to Trista's death and to reduce felonies in another case to misdemeanors if Peterson led officers to Trista's body and if Peterson could prove that Trista's death was accidental. Peterson further alleged that on April 12, 2007, he led officers to Trista's body, and that in numerous interviews with law enforcement, he told the officers that he did not intentionally kill Trista.

[7,8] Once a cooperation agreement is shown to exist, the State has the burden to show that the defendant did not perform his or her part of the agreement. See *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981). See, also, *U.S. v. Fitch*, 964 F.2d 571 (6th Cir. 1992), citing *U.S. v. Packwood*, 848 F.2d 1009 (9th Cir. 1988). Therefore, the government bears the burden of proving that the defendant failed to comply with the agreement. See, *U.S. v. Fitch, supra*; *United States v. Brown, supra*.

[9] We have not previously addressed the extent of the State's burden. Federal courts have held that the government must prove by a preponderance of the evidence that the defendant breached an agreement and that the breach is "sufficiently material to warrant rescission." *U.S. v. Castaneda*, 162 F.3d 832, 836 (5th Cir. 1998). See, also, *U.S. v. Cantu*, 185 F.3d 298 (5th Cir. 1999). "An immunity agreement invokes the same constitutional due process concerns as a plea agreement, and therefore, . . . the breach of such an agreement must be proved by a preponderance of the evidence." *U.S. v. Gerant*, 995 F.2d 505, 508 (4th Cir. 1993). See, also, *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986).

The *Verrusio* court stated that the "standard of persuasion by which the government must establish several similar pre-trial matters in criminal cases is a preponderance of the evidence," 803 F.2d at 894, citing *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). "The Supreme Court's holding that the constitutionality of a search and the voluntariness of a confession must be proven by a preponderance of the evidence persuades us that the government may establish a defendant's breach of a plea bargain by a preponderance of the evidence." *Verrusio*, 803 F.2d at 895. In *U.S. v. Feliciano*,

787 F. Supp. 846 (N.D. Ill. 1992), the court held that the government has the burden of showing, by a preponderance of the evidence, that a defendant substantially breached his or her plea agreement.

We agree with those federal courts which hold that the government must prove the defendant's breach of an agreement by a preponderance of the evidence. Thus, the State must prove by a preponderance of the evidence that Peterson failed to perform his obligations under the cooperation agreement.

We next address whether the State has met this burden. At the pretrial hearing, the State offered the testimony of a forensic pathologist, Dr. Matthias Okoye, to prove that Trista's death was not accidental. Peterson objected to the testimony based upon the suppression of Peterson's statements and the evidence derived from such statements. The district court overruled the objection. Okoye testified that Trista sustained severe multiple blunt force trauma injuries to her head, neck, and trunk and that the injuries were intentionally inflicted and resulted in her death.

Peterson argues that Okoye's testimony should not be considered on appeal based on the suppression orders. We disagree. A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). The evidence was received by the district court at the pretrial hearing. There is no proscription against this court's considering the testimony from the pretrial hearing in this appeal. The U.S. Supreme Court has held that the rules of evidence applicable in criminal trials "do not operate with full force at hearings before the judge to determine the admissibility of evidence." *United States v. Matlock*, 415 U.S. 164, 172-73, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

The Court stated:

> There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel.

Matlock, 415 U.S. at 175. See, also, *U.S. v. Watson*, 87 F.3d 927 (7th Cir. 1996) (exclusionary rules should not apply in proceeding in which court itself is considering admissibility of evidence).

We have not discussed whether a pretrial hearing to enforce a cooperation agreement is subject to the rules of evidence. Preliminary questions concerning the admissibility of evidence are for the court. Neb. Rev. Stat. § 27-104(1) (Reissue 2008). The Nebraska Evidence Rules do not apply in "preliminary examinations or hearings in criminal cases." Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008). Therefore, we conclude that § 27-1101(4)(b) exempts from application of the rules preliminary examinations or hearings in criminal cases.

In the case at bar and prior to any trial on the guilt or innocence of Peterson, the district court conducted a hearing to determine what charges could be brought based upon the cooperation agreement. This is analogous to a preliminary hearing to ascertain whether a crime has been committed and whether there is reasonable cause to believe that the defendant committed it.

The suppression of certain evidence at trial does not prevent the court from considering such evidence for purposes of the hearing on the enforcement of the cooperation agreement. The question before the court at such a hearing is whether the defendant performed his obligations under the agreement. The evidence is not presented to establish the defendant's guilt or innocence but whether the defendant performed his or her part of the agreement. The district court did not abuse its discretion in overruling Peterson's objection to Okoye's testimony.

Equally important, Peterson did not cross-appeal from the district court's ruling which admitted Okoye's testimony. The evidence was a part of the record at the pretrial hearing on the motion to enforce the cooperation agreement and can be considered by this court. Peterson did not assign as error the overruling of his motion.

[10] The district court's findings of fact regarding whether a defendant complied with a cooperation agreement and whether the defendant detrimentally relied upon that agreement should be upheld unless the findings are clearly erroneous. *State v.*

Howe, 2 Neb. App. 766, 514 N.W.2d 356 (1994). Therefore, we review for clear error the district court's finding that Peterson performed his end of the agreement.

Peterson did not testify at the hearing or present any evidence as to the cause of Trista's death. The only evidence was Okoye's testimony, which established that Trista's death was caused by blunt force trauma that was intentionally inflicted.

Based upon the State's evidence from Okoye, we conclude that the district court was clearly wrong in finding that Peterson performed his obligations under the cooperation agreement. There were two provisions in the agreement: Peterson was to lead authorities to Trista's body and he was to prove that her death was accidental. No evidence was presented to support a claim that Trista's death was accidental. Peterson's allegation that he did not intentionally kill Trista did not establish that her death was accidental. To the contrary, the evidence offered by the State showed that Trista's death was caused by blunt force trauma that was intentionally inflicted. The State has sustained its burden to show that Trista's death was not accidental.

We reverse the order of the district court which dismissed without prejudice the felony charges against Peterson and remand the cause for further proceedings.

CONCLUSION

The district court was clearly wrong in ordering the dismissal of the felony charges against Peterson. The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DARNALL RANCH, INC., APPELLANT, V. BANNER COUNTY BOARD OF EQUALIZATION, APPELLEE.

789 N.W.2d 26

Filed October 1, 2010. Nos. S-09-1246 through S-09-1251.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Appeals from the Tax Equalization and Review Commission. Reversed and vacated.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

James L. Zimmerman, Banner County Attorney, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The Banner County assessor set the 2005 valuation on certain parcels of property owned by Darnall Ranch, Inc. (DRI). DRI protested those valuations. At a hearing, the Banner County Board of Equalization (Board) agreed with the valuations placed on the properties. DRI appealed to the Tax Equalization and Review Commission (TERC). Meanwhile, in a separate case, the Nebraska Court of Appeals voided the valuations,[1]

[1] *Wolf v. Grubbs*, 17 Neb. App. 292, 759 N.W.2d 499 (2009).

concluding that the Board violated the Open Meetings Act (Act).[2] TERC overruled the Board's motion to dismiss based on the Court of Appeals' action and, following a hearing, affirmed the county assessor's valuations for three parcels, and reversed the county assessor's valuations and set new values for the remaining three parcels. DRI appeals.

BACKGROUND

DRI operates a ranch in Banner County, Nebraska. At issue on appeal are six parcels of land owned by DRI. In each instance, the parcel was valued by the county assessor for the 2005 tax year and that valuation was protested by DRI. And in each instance, a hearing was held before the Board regarding that protest, with the Board rejecting the protest and adopting the county assessor's valuation. DRI then appealed to TERC.

While DRI's appeal to TERC was pending, a separate suit against the Board was proceeding in the Banner County District Court regarding alleged violations of the Act by the Board. And in *Wolf v. Grubbs*,[3] the Nebraska Court of Appeals concluded that the Board had committed violations of the Act and voided all valuations set at meetings which violated the Act, including valuations on the parcels owned by DRI which are at issue in this case.

After the decision in *Wolf*, the Board filed a motion to dismiss DRI's appeal. DRI objected. TERC concluded that it had jurisdiction over the appeals and overruled the Board's motion. Following a hearing on all six parcels at issue, TERC issued opinions upholding the county assessor's valuation with respect to three parcels and reversing the county assessor's valuation and setting a new value on the other three parcels. DRI appeals with respect to all six parcels.

ASSIGNMENTS OF ERROR

On appeal, DRI assigns, consolidated and restated, that TERC erred in (1) concluding it had jurisdiction and therefore

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[2] See Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 2008 & Supp. 2009).

[3] *Wolf v. Grubbs, supra* note 1.

denying the motions to dismiss, (2) applying an incorrect standard of review, (3) holding that DRI had been given valid notice of the decision of the Board, (4) the valuations of its property, and (5) not taxing the costs of the action against the Board. In addition, DRI contends that Neb. Rev. Stat. § 77-5007(13) (Reissue 2009)[4] is unconstitutional.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[5] 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.[6] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[7]

ANALYSIS

DRI first contends that TERC erred by not dismissing its appeals for a lack of jurisdiction after the Court of Appeals' decision in *Wolf*. We agree with DRI that TERC lacks jurisdiction.

[4] As an initial matter, we note that DRI opposed the Board's motion to dismiss for lack of jurisdiction before TERC, but now argues that, in fact, TERC did lack jurisdiction. But because this court must determine whether it has jurisdiction over this appeal before it reaches the legal issues presented for review,[8] DRI's change of position is immaterial.

In concluding that it had jurisdiction subsequent to the Court of Appeals' decision in *Wolf*, TERC relied upon this court's 1883 decision in *Sumner & Co. v. Colfax County*.[9] In *Sumner & Co.*, this court held that the failure to act on a property

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[4] See 2010 Neb. Laws, L.B. 877, § 7.

[5] *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009).

[6] *Id.*

[7] *Id.*

[8] See *Carmicheal v. Rollins, ante* p. 59, 783 N.W.2d 763 (2010).

[9] *Sumner & Co. v. Colfax County*, 14 Neb. 524, 16 N.W. 756 (1883).

owner's protest was for all "practical intents and purposes a denial and rejection of the . . . application."[10] TERC reasoned that because the Board's original decisions had been voided, and because the Board could no longer hear DRI's 2005 protests,[11] it was as though the Board had failed to hear DRI's protests at all. And under *Sumner & Co.*, such inaction was a rejection of DRI's protests.

On appeal, the Board now agrees that TERC had jurisdiction under *Sumner & Co.*, while DRI contends that TERC lacks jurisdiction. DRI argues that the relevant language from *Sumner & Co.* is dicta and contrary to this court's decision in *Falotico v. Grant Cty. Bd. of Equal*.[12] We held in *Falotico* that an increase in property valuation was void where the county clerk failed to give notice to the taxpayers within the statutorily required 7 days after the board made its decision. Because the increase was void, the property valuation reverted back to the previous year's valuation.

We disagree with TERC's conclusion that *Sumner & Co.* is applicable in this case. *Sumner & Co.* dealt with the inaction of a county board. In this case, though, the county board did act. But because of the violations of the Act, those actions were later declared void.

We instead conclude that *Falotico* governs situations such as the one presented, where a county board's action is void. In *Falotico*, we noted that compliance with the notice provision at issue was necessary to provide a property owner with the process due under the statutes and that where a board's actions were void, TERC lacked jurisdiction over the property owner's appeal. In such circumstances, we further noted, any increase in a property valuation was similarly voided.

In the same way that the property owner's right to process and the protections offered therein was violated in *Falotico*, DRI's right to the protections of the Act was violated in this case. Therefore, in conformity with *Falotico,* we conclude that

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[10] *Id.* at 525, 16 N.W. at 756.

[11] See Neb. Rev. Stat. § 77-1502 (Reissue 2009).

[12] *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001).

TERC lacks jurisdiction over DRI's appeal as a result of the Board's failure to comply with the Act. As such, DRI's 2005 valuations are voided and revert to the valuations placed on the property at issue in 2004. We therefore reverse TERC's decisions in this case, vacate the decision of the Board denying DRI's protests, and declare as void the actions of the county assessor increasing the valuations of the subject properties for the purposes of taxation as of January 1, 2005.

CONCLUSION

Because TERC lacks jurisdiction over these appeals, we reverse TERC's decisions, vacate the decisions of the Board, and void the 2005 valuations of DRI's properties.

REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. APRIL DINSLAGE, ALSO KNOWN AS APRIL CLEARY, APPELLANT.

789 N.W.2d 29

Filed October 1, 2010. No. S-10-252.

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. **Sentences: Probation and Parole.** Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** 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.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** The State is not required to prove a temporal nexus between a breath test and the defendant's alcohol level at the moment he or she was operating the vehicle.
5. ____: ____: ____. Matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.
6. **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.

7. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
8. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Brett B. Pettit, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, George R. Love, and Elizabeth W. Alderson, Senior Certified Law Student, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

April Dinslage, also known as April Cleary, appeals her conviction and sentence for driving under the influence (DUI), third offense, with more than .15 of 1 gram of alcohol per 210 liters of her breath. The breath test conducted 50 minutes after the stop demonstrated that Dinslage had a concentration of .20 of 1 gram of alcohol per 210 liters of breath. Nevertheless, Dinslage argues that the test was insufficient proof of her breath alcohol concentration at the time she was stopped, because she had consumed several drinks immediately before driving and those drinks had not yet metabolized into her system. Dinslage also argues that the trial court lacked statutory authority to impose 180 days' confinement as a condition of the sentence of probation and that her sentence was otherwise excessive.

BACKGROUND

Dinslage testified that on the night of May 21, 2008, she had gone to a bar to meet a friend at approximately 9:30 p.m. Within the first hour, she consumed one "Southern Comfort

and Mountain Dew" and one "Jägerbomb." Dinslage explained that the Southern Comfort drinks at this bar were especially large and strong, each containing at least 2½ ounces of alcohol. Jägerbombs contain a shot of liqueur. Dinslage was not entirely sure how much she drank in between the time she arrived and "last call," but it was at least 1½ more Southern Comfort drinks. At "last call," her friend bought her another Southern Comfort drink and Jägerbomb. She quickly drank those and the remainder of the Southern Comfort drink she had from earlier, and left the bar at 12:50 a.m.

At approximately 1 a.m., Officer Brock Wagner observed Dinslage's vehicle swerve twice past the right fog line of the road. Wagner initiated a traffic stop at approximately 1:09 a.m. Upon approaching the vehicle, Wagner noticed that Dinslage had slurred speech; bloodshot, watery eyes; and a strong odor of alcohol on her breath. When Dinslage exited her vehicle, Wagner observed that Dinslage swayed and stumbled when she walked.

Dinslage failed several field sobriety tests. During the nine-step walk-and-turn test, she was unable to maintain the heel-to-toe position or keep her arms at her sides. She was also unable to keep her balance during the instructional phase and when she turned. During the one-leg stand, Dinslage was unable to maintain her arms at her sides, and she put her foot down prematurely. During the "Romberg balance test," which consists of tilting one's head back and closing one's eyes while estimating the passage of 30 seconds, Wagner observed that Dinslage swayed from left to right and front to back. Dinslage was able to recite the alphabet, but she demonstrated slurred speech while doing so. She showed all seven clues of impairment in the horizontal gaze nystagmus test.

On cross-examination, Wagner admitted that Dinslage was not "falling down drunk." No specific calculations were offered regarding alcohol consumption and weight, but Wagner agreed that it takes several drinks to get over the legal limit at any size. The identification technician responsible for maintaining the Intoxilyzer units confirmed on cross-examination that it takes approximately 30 to 90 minutes for an alcoholic beverage to be absorbed into the bloodstream and recognized by the

Intoxilyzer. The Intoxilyzer test was conducted on Dinslage at 1:59 a.m., showing a concentration of .20 of 1 gram of alcohol per 210 liters of breath at that time.

The trial court overruled defense counsel's motion for directed verdict. Sitting as the trier of fact, the court found Dinslage guilty of DUI, third offense, with more than .15 of 1 gram of alcohol per 210 liters of her breath. At sentencing, defense counsel argued that Dinslage was an appropriate candidate for probation. The presentence investigation report showed that Dinslage had a small child, born after the arrest, who had reportedly motivated Dinslage to change. Dinslage successfully participated in a rehabilitation program for alcohol abuse. However, reports evaluated her risk of relapse and reoffending as "very high." Besides two previous DUI's, Dinslage had a record of multiple misdemeanor offenses, including negligent driving, disturbing the peace, making false statements to police officers, and four convictions for driving with a suspended license.

The trial court explained that it was not entirely convinced that Dinslage was an appropriate candidate for probation, but, in deference to the minor child and the probation officer's opinion that Dinslage might be a reasonable candidate for probation, the court was willing to give her the opportunity to show that she could comply. The trial court sentenced her to 180 days' confinement as a condition of the probation. The court denied defense counsel's motion to modify the sentencing order on the ground that the maximum jail time under Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2007) was 60 days. The trial court explained that, as required by § 60-6,197.03(6), his order "include[d]" 60 days' confinement. And the court found no conflict between § 60-6,197.03(6) and Neb. Rev. Stat. § 29-2262 (Reissue 2008), which authorizes trial courts to impose jail time as a condition of probation for a period "not to exceed" 180 days for a felony, which this was.

ASSIGNMENTS OF ERROR

Dinslage asserts that the trial court erred in (1) finding her guilty of having a breath alcohol level of .15 or more, as no rational trier of fact could have made that finding based upon

the offered evidence; (2) sentencing Dinslage to 180 days' confinement when such sentence is not permitted by law; and (3) sentencing Dinslage to 180 days' confinement, as such sentence is excessive under the circumstances.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1]

[2] Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.[2]

ANALYSIS

Sufficiency of Evidence to Show .15

[3] Dinslage concedes she was driving while intoxicated, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). She argues that the evidence was insufficient to prove that she was driving with a concentration of .15 of 1 gram or more of alcohol per 210 liters of her breath, which, in conjunction with her prior DUI's, makes her offense punishable under § 60-6,197.03(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.[3] 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.[4]

[4,5] Dinslage argues that because the significant amount of alcohol she consumed at "last call" could not have entered

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[1] *State v. Prescott, ante* p. 96, 784 N.W.2d 873 (2010).

[2] *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

[3] *State v. Prescott, supra* note 1.

[4] *Id.*

her blood or breath when she was stopped approximately 35 minutes later, the Intoxilyzer test results obtained approximately 50 minutes after the stop did not establish that she was operating a vehicle with a breath alcohol concentration of .15 or greater. Neb. Rev. Stat. § 60-6,201(1) (Cum. Supp. 2008) states that any chemical test conducted according to methods approved by the Department of Health and Human Services and with a valid permit "shall be competent evidence" in any prosecution for operating a motor vehicle "when the concentration of alcohol in the blood or breath is in excess of allowable levels." In *State v. Kubik*,[5] we explained that the State is not required to prove a temporal nexus between the test and the defendant's alcohol level at the moment he or she was operating the vehicle. It would be an impossible burden on the State to conduct such an extrapolation when its accuracy depends on the defendant's willingness to testify and his or her honesty in reporting all relevant factors, including the time and quantity of consumption.[6] Thus, matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.[7] And a valid breath test given within a reasonable time after the accused was stopped is probative of a violation.[8] We speculated in *Kubik* that there might in some cases be a "delay . . . so substantial as to render the test results nonprobative of the accused's impairment or breath alcohol level while driving."[9] But we held that a breath test given "less than 1 hour" after the defendant was stopped did not entail an unreasonable delay.[10]

The 50-minute delay in this case was not unreasonable. Nor are we persuaded that the consumption of large quantities

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[5] See *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). See, also, *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992); *State v. Towler*, 240 Neb. 103, 481 N.W.2d 151 (1992).

[6] See *State v. Kubik, supra* note 5.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 634, 456 N.W.2d at 501.

[10] *Id.*

of alcohol immediately before driving somehow rendered Dinslage's breath test result nonprobative. The evidence demonstrated that well before "last call," Dinslage had been drinking, and that she was impaired enough to fail almost every field sobriety test given. Viewing the evidence in the light more favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that Dinslage was operating her vehicle with a breath alcohol concentration of .15 or greater.[11]

Maximum Term of Imprisonment as Condition of Probation

We next consider Dinslage's argument that the jail term imposed by the trial court was outside its statutory authority. Section 60-6,197.03 describes 10 different levels of DUI, which are classified by the statute as ranging from a Class W misdemeanor to a Class II felony. Where the court orders probation, § 60-6,197.03 specifies the mandatory conditions of such probation, including jail time for the greater offenses. Thus, if the court orders probation for a person who has no prior DUI's and who was most recently stopped with an alcohol level of less than .15, then the court must order a 60-day license revocation and the order of probation "shall also include" a $400 fine.[12] But, if the court gives probation to a defendant who has had four or more prior convictions and who had an alcohol level of .15 or greater, then the court must revoke the offender's license for 15 years and the order of probation "shall also include" a $1,000 fine and confinement in the city or county jail for 180 days.[13]

Dinslage had two prior DUI convictions and a breath alcohol level of at least .15, so it was mandated by subsection (6) that her license be revoked "for a period of at least five years but not more than fifteen years," and her order of probation "shall also include, as conditions, the payment of a one-thousand-dollar fine and confinement in the city or county jail for sixty

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[11] See *State v. Prescott, supra* note 1.

[12] § 60-6,197.03(1).

[13] § 60-6,197.03(9).

days."[14] Dinslage argues that this 60-day period of confinement is both the minimum and the maximum term allowed by law for a defendant granted probation under this subsection. We disagree.

In *State v. Vasquez*,[15] we considered a similar argument under the previous version of § 60-6,197.03, Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). We concluded that § 60-6,196 did not set forth maximum jail times for probation and should be read in conjunction with § 29-2262. Section 29-2262 generally sets forth the conditions of probation which may be imposed by the trial judge. Section 29-2262(2)(b) states that the court may require the offender "[t]o be confined periodically in the county jail . . . but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense and (ii) for felonies, one hundred eighty days." In *Vasquez*, we concluded that the jail times described in § 60-6,196 were an additional minimal requirement and that the maximum was set forth in § 29-2262(2)(b). We noted that the legislative history to § 60-6,196 also supported this conclusion.

At the time *Vasquez* was decided, the law was distinct from its current form insofar as it set forth only four levels of DUI, ranging from a Class W misdemeanor to a Class IV felony, and the punishments were less severe. However, there is no relevant difference in the operative language governing the question of whether a stated incarceration period means to set forth a maximum as well as a minimum. The offense considered in *Vasquez* was classified as a misdemeanor, and § 60-6,196 mandated that any order of probation "*shall . . . include*, as conditions, the payment of a six-hundred-dollar fine and either *confinement in the . . . county jail for ten days* or the imposition of not less than four hundred eighty hours of community service."[16] The trial court had given probation and chosen confinement rather than community service, ordering 90 days' confinement. The

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[14] § 60-6,197.03(6).

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

[16] Neb. Rev. Stat. § 60-6,196(2)(c) (Cum. Supp. 2002) (emphasis supplied).

trial court subsequently modified the order of confinement to 10 days, convinced that the 10-day period referred to in § 60-6,197.03(3) (Reissue 2004) was both the minimum and maximum. We held that the 10-day period was only the minimum and that the first order of 90 days' confinement was within the court's statutory authority.

Dinslage argues that *Vasquez* does not control our decision here because the Legislature has demonstrated in § 60-6,197.03 (Supp. 2007) its ability to clearly specify a range of penalties when that is intended—and "shall include" must be interpreted in this context. We observe that such legislative ability was also demonstrated in § 60-6,196, when the Legislature provided that community service shall be "not less than" a specified number of hours[17] or, in the case of a level-four offense, that the sentence shall be "at least ten days" of imprisonment.[18] Nor do we find it apposite that the legislative history to the amended statute does not specifically address whether it intended only a minimum period of confinement. The legislative history cited in *Vasquez* merely bolstered a conclusion already reached based upon a sensible construction viewed in pari materia with all related statutes. Furthermore, the legislative history cited in *Vasquez* continues to be part of the history of § 60-6,197.03, and has not since been contradicted.

[6,7] 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.[19] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[20] The mandate that an order of probation "shall include" 60 days' confinement[21] does

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[17] §§ 60-6,196(c) and 60-6,196(d) (Reissue 2004).

[18] § 60-6,196(d).

[19] *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

[20] *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010).

[21] § 60-6,197.03(6).

not conflict with the provision that a trial court may require the offender to be confined for a period not to exceed 180 days.[22] Read in pari materia, it is clear that the minimum jail term for a period granted probation for an offense punishable under § 60-6,197.03(6) is 60 days and that the maximum is 180 days. There is no indication that the Legislature intended to make terms of probation imposed upon DUI offenders more lenient than would otherwise be allowed by law. We find no merit to Dinslage's argument that the trial court exceeded its statutory authority in ordering her to serve 180 days' confinement as a condition of her probation.

Excessive Sentence

[8] Finally, we address Dinslage's argument that in light of her recent rehabilitation, the sentence imposed was excessive. The steadfast rule in this state is that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.[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.[24] 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] But the appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[26]

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[22] § 29-2262(2)(b).

[23] *State v. Tejral, supra* note 5.

[24] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[25] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

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

Because Dinslage committed a Class IIIA felony, the trial court could have sentenced her to up to 5 years' imprisonment.[27] But, despite a substantial criminal record, the court elected to sentence Dinslage to probation. The court did not abuse its discretion in imposing the maximum term of incarceration as a condition of Dinslage's probation.

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

[27] See Neb. Rev. Stat. § 28-105 (Reissue 2008).

IN RE ESTATE OF FAUNIEL F. MUNCILLO, DECEASED. CHRISTINE MUNCILLO, APPELLEE, AND GREGORY MUNCILLO, APPELLANT, V. ANGELA MUNCILLO AND BARBARA L. HOSFORD, PERSONAL REPRESENTATIVE OF THE ESTATE OF FAUNIEL F. MUNCILLO, DECEASED, APPELLEES.

789 N.W.2d 37

Filed October 8, 2010. No. S-09-1224.

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. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.
3. **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.
4. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
5. **Decedents' Estates: Final Orders.** Proceedings under the Nebraska Probate Code are special proceedings within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
6. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right, not a mere technical right.
7. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is not affected when that right can be effectively vindicated in an appeal from the final judgment.

8. **Decedents' Estates: Executors and Administrators: Final Orders: Appeal and Error.** A probate court's denial of an application for the appointment of a special administrator, brought pursuant to Neb. Rev. Stat. § 30-2457(2) (Reissue 2008), is a final, appealable order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
9. **Decedents' Estates: Executors and Administrators.** A special administrator should not be appointed every time a potential beneficiary disagrees with the personal representative's administration decisions, absent some showing that the personal representative is not lawfully fulfilling his or her duties under the Nebraska Probate Code.
10. **Decedents' Estates: Executors and Administrators: Proof.** A showing that the personal representative is not lawfully fulfilling his or her duties necessitates, at minimum, an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or cannot act to preserve the estate, or the existence of some other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty.

Appeal from the County Court for Douglas County: CRAIG Q. MCDERMOTT, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Jason M. Bruno and Laura K. Woods, of Sherrets, Bruno & Vogt, L.L.C., for appellee Angela Muncillo.

Donald C. Hosford, Jr., for appellee Barbara L. Hosford.

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

GERRARD, J.

At the time of Fauniel F. Muncillo's death, she had three bank accounts, listing her daughter, Angela Muncillo, either as the joint owner or as the payable-on-death beneficiary. Her other children, Christine Muncillo and Gregory Muncillo, objected to the distribution of the accounts to Angela, claiming that her signatures on the account agreements had been obtained by undue influence. Christine and Gregory applied for the appointment of a special administrator to pursue the accounts for the estate, claiming that the appointed personal representative was not pursuing the matter. However, the county court determined that the accounts were nonprobate assets and that the personal representative could adequately protect the

interests of the estate. The county court denied the appointment of a special administrator, and Gregory appeals. For the following reasons, we affirm the judgment of the county court.

BACKGROUND

Fauniel died on March 14, 2009. Fauniel's attorney, Barbara L. Hosford, petitioned for formal probate, a determination of heirs, and the appointment of a personal representative to represent Fauniel's estate. The court admitted Fauniel's will and a later codicil to formal probate. The will and codicil provided that Angela, Christine, and Gregory would share Fauniel's estate in equal shares. The court appointed Hosford as personal representative of the estate.

At the time of her death, Fauniel owned three bank accounts, which contained a total of over $260,000. Fauniel had three corresponding account agreements with the bank, each specifying the type of account and whether there existed a payable-on-death beneficiary. One of the account agreements was a multiple-party account, listing Fauniel and Angela as co-owners with rights of survivorship. The other agreements were single-party accounts in Fauniel's name with Angela designated as the payable-on-death beneficiary.

Hosford petitioned the county court for review of Fauniel's bank account agreements to determine whether the accounts were subject to probate. Christine then filed an objection to the distribution of any funds from the accounts, alleging that the designation of Angela as beneficiary or joint owner was the result of undue influence. Christine sought a constructive trust for the account funds and claimed that she was entitled to one-third of those amounts. Hosford then filed a motion to dismiss her petition for review of the account agreements. The court dismissed Hosford's petition without prejudice.

Angela brought a separate but related action against Christine in the district court, alleging that Christine's interference with the accounts prevented Angela's lawful access to the funds. Gregory apparently filed a petition in intervention in the district court case. In the county court, Christine and Gregory filed an application for the appointment of a special administrator to pursue the bank accounts as estate assets, as Hosford had

dismissed her petition for review of the accounts and was no longer pursuing the matter. Upon questioning by the court as to whether Christine and Gregory were intimating that Hosford was not in a position to properly collect and maintain the estate assets, Christine and Gregory noted that Hosford could become a witness in the district court case and asserted that Hosford "may not feel comfortable in handling it herself."

The county court denied Christine and Gregory's application to appoint a special administrator, finding that a special administrator was not necessary because Hosford could adequately protect the assets of the estate. The court noted that Hosford regularly appeared in probate court and that the court found her to be forthright, straightforward, and honest. Gregory appeals from the order denying the application for the appointment of a special administrator.

ASSIGNMENT OF ERROR

Gregory assigns that the county court erred in denying the application for the appointment of a special administrator.

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.[1]

[2-4] Absent an equity question, an appellate court reviews probate matters for error appearing on the record made by the county court.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[4]

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[1] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010).

[2] See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[3] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009); *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[4] See *id.*

ANALYSIS

Was County Court's Order Final?

Before reaching the merits of this appeal, we settle a jurisdictional matter. Angela argues that the order of the county court denying the application for the appointment of a special administrator is not a final, appealable order. We have determined that orders relating to the removal of a personal representative qualify as final orders.[5] However, we have yet to address whether an order denying the appointment of a special administrator is a final, appealable order.

Neb. Rev. Stat. § 25-1902 (Reissue 2008) defines three types of final orders: (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. We note that the order denying the appointment of a special administrator did not determine an action or prevent a judgment, nor was it an order made on summary application in an action after judgment was rendered. We therefore address whether the order affected a substantial right made in a special proceeding.

[5] A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[6] Gregory and Christine's application for the appointment of a special administrator was brought pursuant to the Nebraska Probate Code, specifically, Neb. Rev. Stat. § 30-2457 (Reissue 2008), located in chapter 30 of the Nebraska Revised Statutes. Our law is clear that proceedings under the Nebraska Probate Code are special proceedings within the meaning of § 25-1902.[7] We therefore find that the order at issue here was made in a special proceeding within the meaning of § 25-1902 and must next answer whether the order affected a substantial right.

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[5] See, e.g., *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). See, also, *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989).

[6] *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[7] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007); *In re Estate of Rose, supra* note 6.

[6,7] A substantial right is an essential legal right, not a mere technical right.[8] We have noted that a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.[9] But here, the denial of the application for the appointment of a special administrator cannot be effectively vindicated on appeal from the final judgment in which the probate estate is finally established, and thus affects an essential legal right.

[8] Under § 30-2457(2), an interested person has a right to petition for a special administrator, who will be appointed if necessary to preserve the estate or to secure its proper administration. If a probate court wrongfully denies the application to appoint a special administrator, the petitioner's right to have a special administrator appointed cannot be vindicated upon appeal from entry of the later final judgment. It is not uncommon for the probate of an estate to remain open for years,[10] and a special administrator cannot go back in time and preserve or administer the estate long after the application to appoint has been denied. Because the denial of the application for the appointment of a special administrator cannot be effectively vindicated on appeal from the final judgment of the probate court, it affects an essential legal right of the petitioner, and thus affects a substantial right within the meaning of § 25-1902. Accordingly, we conclude that the probate court's ruling in this case affected a substantial right of the appellant in a special proceeding, and is therefore a final, appealable order within the meaning of § 25-1902.

Did County Court Err in Denying Appellant's Application?

Gregory argues that the appointment of a special administrator is necessary to protect the estate pursuant to § 30-2457, which reads, in relevant part:

> A special administrator may be appointed:
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> . . . .

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[8] *In re Estate of Rose, supra* note 6.

[9] *In re Estate of Potthoff, supra* note 7; *In re Estate of Rose, supra* note 6.

[10] See *In re Estate of Potthoff, supra* note 7.

> (2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

Under § 30-2457(2), Gregory must show that the appointment of a special administrator is necessary to preserve the estate or to secure its proper administration. Gregory argues that because the personal representative once questioned the account agreements, but then demonstrated an "unwillingness to pursue assets of the estate," a special administrator is necessary to protect estate assets.[11] But the county court determined that the bank accounts did not qualify as estate assets because they transferred immediately to Angela upon Fauniel's death under Neb. Rev. Stat. § 30-2715 (Reissue 2008). Gregory does not contest this determination. Rather, Gregory correctly notes that under Nebraska law, challenges to the transfer of nonprobate assets like the accounts at issue here must be brought in the district court. Gregory contends that it is unclear whether he has standing to challenge the accounts in the district court.

Before the adoption of the Nebraska Probate Code, we permitted an heir to maintain an action to enforce an obligation owed to the estate when an administrator refused to act.[12] We have not determined whether that exception is still permitted after the adoption of the code.[13] However, the issue of whether Gregory has standing to pursue the bank accounts in district court is not properly before us now, and therefore, we do not address it. Rather, we address whether the county court erred in refusing to appoint a special administrator.

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[11] Brief for appellant at 8.

[12] See *Prusa v. Everett*, 78 Neb. 250, 113 N.W. 571 (1907).

[13] *In re Estate of Hedke, supra* note 3.

Gregory argues that because the personal representative is unwilling to further pursue the accounts, and because Gregory might not have standing to pursue the accounts in district court, the county court erred when it denied the application for the appointment of a special administrator. A similar question was addressed by the Montana Supreme Court in *Matter of Estate of Long*.[14] In that case, the appellant beneficiary sought the appointment of a special administrator under the Montana equivalent of § 30-2457(2). Upon the decedent's death, her bank accounts transferred to her friends, the appellees. The appellant claimed that the account documents naming the appellees as joint owners were procured by undue influence. The appellant informed the personal representatives of the decedent's estate of the possible claim of undue influence. However, after reviewing the evidence, the personal representatives declined to pursue the matter on behalf of the estate. The appellant requested that a special administrator be appointed to pursue the assets, but the probate court denied the request.

The Montana Supreme Court found that absent a showing of fraud, collusion, conflict of interest, inability to act, or other special equitable circumstance, a decision by the personal representatives not to bring an action against decedent's friends was not grounds for the appointment of a special administrator under the Montana Probate Code. *Matter of Estate of Long* also noted that the removal of the personal representative was not warranted:

> [The personal representatives] reviewed the information made available by the appellant. Simply because appellant did not agree with the co-personal representatives on what to do about a potential claim does not mean, as the lower court correctly concluded, that they improperly administered the estate such that they should be removed and a special administrator appointed.[15]

[9,10] We find the reasoning of *Matter of Estate of Long* to be persuasive. A special administrator should not be appointed

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[14] *Matter of Estate of Long*, 225 Mont. 429, 732 P.2d 1347 (1987).

[15] *Id.* at 436-47, 732 P.2d at 1352.

every time a potential beneficiary disagrees with the personal representative's administration decisions, absent some showing that the personal representative is not lawfully fulfilling his or her duties under the code. We determine that such a showing, at minimum, necessitates an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or cannot act to preserve the estate, or the existence of some other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty.

Gregory made no such showing. At the hearing on his motion, Gregory presented the court with no evidence supporting his application. Gregory argued below that Hosford "will become a witness, I believe, upstairs in the District Court and perhaps, in being a witness, she may not feel comfortable in handling it herself." The record does not show that Gregory ever unequivocally challenged the competency of the personal representative, nor does it show that the personal representative in any way failed to adequately perform her duties. The record reflects that Hosford was aware of the accounts, that she petitioned for their review, that the account agreements were produced, and that Hosford moved to dismiss her petition. The most that can be extrapolated from the record is that Hosford was aware of the accounts, obtained the account agreements, and decided not to pursue the accounts as estate assets.

A putative beneficiary's disagreement with a personal representative over the proper course of action for a potential claim does not necessitate the appointment of a special administrator, absent a showing of fraud, collusion, conflict of interest, inability to act, or other special equitable circumstance. Absent such a showing, Gregory did not prove that the appointment of a special administrator was "necessary to preserve the estate" under § 30-2457(2). And because Gregory produced no evidence of any of the aforementioned circumstances, we cannot say that the county court erred in denying his application.

Because nothing in the record indicates that the appointment of a special administrator is necessary to protect Fauniel's

estate, we cannot say that the county court's decision to deny the application was arbitrary, capricious, or unreasonable. Gregory's assignment of error is without merit.

CONCLUSION

The county court did not err in finding that a special administrator was not necessary to protect Fauniel's estate. Therefore, the county court's judgment is affirmed.

AFFIRMED.

KATHRYN PODRAZA AND TERRANCE PODRAZA, APPELLANTS AND CROSS-APPELLEES, V. NEW CENTURY PHYSICIANS OF NEBRASKA, LLC, APPELLEE AND CROSS-APPELLANT.

789 N.W.2d 260

Filed October 15, 2010. No. S-09-990.

1. **Summary Judgment.** In appellate review of a summary judgment, the 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. **Parol Evidence: Appeal and Error.** The applicability of the parol evidence rule is a matter of law, for which an appellate court has an obligation to reach a conclusion independent of the lower court's decision.
3. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
4. **Parol Evidence: Contracts: Intent.** The parol evidence rule gives legal effect to the contracting parties' intention to make their writing a complete expression of the agreement that they reached, to the exclusion of all prior or contemporaneous negotiations.
5. **Contracts: Parties: Intent.** In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.
6. **Contracts: Parties: Intent: Proof.** One suing as a third-party beneficiary has the burden of showing that the provision was for his or her direct benefit. Unless one can sustain this burden, a purported third-party beneficiary will be deemed merely incidentally benefited and will not be permitted to recover on or enforce the agreement.
7. **Contracts: Parties: Intent.** General release language is an insufficient expression of an intent to grant rights under a contract to persons who were neither

named parties nor privies to named parties to the contract, and the parties' actual intent controls.

8. ____: ____: ____. Under the intent rule, general releases which fail to specifically designate who is discharged either by name or by some other specific identifying terminology are inherently ambiguous, and the actual intent of the parties will govern.

9. ____: ____: ____. Under the intent rule, the element of specific identification is only met when the reference in the release is so particular that a stranger can readily identify the released party and his or her identity is not in doubt.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed in part, and in part reversed and remanded.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Patrick G. Vipond and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Kathryn Podraza and her husband, Terrance Podraza, brought suit against New Century Physicians of Nebraska, LLC (New Century), to recover for injuries allegedly sustained after New Century's physicians failed to timely discover her appendicitis during two visits to the emergency room at Lakeside Hospital in Omaha, Nebraska. Lakeside Hospital is owned by Alegent Health (Alegent), but its emergency rooms and urgent care centers are staffed by physicians employed by New Century. The Podrazas settled their claims with Alegent. The principal issue in this case is whether the release agreement between the Podrazas and Alegent operates to bar the current suit against New Century.

II. BACKGROUND

On December 11, 2005, Kathryn visited the emergency room at Lakeside Hospital, complaining of severe abdominal pain. According to Kathryn, she told the emergency room

physician that the pain radiated through her entire abdominal area. A noncontrast CT scan performed during her visit was considered generally "unremarkable," but a report on the scan indicated calcification in the region of the appendix, which could be "highly suspicious" if "the patient hurts in the region of the appendix or is symptomatic for appendicitis."

Kathryn was discharged without a clear diagnosis and told to return if her condition worsened. On December 15, 2005, she returned to the emergency room, reporting severe abdominal pain, vomiting, diarrhea, and small amounts of blood in the urine. A different attending physician diagnosed her with cystitis and gastritis, and she was again sent home.

Kathryn's condition continued to deteriorate, and she reported to the emergency room for a final time on December 20, 2005. She was diagnosed with a ruptured appendix and admitted to the hospital for surgery. Kathryn experienced a lengthy recovery, and she alleges that the delay in her diagnosis caused unnecessary pain and suffering, medical bills, lost income, scarring and disfigurement, loss of bodily function, and other damages. Terrance alleges loss of consortium.

1. Relationship Between Alegent and New Century

Shortly after Kathryn's recovery, the Podrazas entered into discussions with Alegent concerning compensation for her injuries. The Podrazas stated they were surprised to learn at that time that the emergency room physicians at Lakeside Hospital were not employed by Alegent, but were provided through an independent contractor agreement with Premier Health Care Services, Inc. (Premier Health), the parent company of New Century.

Alegent contracted for Premier Health to provide qualified physicians to work at Alegent's hospital departments of emergency medicine and Alegent's express care locations and to provide medical directors responsible for coordinating and overseeing the quality, availability, safety, and appropriateness of those physicians' services. Under the agreement, the physicians were directed to work alongside Alegent's nonphysician personnel, including nurses and technical and paramedical personnel. Dr. Jeff Snyder, the regional medical director for

Premier Health, explained that New Century physicians working at the Alegent-owned emergency rooms and urgent care centers were "seamlessly integrated into the Alegent healthcare system" and that "[b]y all outward appearances Premier Health and New Century physicians are Alegent physicians, right down to the employee identification tags provided by Alegent." Alegent was responsible for providing the equipment, supplies, and ordinary utilities and services.

The agreement between Alegent and Premier Health provided that none of its provisions were intended to create any relationship between the parties other than that of "independent entities contracting with each other solely for the purpose of effecting the provisions of this Agreement." Furthermore, "[n]either of the parties . . . shall have the authority to bind the other or shall be deemed or construed to be the agent, employee or representative of the other" except as specifically provided in the agreement.

2. Release Agreement

Neither Premier Health nor New Century participated in the settlement negotiations between the Podrazas and Alegent, and it is unclear whether they were aware the negotiations were taking place. While disclaiming liability for what it considered a "doubtful and disputed claim," Alegent agreed to forgive the Podrazas' copay liability for their hospital bills, which totaled $1,765.33, and to pay an additional $11,234.67 in cash, for a total settlement of $13,000.

The release signed by the Podrazas and Alegent stated in pertinent part that in consideration for $13,000, the Podrazas agreed to "release, acquit and forever discharge the said **Released Parties,** and all others directly or indirectly liable or claimed to be liable, if any, from any and all claims and demands, actions and causes of action, damages, [and] claims for injuries," which were

> in any way growing out of any and all care received by Kathryn Podraza at Alegent Health, Alegent Health - Lakeside Hospital, their staff, employees, designees or representatives, successors and assigns and any officers, directors, or any corporation, organization, affiliate, or

> subsidiary of Alegent Health, as a result of medical services received, or the alleged lack thereof, performed at Alegent Health - Lakeside Hospital during the period of December 11, 2005 through and including December 29, 2005.

The "Released Parties" were defined as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." Premier Health and New Century were not specifically named. They were not signatories to the release agreement and did not contribute to the settlement payment.

The release recited that it contained the entire agreement between the parties and that there were "no agreements or understandings between the parties hereto, other than those expressed or referred to herein." The Podrazas also affirmed, through the agreement, that they had read the release and understood its contents. The Podrazas were not represented by an attorney.

3. Suit Against New Century

After their settlement with Alegent, the Podrazas began discussions with representatives of the two emergency room physicians and New Century. No agreement could be reached, and the Podrazas brought this suit. New Century initially answered with only a general denial of any negligence on the part of its physicians and a denial of proximate causation and the nature and extent of the Podrazas' injuries. But several months later, New Century was allowed to amend its answer to plead accord and satisfaction based upon the release agreement with Alegent. It then moved for summary judgment based upon that release.

The Podrazas responded by presenting deposition and affidavit testimony that the parties to the release agreement did not intend for the agreed-upon amount to fully compensate them for their loss, nor did they intend for the agreement to release New Century. Rather, the Podrazas testified that Alegent had specifically told them the release would not apply to any subsequent action against the emergency room physicians and that

Alegent had encouraged them to pursue the physicians, New Century, and the physicians' medical malpractice insurance provider, even giving them their contact information.

The parties stipulated that Lakeside Hospital would submit evidence rebutting any claim that Alegent had made representations to the Podrazas regarding their ability to pursue New Century after the release. The trial court concluded there was an issue of fact as to the parties' actual intent concerning who was released by the agreement. But the issue was whether the parties' actual intent could be considered at all, because New Century claimed that the parol evidence rule barred consideration of anything other than the plain terms of the written agreement.

The trial court initially denied New Century's motion for summary judgment, concluding that regardless of the language of the written release, parol evidence was admissible to ascertain the parties' intent as concerned persons or entities not parties to the agreement. The trial judge issuing this determination retired, and New Century filed a renewed motion for summary judgment and/or motion to reconsider before a different district court judge. The Podrazas, in turn, moved for partial summary judgment, alleging that the terms of the release unambiguously excluded New Century because it was undisputed that New Century was not an "affiliate" of Alegent.

The new trial judge denied both New Century's renewed motion for summary judgment and the Podrazas' motion for partial summary judgment. The court concluded that New Century was "'affiliated with'" Alegent, but determined that parol evidence could nevertheless be considered to show whether the parties actually intended New Century to benefit from the release.

After New Century filed a motion for clarification, the trial court reversed its determination as to the applicability of the parol evidence rule and found that summary judgment in favor of New Century should be granted. The court reasoned that New Century should be considered a party to the agreement and that, thus, the Podrazas could not vary the written terms of the release. The Podrazas appealed the trial court's judgment, and New Century cross-appealed.

III. ASSIGNMENTS OF ERROR

The Podrazas assert that the trial court erred in (1) granting summary judgment on the basis that the release barred the Podrazas' action against New Century, (2) receiving into evidence on the matter of summary judgment Snyder's affidavit and its attachments, (3) denying the Podrazas' motion for partial summary judgment on the matter of the release, and (4) ordering that the Podrazas were not entitled to discovery of all e-mail communications between New Century's attorneys and its expert witness.

In its cross-appeal, New Century asserts that the trial court erred in admitting the Podrazas' affidavits insofar as they sought to vary the terms of the written agreement.

IV. STANDARD OF REVIEW

[1] In appellate review of a summary judgment, the 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.[1]

[2] The applicability of the parol evidence rule is a matter of law, for which we have an obligation to reach a conclusion independent of the lower court's decision.[2]

[3] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[3]

V. ANALYSIS

1. Release

On its face, the agreement between Alegent and the Podrazas purports to release the "Released Parties" and "all others directly or indirectly liable or claimed to be liable, if any,

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[1] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[2] See, *In re Estate of Hockemeier, ante* p. 420, 786 N.W.2d 680 (2010); *Zender v. Vlasic Foods, Inc.*, No. 94-56499, 1996 WL 406145 (Cal. App. Aug. 29, 1996) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 91 F.3d 158 (9th Cir. 1996)).

[3] See, *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

from any and all claims and demands, actions and causes of action, damages, [and] claims for injuries." The "Released Parties" were defined as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." The parties dispute whether New Century is "affiliated with" Alegent. But the threshold question is whether the Podrazas' intent must be construed solely from the four corners of this agreement.

[4] The parol evidence rule states that if negotiations between the parties result in an integrated agreement which is reduced to writing, then, in the absence of fraud, mistake, or ambiguity, the written agreement is the only competent evidence of the contract between them.[4] This rule gives legal effect to the contracting parties' intention to make their writing a complete expression of the agreement that they reached, to the exclusion of all prior or contemporaneous negotiations.[5]

Different rules apply, however, when it is not a contracting party who seeks to rely on the legal presumption that the writing is a complete integration. We have held that the parol evidence rule cannot be invoked by a stranger to the agreement to prevent a party to the writing from adducing extraneous evidence as to its terms, even if that evidence varies or contradicts the written agreement.[6] Stated otherwise, we have said that the parol evidence rule operates only between parties to such instrument and those claiming under them.[7]

[5] New Century effectively asserts that because it is encompassed by the plain language of the agreement, it is not a stranger to it. Instead, it claims under the agreement to be a third-party beneficiary, and thus evokes the parol evidence

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[4] See *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000).

[5] See 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.2 (3d ed. 2004).

[6] See, *Grover, Inc. v. Papio-Missouri Riv. Nat. Res. Dist.*, 247 Neb. 975, 531 N.W.2d 531 (1995); *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28, 236 N.W. 165 (1931).

[7] *State Bank of Beaver Crossing v. Mackley, supra* note 6.

rule.[8] As a matter of general contract law, we have strictly construed who has the right to enforce a contract as a third-party beneficiary. In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.[9] The right of a third party benefited by a contract to sue thereon must affirmatively appear from the language of the instrument when properly interpreted or construed.[10]

[6] Authorities are in accord that one suing as a third-party beneficiary has the burden of showing that the provision was for his or her direct benefit.[11] Unless one can sustain this burden, a purported third-party beneficiary will be deemed merely incidentally benefited and will not be permitted to recover on or enforce the agreement.[12]

(a) "All Others Liable" Language

[7] More particular rules have emerged for persons claiming to be third-party beneficiaries to release agreements.[13] We have held that general release language, such as the Podrazas' release of "all others directly or indirectly liable or claimed to be liable," is an insufficient expression of an intent to grant rights under a contract to persons who were neither named parties nor privies to named parties to the contract, and the parties' actual intent controls.

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[8] See 11 Samuel Williston, A Treatise on the Law of Contracts § 33:11 (Richard A. Lord ed., 4th ed. 1999) (third-party beneficiaries are persons claiming under contract for purpose of stranger-to-the-agreement exception to parol evidence rule).

[9] See *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005).

[10] See *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984).

[11] 13 Samuel Williston, A Treatise on the Law of Contracts § 37:8 (Richard A. Lord ed., 4th ed. 2000 & Supp. 2010).

[12] *Id.*

[13] See Annot., 13 A.L.R.3d 313 (1967).

In *Scheideler v. Elias*,[14] for example, we considered whether a general release of all persons liable, signed as part of a settlement with a tort-feasor, could be enforced by physicians later sued for negligent treatment of the victim's injuries. We found the general release language to be inconclusive in light of the circumstances under which the contract was created, and we held that parol evidence should be considered to determine the parties' actual intent.[15] To view the contract any other way, we explained, would strangle justice, not serve it, as unwary laymen would often accept less reparation from one tort-feasor, intending to pursue others, "'"'"'only to find later they have walked into a trap.'"'"'"[16] Not considering the parties' actual intent would give nonparty tort-feasors "'"'"'an advantage wholly inconsistent with the nature of their liability.'"'"'"[17]

Our holding in *Scheideler* was limited to the discharge of successive tort-feasors, and we have not squarely addressed these releases under current joint tort-feasor liability. But we have consistently looked to actual intent as concerns unnamed parties encompassed by broadly termed release agreements. Thus, under our prior common-law concept of unity of discharge for joint tort-feasors, we held that settlement with one of several joint wrongdoers is not a defense to an action against another unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered.[18] And we held that parol evidence is always admissible to determine the parties' true intent under such circumstances, even when the terms of the release explicitly state that the victim acknowledges receipt of full payment and satisfaction for his or her injuries.[19]

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[14] *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981).

[15] *Id.*

[16] *Id.* at 612, 309 N.W.2d at 73.

[17] *Id.*

[18] *Menking v. Larson*, 112 Neb. 479, 199 N.W. 823 (1924). See, also, *Scheideler v. Elias, supra* note 14; *Holland v. Mayfield*, 826 So. 2d 664 (Miss. 1999).

[19] See, *Menking v. Larson, supra* note 18; *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

(b) Intent Rule

That joint and several liability for noneconomic damages has since been abrogated[20] only strengthens the principle that broad or universal language is not enough to release nonparty joint tort-feasors without consideration of the parties' actual intent.[21] Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008) is consistent with this when it states: "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides."

Other courts have relied on this language, derived from the Uniform Contribution Among Tortfeasors Act,[22] in adopting the so-called specific-identity rule for persons who are not parties to release agreements. Under the specific-identity rule, it is conclusively presumed that the liability of a party not named or otherwise specifically identified by the terms of the release is not discharged.[23]

[8] But many courts, under the same statutory language, have adopted a less stringent intent rule for interpreting releases as to nonparty tort-feasors. Under the intent rule, general releases which fail to specifically designate who is discharged either by name or by some other specific identifying terminology are inherently ambiguous, and the actual intent of the parties will govern.[24] Some of these courts create a rebuttable presumption, consistent with comparative fault principles, that a release benefits only those persons specifically designated.[25]

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[20] Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008).

[21] See *Hansen v. Ford Motor Co.*, 120 N.M. 203, 900 P.2d 952 (1995).

[22] Unif. Contribution Among Tortfeasors Act §§ 1 to 6, 12 U.L.A. 201 (2008).

[23] See, e.g., *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Young v. State*, 455 P.2d 889 (Alaska 1969).

[24] See, e.g., *Luther v. Danner*, 268 Kan. 343, 995 P.2d 865 (2000); *Hansen v. Ford Motor Co., supra* note 21. See, also, 13 A.L.R.3d 320, *supra* note 13.

[25] *Luther v. Danner, supra* note 24; *Hansen v. Ford Motor Co., supra* note 21.

We view the intent rule as consistent with our case law governing third-party beneficiaries and the release of nonparty joint tort-feasors as discussed above, and we hereby adopt it. We also adopt a rebuttable presumption that a release benefits only those specifically designated and that in accordance with general principles for third-party beneficiaries, it is the unnamed party claiming under the release who has the burden to show an actual intent to benefit him or her. The intent rule, like our holding in *Scheideler* and under our unity of discharge case law, considers broad releases to be inherently ambiguous as to unnamed parties. Since we have traditionally considered the parties' actual intent in such circumstances, we reject the specific-identity rule, which conclusively presumes any party not named or otherwise sufficiently specified was not intended to be released.

Accordingly, the broad description of "Released Parties" in the agreement between the Podrazas and Alegent is not conclusive of whether those parties actually intended to confer a benefit upon New Century. The question next becomes whether the definition of "Released Parties" in the agreement, as including entities "affiliated with" Alegent, is a sufficiently specific designation such that inquiry into the parties' actual intent is no longer warranted by the intent rule.

(c) "Entity Affiliated With" Language

[9] Under the intent rule, actual intent governs as to everyone except those discharged by name "'or by some other specific identifying terminology.'"[26] However, this element of specific identification is only met when the reference in the release is so particular that a stranger can readily identify the released party and his or her identity is not in doubt.[27] The intent to release a person who did not participate in the agreement or pay consideration must be clearly manifest.[28]

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[26] *Luther v. Danner, supra* note 24, 268 Kan. at 349, 995 P.2d at 870, quoting *Hansen v. Ford Motor Co., supra* note 21.

[27] See *Duncan v. Cessna Aircraft Co., supra* note 23. See, also, e.g., *Country Club of Jackson, Miss. v. Saucier*, 498 So. 2d 337 (Miss. 1986).

[28] See, *Smith v. Falke*, 474 So. 2d 1044 (Miss. 1985); Restatement (Second) of Torts § 885(1) (1979).

The relevant language of the agreement defines the "Released Parties" as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." The parties dedicate most of their briefs to their opposite conclusions as to what "affiliated with" means. The Podrazas view the phrase narrowly to include only those entities either owned by or controlled by Alegent, and not independent contractors bound only by contract to perform in a designated manner. New Century states that while the Podrazas might be correct for "affiliate" as a noun, as an adjective, "affiliated with" broadly includes any form of close association or allegiance.

Suffice it to say that under the circumstances presented here, "affiliated with" does not satisfy the level of specificity required for a third-party beneficiary to be able to rely solely on the four corners of the agreement. Even if we were to accept New Century's definition, it presents too broad a category for a stranger to be able to easily identify to whom it refers. Moreover, to determine whether any given entity falls under this definition, an intricate knowledge of all contracting entities and their relationship with New Century would be necessary. This likewise does not make those persons readily identifiable.

Certainly, the Podrazas stated that they did not suspect New Century was in any way being described in the release. In light of the language of the release, the fact that New Century did not participate in the settlement, and the alleged assurances by Alegent that the Podrazas could still pursue New Century, such a viewpoint was not unreasonable. As we stated in *Scheideler*, we look to actual intent in order to protect the unwary layman from overly broad release agreements that would give nonparty tort-feasors advantages wholly inconsistent with the nature of their liability.[29] We conclude that the actual intent of the contracting parties in this case must be determined by the trier of fact, and it is New Century's burden to prove it was specifically intended to be benefited by the agreement. We therefore

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[29] *Scheideler v. Elias, supra* note 14.

reverse the trial court's grant of summary judgment, and we remand the cause for further proceedings.

We accordingly find no merit to New Century's cross-appeal. Nor do we find merit to the Podrazas' argument that we may conclude as a matter of law that New Century was not an intended beneficiary of the release. We find no need to determine the Podrazas' second assignment of error concerning conclusions in Snyder's affidavit that New Century may be deemed "affiliated with" Alegent, as that question is inextricably tied to the trier of fact's determination of the parties' actual intent to benefit New Century. We will, however, next address the Podrazas' assignment of error concerning certain paralegal-expert witness e-mail correspondence, because, if the trier of fact finds New Century was not intended to be released by the agreement, this discovery question will remain an issue on remand.

2. Attorney-Expert Communications

The Podrazas' fourth assignment of error relates to their efforts, during discovery, to obtain correspondence between New Century's attorneys and its expert witness. New Century objected to the request, but the parties eventually reached an out-of-court understanding as to most matters. In particular, with regard to proposed expert witness Dr. Edward Mlinek, New Century had produced everything agreed upon, but the parties could not agree whether certain e-mail correspondence from the paralegal for New Century's attorneys to Mlinek was discoverable. The correspondence contained discussions about whether Mlinek could recommend a radiologist for New Century to employ in order to obtain a second opinion as to the interpretation of Kathryn's CT scan.

The Podrazas became aware of this specific correspondence because New Century inadvertently sent it to them, and New Century sought a protection order for the correspondence, claiming it contained privileged work product. The Podrazas argued that the correspondence was not privileged and that it was relevant to show Mlinek's bias, because the paralegal stated in the e-mail: "You [Mlinek] suggested we should have a radiologist interpret the CT scan and hopefully confirm that there is no calcification within the appendix." The Podrazas argued

that the word "hopefully" indicated Mlinek's biased interest in seeing a certain outcome from the radiologist's report. The trial court granted New Century's motion for a protective order on the basis that the e-mail contained inadvertently disclosed work product, and the Podrazas were prohibited from using or further disclosing the correspondence and were ordered to destroy all copies.

Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[30] We have also more specifically stated that a trial court has discretion in the matter of discovery where material is sought for impeachment purposes.[31] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.[32] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[33]

Neb. Ct. R. Disc. § 6-326(b)(3) describes the circumstances under which a party may obtain work product. It states in part:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial

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[30] See, *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 3; *In re Estate of Jeffrey B., supra* note 3.

[31] *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995).

[32] *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998).

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

> equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Subsection (b)(4), in turn, specifically relates to expert witnesses:

> Trial Preparation: Experts. Discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial *may be obtained only as follows*:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(Emphasis supplied.)

The e-mails contain private discussions between the paralegal for New Century's attorneys and its retained expert, and the Podrazas do not claim that the paralegal should not be considered New Century's representative. They argue instead that the e-mails represent the expert's thoughts, and not those

of the attorneys' office, and that this is somehow determinative. But whether considered attorney work product or the expert's opinions, it is clear from the rules above that, at the very least, the Podrazas had to demonstrate a substantial need for the materials.

There is no such substantial need to use at trial for impeachment purposes someone else's characterization that the retained expert had indicated that an unbiased radiologist would "hopefully" have a favorable reading of the CT scan. This is not a case, such as those relied upon by the Podrazas, where the Podrazas are seeking information necessary to understand the basis for the expert's opinion. Indeed, the correspondence in question relates more to administrative matters within the attorneys' office than to the formation and basis of any expert's testimony. Nor do we find merit to the Podrazas' contention that the inadvertent disclosure waived the protections afforded by the discovery rules. The trial court did not abuse its discretion in granting a protection order in favor of New Century for the e-mail communications.

VI. CONCLUSION

We reverse the trial court's order of summary judgment in favor of New Century, but affirm its grant of a protection order for e-mail correspondence between New Century's attorneys' office and its expert witness. We affirm the trial court's denial of the Podrazas' partial motion for summary judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JAMES M. SCOTT, APPELLEE, V. COUNTY OF RICHARDSON, APPELLANT.

789 N.W.2d 44

Filed October 15, 2010. No. S-10-039.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.

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. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
4. **Due Process: Public Officers and Employees: Property: Contracts.** A public employee's due process rights arise from a contractually created property right to continued employment.
5. **Termination of Employment: Due Process: Case Overruled.** Deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process. To the extent that *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), holds to the contrary, it is expressly overruled.
6. **Public Officers and Employees: Termination of Employment: Due Process.** Due process requires that a public employer provide its employees with appropriate pretermination and posttermination proceedings.

Appeal from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Reversed and remanded with directions.

Vincent Valentino for appellant.

Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

After James M. Scott was terminated from his employment as a deputy sheriff for Richardson County (County), he filed a grievance. Richardson County's grievance board (Board) found irregularities in the manner in which Scott was terminated, and it reinstated his employment for the period between his termination and the date of the grievance hearing. Scott was also awarded backpay and benefits. Finding just cause, the Board subsequently terminated Scott's employment effective the date of the grievance hearing. After Scott filed a petition in error, the district court reversed and vacated the Board's decision to terminate Scott's employment and ordered that he be reinstated. The County appeals.

SCOPE OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007). On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id.*

FACTS

Scott's employment was terminated by Randy Raney, who was the chief deputy and Scott's supervisor, on February 17, 2009. As a deputy sheriff, his employment with the sheriff's department was covered by a labor agreement between the County and the International Union of Operating Engineers, Local 571 (Union). The agreement includes a multistep grievance procedure.

Scott filed a grievance with Sheriff Vernon Buckminster, who denied it. Scott next submitted a complaint to the Richardson County Board of Commissioners, which complaint was also denied. He then appealed to the Board, which consists of two members appointed by the county commissioners, two members appointed by the Union, and one member agreed upon by the County and the Union. The Board upheld the termination of Scott's employment effective July 16, 2009.

Testimony about the basis for Scott's termination was received at a hearing before the Board on July 16, 2009. Raney testified that June Dettmann, a dispatcher and jailer for the sheriff's office, complained in December 2008 that Scott had "become affectionate toward her" and indicated he wanted a relationship with her. Dettmann stated that after she told Scott she was not interested in a relationship, Scott became distant, slammed doors when he left the office area, failed to contact her on the radio as required by office policy, and hung up on

her when she called him. Raney asked Dettmann to submit her complaint in writing, and Raney subsequently met with Scott and advised him that his conduct was not acceptable and that it could be considered sexual harassment. Raney advised Scott not to talk to Dettmann about personal matters at work. Scott denied Dettmann's allegations.

Dettmann contacted Raney on January 25, 2009, to report that Scott's behavior had deteriorated. That night, Scott had been in the office and responded to a disturbance call in the southeast part of the county. He did not report to Dettmann that he was responding to the call. Raney said office policy provided that the dispatcher is to be informed of where an officer is going and of the type of call because the dispatcher serves as a lifeline for officers and needs to be able to dispatch other officers for assistance.

When Scott returned to the office, Dettmann was preparing a crime report about the disturbance call. Scott asked her to change the report because he thought it would bring undue attention to him. Dettmann told Raney she felt pressured to change the report lest Scott have her fired.

On January 29, 2009, Raney informed Scott that he was on paid suspension for gross insubordination and harassment pending an internal investigation. Raney met with Scott, Buckminster, and a Union representative on February 6. Raney gave Scott a detailed report stating the reasons for the disciplinary action against him, including (1) that Scott asked Dettmann to participate in a sexual relationship and other behavior that could be considered sexual harassment if it continued; (2) that Raney found a letter, dated January 24, 2008, written by Scott on a sheriff's office computer, which letter made allegations of inappropriate conduct by Dettmann; (3) that Raney received a complaint in April 2008 from another dispatcher about Scott and Dettmann's spending time together in the office or in Scott's patrol car when Dettmann was not on duty; and (4) that Dettmann called Raney on January 25, 2009, reporting that Scott had failed to inform her of his location, hung up on her, tried to turn other employees against her, and coerced her into changing a crime report. Scott denied all the allegations included in the report.

Between February 6 and 17, 2009, Raney investigated the allegations against Scott. On February 16, Scott submitted to a polygraph examination; however, the results were not offered or admitted at the hearing. On February 17, at a meeting attended by Scott, Raney, Buckminster, and the Union representative, Raney asked for Scott's resignation. Scott refused to resign, and Raney terminated his employment.

Dettmann also testified at the grievance hearing. She stated that on January 25, 2009, Scott called in on the police radio but she did not know his location. Scott reported that he had left the information on the counter in the office. Dettmann found a note from Scott underneath the logbook indicating that he was responding to a call. Dettmann called Scott to tell him she was upset because he had not followed office procedure. In response, Scott told her that he had drafted a complaint about her that he was going to submit to Raney. Scott said that if they could work things out, he would shred the complaint.

When Scott returned to the office, Dettmann was working on the crime report for the disturbance call. Scott said he had torn up the complaint about her. Scott asked Dettmann to change the crime report so it would not include his violation of office policy, because it would reflect poorly on him. She changed the report because she was upset and intimidated by Scott.

The Board found that just cause existed to terminate Scott's employment as of July 16, 2009. The evidence showed that Scott sexually propositioned Dettmann and that he denied the accusation when questioned by Raney. The Board concluded that Scott lied to Raney, his supervisor, and, in doing so, was insubordinate and unprofessional. The Board found that Scott left the office on January 25 and failed to follow office policy and procedure by not properly notifying Dettmann of his destination or his purpose in leaving. Upon his return to the office, Scott pressured, intimidated, and coerced Dettmann into altering the crime report. The Board found that this conduct was inappropriate, unprofessional, and contrary to department policy and procedure and that it constituted insubordination and unprofessional conduct.

However, the Board expressed reservations about the manner in which Scott's termination had been handled and whether there was inappropriate reliance on the results of a polygraph examination. The Board determined that any irregularities could effectively be cured by granting Scott's grievance in part. It ordered that Scott's employment be reinstated with backpay and benefits from July 16, 2009 (the date of the Board's decision), retroactively to February 17 (the date of Scott's termination of employment). However, the Board determined that Scott's due process rights had been fully honored in the proceedings before the Board, and it denied the grievance as to Scott's employment beyond July 16.

Scott filed a petition in error pursuant to Neb. Rev. Stat. § 25-1901 (Reissue 2008). The district court concluded that Scott's pretermination due process rights under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), were violated. Under *Loudermill, supra*, a public employee with a property interest in his employment has the right to due process of law, which requires that the employee be provided with oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to explain his or her side of the story.

The district court determined that Scott was not given adequate notice of the charges, an explanation of his employer's evidence, and an opportunity to explain his side of the story before his employment was terminated. The court concluded that Scott was told only that he was on paid suspension for gross insubordination and harassment, without any details regarding Dettmann's complaints about him.

The district court concluded that no process was followed to ensure that Scott's rights under *Loudermill, supra*, were "provided in a meaningful way." The court relied upon *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), in which the Nebraska Court of Appeals held that posttermination proceedings cannot cure violations of pretermination due process. It held that the pretermination denial of Scott's due process rights caused the Board's decision to be a nullity. The court reversed and vacated the Board's

decision to terminate Scott's employment effective July 16, 2009. The County appeals.

ASSIGNMENTS OF ERROR

The County assigns the following errors, which we have summarized and restated: The district court erred (1) in concluding that an extensive posttermination due process hearing did not cure pretermination due process deficiencies and (2) in failing to find that Scott waived his pretermination due process argument by accepting backpay.

ANALYSIS

In this case, we are presented with whether violations of an employee's pretermination due process rights can be cured by posttermination proceedings. In *Martin, supra*, the Court of Appeals held that such violations cannot be cured by posttermination proceedings. The appellate court concluded that the posttermination proceedings, which included a de novo review of the case in the district court, although procedurally adequate, did not cure the pretermination violations of the employee's right to procedural due process. It is against this legal background that we begin our analysis in the case at bar.

[4] A public employee's due process rights arise from a contractually created property right to continued employment. *Loudermill, supra*. Neither party disputes that Scott had a protected property interest in his continued employment. When a state deprives a public employee of that right, the deprivation must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). *Loudermill* divides procedural due process claims into three stages. *Krentz v. Robertson*, 228 F.3d 897 (8th Cir. 2000).

> Initially, an employee receives notice that he will be terminated, and he is given an opportunity to respond: that is "pretermination process." Then, the employer actually fires the employee. Finally, in the third stage, an employee has an opportunity to receive some measure of

> post-termination process, usually a hearing with heightened procedural safeguards.

Id. at 902, citing *Loudermill, supra*. See, also, *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007).

The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id*. On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id*.

The County argues that the district court erred in concluding that the posttermination hearing did not cure the pretermination due process deficiencies. We have not addressed this question, and other courts are split.

The district court relied upon *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998). In that case, the employee was dismissed based on alleged insubordination and failure to fulfill basic job responsibilities. After an evidentiary hearing, the hearing officer found sufficient evidence to support the insubordination allegation, but not to support the allegation that the employee had failed to fulfill job responsibilities. The Nebraska State Personnel Board found that the employee had been dismissed for just cause, and the district court affirmed.

The Court of Appeals reversed the decision and remanded the cause with directions because it found that information relied upon in the decision to dismiss the employee was not available to the employee prior to the termination of his employment and that he was not given an adequate explanation of the evidence gathered in the investigation or an opportunity to respond. *Id*.

After determining that the employee's due process rights were violated, the Court of Appeals concluded that a failure to provide sufficient pretermination process cannot be cured by the availability of posttermination procedures.

> "To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would

> be to render the United States Supreme Court's holding in [*Loudermill*] a nullity. Furthermore, no matter how fair and adequate the procedures at the post-termination hearing may be, the initial decision made after the pre-termination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing."

Martin, 7 Neb. App. at 594, 584 N.W.2d at 491-92, quoting *Stallworth v. City of Evergreen*, 680 So. 2d 229 (Ala. 1996).

Other courts have similarly held that there is no cure for a pretermination violation of due process. "Where an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation." *Cotnoir v. University of Maine Systems*, 35 F.3d 6, 12 (1st Cir. 1994). If an employee is fired without pretermination protections, the constitutional deprivation is complete and posttermination procedures cannot compensate. *Id.*

A posttermination judicial finding as to an employment dismissal is not a substitute for a pretermination due process hearing. *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984). The availability of postdeprivation grievance procedures does not cure a due process violation. *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984). See, also, *Murray v. Dept. of Revenue & Taxation*, 543 So. 2d 1150 (La. App. 1989) (posttermination hearing does not cure failure to provide pretermination hearing).

However, other courts have held that due process violations may be cured. "[*Cleveland Board of Education v.*] *Loudermill*[, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985),] instructs us that extensive post-termination proceedings may cure inadequate pretermination proceedings." *Krentz v. Robertson*, 228 F.3d 897, 902 (8th Cir. 2000). The *Krentz* court interpreted *Loudermill* "to require only limited pretermination process, especially if post-termination proceedings are available and extensive." 228 F.3d at 902-03. "Ultimately, [the *Krentz* court's] conclusion that [the employee in *Krentz*] received adequate pretermination process depends heavily upon the fact that robust post-termination proceedings may cure superficial pretermination proceedings." *Id.* at 903. See, also,

Smutka v. City of Hutchinson, 451 F.3d 522 (8th Cir. 2006); *Schleck v. Ramsey County*, 939 F.2d 638 (8th Cir. 1991) (employer not required to provide full hearing or to disclose all details of charges against employee); *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504 (8th Cir. 1986) (employee's due process rights not violated even if employee did not receive all procedural safeguards during initial proceeding as long as hearing was granted at later date).

Other federal courts have also held that errors in pretermination procedures can be cured by subsequent posttermination proceedings. See, *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). State courts have held similarly. See, e.g., *City of North Pole v. Zabek*, 934 P.2d 1292 (Alaska 1997) (evidence presented in posttermination hearing may be sufficient to justify suspension or termination even if insufficient to justify summary suspension or termination); *Maxwell v. Mayor & Alder. of Savannah*, 226 Ga. App. 705, 487 S.E.2d 478 (1997) (no violation of procedural due process rights unless and until employer refuses to make remedy available); *Smith v. Five Rivers MetroParks*, 134 Ohio App. 3d 754, 732 N.E.2d 422 (1999) (posttermination arbitration hearing sufficient to cure any deficiencies in notice of charges); *Ross v. Medical Univ. of South Carolina*, 328 S.C. 51, 492 S.E.2d 62 (1997) (posttermination proceedings remedied pretermination deficiencies).

This court has never addressed whether proceedings after a termination of employment can remedy the failure of due process prior to the termination of employment. Although we cited *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998), in *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007), we did not discuss the specific issue presented here.

[5] Stating that it was bound to follow the "rulings of law" in *Martin*, the district court concluded in the case at bar that the posttermination proceedings did not cure the pretermination due process violations. We disagree with that conclusion. We hold that deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process. Such measures can be provided

by grievance procedures that have been agreed upon by the employer and the employee. To the extent that *Martin* holds to the contrary, it is expressly overruled.

[6] The interpretation of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), by the Eighth Circuit is the better reasoning. *Loudermill* requires only limited pretermination process, especially if post-termination proceedings are available and extensive. *Krentz v. Robertson*, 228 F.3d 897 (8th Cir. 2000). Due process requires that a public employer provide its employees with appropriate pretermination and posttermination proceedings. *Smutka v. City of Hutchinson*, 451 F.3d 522 (8th Cir. 2006). A pretermination hearing need not be elaborate. *Loudermill, supra*. Informal meetings with supervisors are sufficient. *Schleck v. Ramsey County*, 939 F.2d 638 (8th Cir. 1991).

A pretermination hearing need not "definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 545-46. To require more than notice of the charges, an explanation of the employer's evidence, and an opportunity to present the employee's side of the story "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*, 470 U.S. at 546.

In the case at bar, the labor agreement outlined the steps in the grievance process. An employee is first required, before filing a grievance, to verbally inform his or her immediate supervisor of the cause of dissatisfaction and give the supervisor an opportunity to correct the situation. If the employee is not satisfied, he or she may present a grievance in writing to the supervisor, who has 5 working days to answer. If the employee remains dissatisfied, he or she may refer the matter to the Union, which must then contact the sheriff in writing and present the employee's case. If the matter remains unsatisfactorily settled, the Union must present the grievance in writing to the Richardson County Board of Commissioners. If no settlement is reached, the grievance is presented in writing to the Board,

which is made up of two members appointed by the county commissioners, two members appointed by the Union, and one member agreed upon by the County and the Union. This multistep grievance process provides employees with the due process required under *Loudermill, supra*.

After Scott met with Raney on January 29, 2009, he was placed on paid suspension for gross insubordination and harassment pending an internal investigation. On February 6, in a meeting also attended by Buckminster and a Union representative, Raney gave Scott a detailed report stating the reasons for the disciplinary action. The report included Dettmann's statement that Scott wanted a sexual relationship with her and that after she rejected such offer, Scott's behavior changed. He would not answer the radio, hung up the telephone, and slammed doors when he left the office. Scott was told he could be responsible for a sexual harassment complaint if his conduct continued. The report also noted the January 25, 2009, incident of Scott's failure to report his location to Dettmann, at a time when she was the dispatcher on duty, and attempt to coerce her into changing a crime report. He was given an opportunity to tell his side of the story at the February 6 meeting, where he denied all the allegations.

Following the termination of his employment, Scott was given a hearing before the Board. Prior to the hearing, he was furnished with notice, a listing of the charges, and a detailed explanation of the exhibits and witnesses. The charges described in detail Scott's attempt to participate in a sexual relationship with Dettmann and his behavior surrounding the January 25, 2009, incident, reiterating the allegations of his failure to notify Dettmann of his destination as well as his intimidation of Dettmann so she would change her report. He was advised that he had provided dishonest responses when questioned by investigators about the above events.

At the hearing, evidence was presented in the form of testimony and documents. Scott was represented by an attorney. The Board then deliberated and made its decision. The parties had specifically contracted for such procedures relating to employee grievances, and we conclude these procedures were adequate to provide the due process required.

Having concluded that the violation of Scott's due process rights was cured by the extensive posttermination hearing, we consider whether the Board acted within its jurisdiction and whether sufficient relevant evidence supports the decision of the Board. In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

The labor agreement granted the County the right to "hire, promote, demote, suspend, discipline or discharge for just cause." The grievance procedure granted the Board the authority to determine whether Scott's employment had been terminated for just cause. Thus, pursuant to the labor agreement, the Board had jurisdiction to affirm the termination of his employment. We do not decide any other issue concerning the Board's authority in this appeal.

We also note that the evidence supports the termination of Scott's employment for just cause. The record shows that Scott sexually propositioned Dettmann, a fellow employee of the sheriff's department, and lied to Raney, his supervisor, about the incident. He failed to follow office policy when responding to a disturbance call, and he coerced Dettmann into altering a crime report. This evidence is sufficient to support disciplinary action, including termination of employment.

The County also argues that Scott waived his pretermination due process argument by accepting backpay. Given our reversal of the district court's order, it is not necessary to reach the waiver issue.

CONCLUSION

There is no dispute whether Scott's due process rights were lacking in some respects. However, any violation of Scott's due process rights during the pretermination process was cured by the posttermination proceedings. Thus, the district court erred in ordering that Scott be reinstated to his employment with the County. The district court's judgment is reversed, and the cause

is remanded with directions to reinstate the order of termination entered by the Board.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMAS E. BURNHAM, APPELLANT, V. THE PACESETTER CORPORATION AND LIBERTY MUTUAL GROUP, APPELLEES.

789 N.W.2d 913

Filed October 15, 2010. Nos. S-10-229, S-10-344.

1. **Jurisdiction: Judgments: Appeal and Error.** 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.
2. **Judgments: Appeal and Error.** An appellate court independently decides questions of law.
3. **Workers' Compensation: Jurisdiction: Statutes.** The Workers' Compensation Court is not a court of general jurisdiction, but, rather, is a statutorily created court.
4. ____: ____: ____. No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court.
5. **Workers' Compensation: Courts: Statutes.** A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.

Appeals from the Workers' Compensation Court. Affirmed.

Eric W. Kruger, of Rickerson & Kruger, for appellant.

Scott A. Lautenbaugh, of Hansen, Lautenbaugh & Buckley, L.L.P., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

This case comes to us from the Nebraska Workers' Compensation Court. Thomas E. Burnham was injured while working for The Pacesetter Corporation, and in 2007, the Nebraska Court of Appeals granted summary affirmance

to Burnham confirming his award. This appeal arises from Burnham's attempts to enforce the award against appellees, The Pacesetter Corporation and Liberty Mutual Group (Liberty Mutual), its insurance carrier, through the compensation court, first by filing a motion to enforce the award and then by filing a motion to compel. In both cases, the compensation court found it did not have jurisdiction. Burnham appeals those decisions, which have been consolidated for purposes of this appeal.

FACTS

The background and procedural posture of this case involve multiple appeals and multiple motions. Briefly, after several appeals, the Court of Appeals upheld the decision of the compensation court, finding that Burnham had suffered a 65-percent loss of earning capacity. The Court of Appeals also affirmed the imposition of a waiting-time penalty and attorney fees.

On May 15, 2009, Burnham initiated a garnishment action in the Douglas County District Court to collect his award. The district court garnished $28,191.90 from Liberty Mutual and ordered Liberty Mutual to deliver that amount to the court, pending appeal. The Court of Appeals eventually summarily affirmed that order on January 13, 2010, in case No. A-09-730.

While the garnishment proceeding was on appeal, Burnham filed his "Motion for Enforcement of Award and Notice of Hearing" in the compensation court on February 10, 2009, and filed a "Motion to Compel re: Liberty Mutual's Violation of Court Orders" on December 8. That court denied both motions, finding that it did not have the authority to enforce collection of its own awards and that Burnham had a sufficient remedy in the district court. The three-judge review panel of the compensation court affirmed those decisions, and Burnham appeals. Burnham alleges that our recent decisions in *Russell v. Kerry, Inc.*[1] and *Midwest PMS v. Olsen*[2] allow the compensation court to enforce its own decisions.

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[1] *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009).

[2] *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010).

ASSIGNMENTS OF ERROR

Burnham assigns, consolidated and restated, that the compensation court erred when it determined that it did not have the authority to enforce the judgment or compel appellees to pay the award and that Burnham's sole remedy is in the district court.

STANDARD OF REVIEW

[1] 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]

[2] An appellate court independently decides questions of law.[4]

ANALYSIS

We note at the outset that during oral argument, Burnham claimed he was seeking clarification from the compensation court as to the penalties that were ordered. Burnham makes no argument in his brief regarding clarification, but instead argues that the compensation court has the authority to enforce the judgment against appellees, to compel appellees to pay what they owe, and to find appellees in contempt for failing to follow that court's order. Appellees argue that any award must be enforced through the district court. We agree that Burnham's remedy must be pursued in the district court.

Burnham appealed the decisions of the compensation court, and those two appeals were consolidated in the present case. Burnham acknowledges that he received payment of $28,191.90 through the garnishment action, but alleges that the waiting-time penalty was not part of that garnishment action and that he is still owed in excess of $90,000. Although Burnham does not explain why he omitted the waiting-time penalties from his motion for garnishment, he stated that he filed the actions that make up the current appeal in response to our decision in *Russell v. Kerry, Inc.*[5]

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[3] *Harleysville Ins. Group v. Omaha Gas Appliance Co.*, 278 Neb. 547, 772 N.W.2d 88 (2009).

[4] *Russell, supra* note 1.

[5] *Id.*

In *Russell*, the employee received an award before the compensation court.[6] The employer then failed to timely pay the award, and the employee sought a waiting-time penalty and attorney fees. While that enforcement motion was pending, the employer ceased paying the employee weekly disability benefits and he filed a second enforcement action before the compensation court. While the second action was pending, the employer perfected its appeal on the first action to the three-judge review panel. Both enforcement actions were denied, and the employee appealed.

In *Russell*, the compensation court found that it did not have jurisdiction over the second enforcement action while the appeal of the first enforcement order was pending. We disagreed, finding that the compensation court did have jurisdiction to assess a waiting-time penalty, attorney fees, and interest for all delinquent payments.[7] We determined that because the employer's appeal of the first violation (failing to make payments within 30 days) had nothing to do with the second violation (ending weekly benefit payments), the employee could bring a second action to assess a penalty over which the compensation court had jurisdiction.[8] We further held that interest should be assessed on each installment of compensation benefits from the date interest becomes due.[9]

The second case Burnham cites in support of his claim is *Midwest PMS v. Olsen*.[10] The crux of *Midwest PMS* was a dispute between two workers' compensation insurance carriers. The compensation court dismissed the case, finding it did not have jurisdiction to decide a case between two insurance carriers. One insurance company appealed. We stated that Neb. Rev. Stat. § 48-161 (Reissue 2004) granted the compensation court the authority to exercise ancillary jurisdiction.[11] We noted

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Midwest PMS, supra* note 2.

[11] *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990) (superseded by statute as stated in *Midwest PMS, supra* note 2).

that the subrogation issue involved facts usually decided by the compensation court. We determined that "the final resolution of an employee's right to workers' compensation benefits does not preclude an issue from being 'ancillary' to the resolution of the employee's right to benefits within the meaning of § 48-161."[12] Therefore, the compensation court had authority to determine liability as between insurance companies.

Here, the three-judge review panel stated:

> In the original award, [Burnham] received weekly benefits plus penalties on weekly benefits and additional penalties on weekly benefits until the benefits became current. Only one penalty can be awarded and only one attorney fee awarded, and once [Burnham] recovers the penalty and an attorney fee for late payment of weekly benefits and late payment of medical benefits, the . . . compensation court is without authority to award additional penalties and attorney's fees. Without statutory authority to act on [Burnham's] request, the Court has no jurisdiction on the issue of additional attorney's fees.

The three-judge review panel further stated that although interest continued to accrue, the amount of the award was to be determined by the district court.

We find that to the extent that Burnham is asking for a clarification of his award, as suggested during oral argument, the compensation court has the authority to do so. Contrary to Burnham's allegation, however, although the compensation court does have jurisdiction to clarify its award, it does not have the authority to enforce the collection of its award. Nor does the compensation court have the authority to issue contempt citations. In *Russell*,[13] we held that the compensation court can impose a penalty for refusing to pay an award. However, *Russell* is distinguishable. After the employer was assessed a waiting-time penalty for failing to pay medical expenses and the matter was on appeal, the employer ceased to pay weekly benefits, thereby incurring a second, separate penalty.

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[12] *Midwest PMS, supra* note 2, 279 Neb. at 499, 778 N.W.2d at 733.

[13] *Russell, supra* note 1.

In Burnham's case, the award was finalized in 2006, and a waiting-time penalty and attorney fees were assessed at that time as well. But as the compensation court noted, "[a]ny argument that there was a continuing obligation to pay benefits terminated on May 1, 2006, when the 300[-]week statutory maximum period for payment of benefits occurred." Therefore, unlike in *Russell*, where there were two separate violations, the compensation court had no reason to impose a second penalty on appellees for failing to pay weekly benefits.

In a supplemental letter, Burnham also relies on *Smeal Fire Apparatus Co. v. Kreikemeier*,[14] arguing that under that case, the compensation court has the authority to find a party in contempt for failing to comply with an order. In *Smeal Fire Apparatus Co.*,[15] we discussed a court's "inherent contempt powers," particularly in light of Neb. Rev. Stat. § 25-1072 (Reissue 2008). And we stated that "a court properly exercising equity jurisdiction may completely adjudicate all matters properly presented and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation."[16] In effect, any court of general jurisdiction has inherent power to remedy violations of its orders, which includes finding a party in contempt.[17]

[3-5] The compensation court is not a court of general jurisdiction, but, rather, is a statutorily created court.[18] And no Nebraska statute grants equity jurisdiction to the compensation court.[19] "A statutorily created court, such as the Workers' Compensation Court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute."[20]

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[14] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[15] *Id.* at 670, 782 N.W.2d at 859.

[16] *Id.* at 673-74, 782 N.W.2d at 861.

[17] *Smeal Fire Apparatus Co., supra* note 14.

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

[19] *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008).

[20] *Schweitzer, supra* note 18, 256 Neb. at 358, 591 N.W.2d at 530.

After our decision in *Thomas v. Omega Re-Bar, Inc.*,[21] the Legislature amended § 48-161 to invest the compensation court with ancillary jurisdiction "to determine insurance coverage disputes in the claims before it, including the existence of coverage, and the extent of an insurer's liability."[22] We have stated that the main purpose behind giving the compensation court ancillary jurisdiction was to prevent delay in payment of benefits.[23] Ancillary jurisdiction does not include the power to enforce the collection of an award, as Burnham suggests. We noted in *Midwest PMS* that the subrogation issue involved facts usually decided by the compensation court. In the present case, Burnham is asking the compensation court to enforce the collection of its award and/or find appellees in contempt. Nowhere in the Nebraska Workers' Compensation Act is the compensation court vested with the authority to issue contempt orders. Those powers have traditionally been reserved for the district court.

Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008) provides Burnham with a sufficient remedy. Under that statute, Burnham may file his award with the district court, which will give it the same force and effect as a judgment of the district court.[24] Burnham has, in effect, done exactly this by pursuing a garnishment proceeding in the district court. Burnham has failed to present any compelling reason why he cannot continue to pursue through the district court what he claims he is still owed.[25]

We therefore find Burnham's assignment of error without merit and affirm the decision of the three-judge review panel of the compensation court finding that it did not have jurisdiction over Burnham's motions.

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[21] *Thomas, supra* note 11.

[22] *Schweitzer, supra* note 18, 256 Neb. at 358, 591 N.W.2d at 530.

[23] *Midwest PMS, supra* note 2; *Schweitzer, supra* note 18.

[24] See § 48-188.

[25] See *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996), *disapproved on other grounds, Allen v. Immanuel Med. Ctr.*, 278 Neb. 41, 767 N.W.2d 502 (2009).

CONCLUSION

The Workers' Compensation Court is a statutorily created court and has only the authority granted to it by statute. The Nebraska Workers' Compensation Act does not grant the compensation court the authority to enforce the collection of its awards. Under § 48-188, a worker must seek such enforcement through the district court. We therefore affirm the decision of the three-judge review panel of the compensation court.

AFFIRMED.

GLEN R. DAVIS, APPELLEE, V. CHOCTAW CONSTRUCTION, INC., DOING BUSINESS AS MID-AMERICA PUMP & SUPPLY, A NEBRASKA CORPORATION, APPELLANT.

789 N.W.2d 698

Filed October 22, 2010. No. S-10-005.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.
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. **Limitations of Actions: Dismissal and Nonsuit.** Neb. Rev. Stat. § 25-217 (Reissue 2008) is self-executing, so that an action is dismissed by operation of law, without any action by either the defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed.
4. **Limitations of Actions: Dismissal and Nonsuit: Jurisdiction.** After dismissal of an action by operation of law under Neb. Rev. Stat. § 25-217 (Reissue 2008), there is no longer an action pending and the district court has no jurisdiction to make any further orders except to formalize the dismissal. If any orders are made following the dismissal, they are a nullity.
5. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Reversed and remanded with directions to vacate and dismiss.

Robert M. Sullivan, of Sullivan, Shoemaker, Witt & Burns, P.C., L.L.O., for appellant.

Michael Mead, of Law Offices of Whelan, Scherr, Glen, Goding & Mead, P.C., L.L.O., for appellee.

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

STEPHAN, J.

Glen R. Davis brought this action against Choctaw Construction, Inc. (Choctaw), doing business as Mid-America Pump & Supply, alleging that his brief employment with the company was wrongfully terminated. After a bench trial and judgment in favor of Davis, Choctaw moved for a new trial and for dismissal based in part upon the fact that it had not been served with summons and a copy of the complaint within 6 months from the date the complaint was filed. The district court overruled the motions, and Choctaw appeals.

BACKGROUND

From 1994 to 2003, Davis worked in Hawaii as an applications engineer for a company that drilled water wells. In 2002, he began looking for employment in the continental United States. In September 2002, Davis sent a cover letter and a resume to Thomas Bramble, the president of Choctaw.

Bramble subsequently contacted Davis and arranged for Davis and his wife to travel to Hastings, Nebraska. Davis met with Bramble in Hastings in late 2002 and toured the facilities of Mid-America Pump & Supply. Bramble also interviewed Davis for possible employment. Davis testified that during this interview, he told Bramble that he would accept a position only if he was given a 3-year employment contract. According to Davis, he left Nebraska anticipating that he would receive a written contractual offer from Bramble.

Approximately 2 weeks later, Davis received a handwritten letter from Bramble offering Davis a job in Hastings. In addition to stating the salary and benefits of the position, the letter provided:

> Glen, we are looking for [a] person for longterm employment. But I understand that things change! We would like you to commit to [at] least 3 years here but hopeful you will stay many more!!

> Glen, I would request a contract for this. It would be [a] basic contract stating that you would continue employment for 3 years, and if you wanted to leave between hire date and 18 months, you would be required to reimburse Mid America 4000.$\frac{00}{}$, from 18 months to 36 months 2000.$\frac{00}{}$. This in my heart is not set in stone!

Davis construed this letter as a contract, moved to Nebraska, and started working at Mid-America Pump & Supply in February 2003. Choctaw paid for Davis' moving expenses. No other written agreement was entered into by the parties. On May 16, 2003, Choctaw terminated Davis' employment, citing poor job performance as the reason for termination.

On August 15, 2005, Davis filed this action in the district court for Adams County, seeking damages resulting from his termination of employment under theories of breach of contract and promissory estoppel. After two unsuccessful attempts at service initiated by his former attorney, Choctaw was served with summons and a copy of the complaint on August 16, 2006, more than 1 year after the complaint was filed. Choctaw's first appearance in the case was on September 7, when it filed a motion to dismiss for failure to state a claim upon which relief could be granted. That motion was overruled.

Following a bench trial, the district court concluded that there was no employment contract between Choctaw and Davis, but that Davis was entitled to recover on the theory of promissory estoppel. The court entered judgment for Davis in the amount of $160,657.80.

After the judgment was entered, Choctaw filed a motion for new trial. One basis of the motion was that pursuant to Neb. Rev. Stat. § 25-217 (Reissue 2008), the district court lacked jurisdiction to enter the judgment because Choctaw had not been served with a copy of the complaint within 6 months from the date the complaint was filed. This was the first time that the jurisdictional issue had been raised. At the hearing on this motion, Choctaw also made an oral motion to dismiss the action based on § 25-217. The district court overruled these motions, and Choctaw filed this timely appeal. We moved the appeal to our docket on our own motion pursuant to our

statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Choctaw assigns, restated, that the district court erred in (1) failing to dismiss for lack of jurisdiction based on § 25-217, (2) finding that all the elements of promissory estoppel were proved by Davis, (3) finding that Davis was wrongfully terminated, (4) calculating damages, and (5) failing to find that Davis was an at-will employee subject to termination at any time.

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, which requires the appellate court to reach a conclusion independent of the lower court's decision.[2]

ANALYSIS

[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] Here, Choctaw contends that pursuant to § 25-217, the district court lacked jurisdiction to enter judgment in this case because Choctaw was not served with a copy of the complaint within 6 months of the date the complaint was filed.

[3,4] Section 25-217 provides: "An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." This court and the Nebraska Court of Appeals have repeatedly held that this statute is self-executing, so that an action is dismissed by operation of law, without any action by either the

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *In re Estate of Hockemeier, ante* p. 420, 786 N.W.2d 680 (2010); *Davio v. Nebraska Dept. of Health & Human Servs., ante* p. 263, 786 N.W.2d 655 (2010).

[3] *In re Estate of Hockemeier, supra* note 2; *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed.[4] After dismissal of an action by operation of law under § 25-217, there is no longer an action pending and the district court has no jurisdiction to make any further orders except to formalize the dismissal.[5] If any orders are made following the dismissal, they are a nullity.[6]

Davis attempts to distinguish the present action from all of the prior holdings by arguing that in this case, the district court entered a final judgment prior to the time the § 25-217 issue was raised. Davis also argues that it would be inequitable to allow Choctaw to now raise the defense of § 25-217, when Choctaw fully participated in the proceedings which resulted in the judgment against it.

[5] But these arguments cannot be reconciled with the plain language of § 25-217 and the case law regarding its application. Because the statute is self-executing, the dismissal of the action automatically occurred 6 months after the filing of the complaint and no action on the part of the district court or Choctaw was required to effect the dismissal. Therefore, there was nothing legally before the court either when Choctaw entered its initial appearance or when the court conducted the trial and entered judgment. The trial proceedings are nullities, and the district court erred in not vacating the judgment and dismissing the action when the issue of subject matter jurisdiction was raised in the postjudgment motions. Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[7]

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[4] See, *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007); *Dillion v. Mabbutt*, 265 Neb. 814, 660 N.W.2d 477 (2003); *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000); *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999); *McDaneld v. Fischer*, 8 Neb. App. 160, 589 N.W.2d 172 (1999).

[5] *Reid v. Evans, supra* note 4; *Dillion v. Mabbutt, supra* note 4.

[6] *Reid v. Evans, supra* note 4; *Kovar v. Habrock, supra* note 4.

[7] *In re Estate of Hockemeier, supra* note 2; *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

CONCLUSION

Because Choctaw was not served with summons and a copy of the complaint within 6 months from the date the complaint was filed, this action was dismissed by operation of law before any issue was submitted to the district court. The judgment entered in favor of Davis was therefore null and void. We therefore reverse, and remand with directions to the district court to vacate its judgment and to enter an order that Davis' complaint stands dismissed under § 25-217.

REVERSED AND REMANDED WITH DIRECTIONS TO VACATE AND DISMISS.

IN RE ADOPTION OF DAVID C.
MISTY R. AND JEREMY R., APPELLEES, V. JERAD F., APPELLANT.

790 N.W.2d 205

Filed October 29, 2010. No. S-09-1044.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **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.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an 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.
7. **Adoption: Abandonment: Proof.** The issue of abandonment in an adoption proceeding must be established by clear and convincing evidence.
8. **Abandonment: Intent.** The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.

Daniel W. Ryberg for appellant.

R. Bradley Dawson, of Lindemeier, Gillett, Dawson & Troshynski, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The putative father, Jerad F., appeals from the finding of the Lincoln County Court that he abandoned David C. The court determined that a petition for stepparent adoption could proceed without Jerad's consent.

SCOPE OF REVIEW

[1] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record. *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

FACTS

David was born in Omaha, Nebraska, on September 30, 2005, to Misty R. and Jerad, who have never been married to each other. There is no dispute that Jerad is David's biological father. After David's birth, Misty moved to North Platte, Nebraska, to be near her family. On March 7, 2008, Misty married Jeremy R., who seeks to adopt David.

On June 26, 2009, Misty and Jeremy filed a petition for stepparent adoption. The petition alleged that Misty and Jeremy were married and that Jeremy wanted to adopt David, thereby "conferring upon [David] all of the rights and duties as if [he] had been born to [Jeremy]." Misty identified Jerad as David's father in the "Affidavit of Identification" attached to the petition.

The petition alleged that Jerad knew of David's birth on September 30, 2005, and had abandoned David for at least 6 months next preceding the filing of the petition, that Jerad failed to provide reasonable financial support for the child and

did not establish any relationship with said child, and that Jerad acted "in a manner evidencing a settled purpose to be rid of all parental responsibilities and obligations" involving David. The petition asked that Jeremy be allowed to adopt David and that his last name be changed.

Jerad's answer admitted that Misty was David's natural mother, that David was born to Misty and Jerad, and that Misty had identified Jerad as the father in the "Affidavit of Identification" attached to the petition. Jerad denied that he abandoned David and claimed that his attempts to have a relationship with David were thwarted by Misty. He requested that the petition for stepparent adoption be dismissed.

The county court found by clear and convincing evidence that Jerad abandoned David and that Jerad's consent was not needed for the adoption. It concluded the evidence was undisputed that Jerad had no contact with David and had provided no financial, emotional, or parental support from February 2006 until the filing of the petition on June 26, 2009. Jerad voluntarily discontinued contact with Misty and David when the child was no more than 6 months old.

The county court found no evidence of duress, fraud, or subterfuge perpetrated by Misty against Jerad. It found by clear and convincing evidence that Jerad had failed to demonstrate any plan to fulfill his parental responsibilities and obligations and that he had withheld his presence, care, love, concern, protection, and maintenance of David without just cause or excuse and failed to avail himself of any opportunity to display parental affection.

The county court determined that Jerad was not a fit and proper parent or suitable custodian for David because Jerad had abandoned David; had no contact with David for more than 3 years; and had provided no financial, emotional, or parental support even though he knew he had a son and the son's location. It concluded that the matter should proceed to adoption without Jerad's consent. We affirm.

ASSIGNMENTS OF ERROR

Jerad assigns the following errors: The county court (1) lacked jurisdiction due to a failure to comply with prepetition

notice requirements; (2) erred in deciding that the adoption should proceed without the consent of the district court; (3) erred in determining that Jerad had abandoned David; (4) erred in bifurcating the proceedings and denying an evidentiary hearing on the best interests of David, depriving Jerad of his constitutional right to due process; and (5) erred in determining that it was in David's best interests to proceed with the adoption.

ANALYSIS

JURISDICTION

[2,3] The parties question whether this court has jurisdiction because the order determining that Jerad had abandoned David was not a final, appealable order. 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. *Carmicheal v. Rollins, ante* p. 59, 783 N.W.2d 763 (2010). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *Id.*

Neb. Rev. Stat. § 43-112 (Reissue 2008) provides that an appeal may be taken from any final order, judgment, or decree of the county court rendered under the adoption statutes to the Nebraska Court of Appeals. In this case, no adoption decree has been entered. Rather, the county court found that Jerad abandoned David, and Jerad has appealed from that determination.

[4] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). Since the order in the case at bar did not determine the action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered, we consider whether the order was made during a special proceeding and affected a substantial right.

This court has construed the term "special proceeding" to include every special civil statutory remedy not encompassed in the civil procedure statutes that is not in itself an action. *Id.* "An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment." *Id.* at 128-29, 760 N.W.2d at 32. Every other legal proceeding in which a remedy is sought by original application to a court is a special proceeding. *Id.*

The statutes regulating adoption in Nebraska are not contained within the civil procedure statutes. Adoption proceedings are governed by Neb. Rev. Stat. § 43-101 et seq. (Reissue 2008 & Supp. 2009). Thus, they are special proceedings. See, e.g., *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

[5,6] A substantial right is an essential legal right, not a mere technical right. See *Steven S., supra*. 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. See *id.* "'"[W]hether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed."'" *Id.* at 130, 760 N.W.2d at 34, quoting *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997), and *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

In the case at bar, the county court found that Jerad abandoned David and that Jerad was not a fit and proper parent due to the abandonment. It concluded that Jerad's consent to the adoption was not required, and it ordered the matter to proceed to adoption without Jerad's consent.

This order affected a substantial right and was therefore final and appealable. An order of abandonment disturbs the parent's relationship with the child forever because the parent no longer has any right to be a part of the adoption proceedings. Once the

relationship is terminated, the parent has no standing to object to the adoption. Because the order affects Jerad's substantial right, it is final and appealable and this court has jurisdiction to review it.

Finding of Abandonment

[7] We next consider the merits of the county court's order, in which the court found by clear and convincing evidence that Jerad had abandoned David and that Jerad's consent was not needed for the adoption. The issue of abandonment in an adoption proceeding must be established by clear and convincing evidence. See *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990), citing *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).

Misty testified that Jerad made no attempt to establish a relationship with David. She did not hear from Jerad during her pregnancy even though she maintained the same telephone number she had while she and Jerad were dating. He did not ask to be informed of David's birth and was not present when David was born. Because Misty's family was in North Platte, she decided to move there to raise David.

After David was born, Misty received a snowsuit for David in the mail, but there was no name on the package, so she did not know whether it came from Jerad. Jerad did not send any other gifts for David or provide any financial support for him. Jerad did not register with the biological father registry. Misty denied Jerad's claims that she refused to make arrangements for visitation, that he offered money and clothing for David, and that she thwarted his attempts to have a relationship with David.

In May 2009, Misty contacted Jerad to inform him that her husband, Jeremy, wanted to adopt David. Jerad gave Misty his contact information so she could send the relinquishment forms. A few days later, Jerad's wife contacted Misty and said she and Jerad wanted to be a part of David's life. Jerad's wife offered to pay Misty $100 per month in child support. Misty said she was surprised that Jerad wanted to start a relationship with David at that time because Jerad had never sent cards or

gifts for David's birthday or at Christmas and had never called and asked to speak to David on the telephone.

Jerad testified that his relationship with Misty ended when she learned she was pregnant. Jerad said Misty did not want anything to do with him, in part because of religious differences. Jerad said that a friend called to let him know of David's birth and that he went to the hospital that day. Jerad claimed he was not allowed to see David, but he did not contact social services at the hospital for assistance.

Within the first months after David's birth, Jerad saw David on one occasion for about 1½ hours at the home of a friend who was related to Misty. Other visitations were scheduled, but they were canceled by Misty because she had car trouble or her daughter was sick.

Jerad said he contacted Misty by telephone in February 2006 and offered her health insurance and money but that she refused to accept it. Misty denied that she had refused Jerad's offer to provide support or health insurance for David. Around the same time, Jerad contacted an attorney for help with visitation, but the attorney produced no results. Jerad testified that he did not attempt to visit David after February 2006. Jerad said that in the 3 months prior to the hearing on the adoption petition, he tried to negotiate with Misty so he could be a part of David's life, but Misty refused. After Misty contacted Jerad at the end of May 2009 about the adoption, Jerad contacted an attorney. The State filed a paternity action in district court, and Jerad filed an answer requesting genetic testing. An order for genetic testing was entered in the district court, and it was pending at the time of the hearing in the adoption case.

Jerad admitted that he had not seen David after February 2006 and had not sent any cards or letters. Jerad said he was waiting until David was "old enough to know what was going on." He had Misty's telephone number, which had not changed since David was born. He was not "trying to be the bad guy" but was trying to negotiate and "work things out." He was not aware that he could acknowledge paternity within the first days after David's birth.

[8] "The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances." *In re Guardianship of T.C.W.*, 235 Neb. 716, 720, 457 N.W.2d 282, 285 (1990).

> "Willful abandonment has been defined as 'a voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection . . . .' . . ."

In re Application of S.R.S. and M.B.S., 225 Neb. 759, 765, 408 N.W.2d 272, 276 (1987), quoting *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).

Although § 43-104 specifies the 6 months preceding the filing of the petition as the critical period of time during which abandonment must be shown, we have stated that this statutory period need not be considered in a vacuum. See *In re Adoption of Simonton, supra*. "One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his child or children." *Id*. at 783, 320 N.W.2d at 453. The parental obligation "requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." *Id*. at 784, 320 N.W.2d at 454.

The record supports by clear and convincing evidence that Jerad abandoned David. Jerad had no contact with and offered no parental support for David from February 2006 until the filing of the petition in June 2009. Misty moved to North Platte with David soon after his birth. She did not attempt to hide her location from Jerad, and she retained the same telephone number she had when they were dating. She traveled to Omaha at least once to allow Jerad to visit the child. There is no evidence that Jerad made any attempt to visit David in North Platte.

The last time Jerad attempted to contact David was in February 2006. He took no further action until the petition was filed in June 2009. No cards, letters, or gifts were sent, and Jerad provided no financial support.

David was nearly 4 years old at the time the adoption petition was filed. The evidence clearly and convincingly supports a finding that Jerad abandoned David by voluntarily discontinuing any contact with David when the child was no more than 6 months of age. The county court was correct in finding abandonment and in concluding that Jerad's consent to the adoption was not required.

Remaining Assignments of Error

Jerad claims that the county court lacked jurisdiction because prepetition notice requirements were not met. He claims that the court erred in (1) deciding that the adoption should proceed without the consent of the district court, (2) bifurcating the proceedings and denying an evidentiary hearing on David's best interests, and (3) determining that David's best interests would be served by proceeding with the adoption.

We find no merit to these assigned errors because Jerad lacks standing to raise them. This case comes to us following the county court's finding of abandonment. No decree of adoption has been entered. Once the court found that Jerad had abandoned David, Jerad no longer had standing to raise objections.

Consent shall not be required of any parent who has abandoned a child for at least 6 months next preceding the filing of the adoption petition. § 43-104. At any hearing to determine the parental rights of a 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 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;
>
> . . . .

> (3) The father had knowledge of the child's birth and failed to provide reasonable financial support for the mother or child.

See § 43-104.22. The effect of a finding of abandonment is that the putative biological father has no further standing to raise objections in the matter of the adoption.

The same is true of Jerad's claim that this adoption may not proceed because there has been no consent by the district court. Given the finding of abandonment, Jerad has no standing to object to any issues of consent.

Jerad objects to the county court's decision to bifurcate the proceedings and deny an evidentiary hearing on David's best interests. He also argues that the county court erred in determining that David's best interests were to proceed with the adoption.

A trial judge has broad discretion over the conduct of a trial, and absent abuse, that discretion should be respected. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). 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. *Id*. 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. *Id*.

In this case, the county court first considered the question of abandonment. Once the court determined that issue, it could proceed to consider whether the adoption of David by Jeremy was in David's best interests. The court found that Jerad had abandoned David, and at that time, Jerad no longer had standing to object to the adoption. It was reasonable, and more efficient, for the court to divide the proceedings. See *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991) (no error in dividing trial into relinquishment phase and best interests phase). Although the county court made a finding as to David's best interests, Jerad has no standing to object to the court's finding. We conclude that Jerad's assignments of error are without merit.

CONCLUSION

The decision of the county court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, APPELLEE, V. AMWEST SURETY INSURANCE COMPANY, APPELLEE, AND FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR NETBANK, F.S.B., CLAIMANT, APPELLANT.

790 N.W.2d 866

Filed October 29, 2010. No. S-09-1128.

1. **Insurance: Equity: Appeal and Error.** An insurer liquidation proceeding lies in equity, and an appellate court reviews a liquidation court's determination of claims disputes de novo on the record.
2. **Contracts: Time.** In the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances.
3. **Uniform Commercial Code: Security Interests: Notice.** The Uniform Commercial Code is a "pure race" statute in which a subsequent creditor's notice of prior creditors is irrelevant.
4. **Security Interests.** As to priority, conflicting perfected security interests rank in the order in which they are filed or perfected.
5. **Security Interests: Time.** Delays in perfecting a security interest measured in months or years are unreasonable.
6. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
7. **Waiver: Estoppel.** To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
8. **Waiver.** A waiver requires that the waiving party have full knowledge of all the material facts.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded.

Robert B. Bernstein, of Vandenberg & Feliu, L.L.P., James G. Powers and Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., L.L.O., and William V. Custer, LeeAnn

Jones, and Jennifer B. Dempsey, of Bryan Cave, L.L.P., for appellant.

Robert L. Nefsky, John H. Binning, and Jane F. Langan, of Rembolt Ludtke, L.L.P., for appellee Director of Insurance.

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

CONNOLLY, J.

SUMMARY

During 1999 and 2000, NetBank, a federal savings bank; Commercial Money Center (CMC); and Amwest Surety Insurance Company (Amwest) entered into seven agreements. Under these agreements, Amwest undertook the duty to perfect NetBank's security interests in the underlying collateral so that NetBank would be protected from subsequent creditors or a CMC bankruptcy. Amwest never perfected the security interests, and CMC later filed for bankruptcy, leaving NetBank an unsecured creditor in CMC's bankruptcy. NetBank filed claims in the Amwest liquidation proceedings for Amwest's alleged breach of contract. We are asked to decide whether a reasonable time to perfect NetBank's security interests had elapsed before a subsequent surety replaced Amwest.

BACKGROUND

In 1999 and 2000, CMC sold, transferred, and assigned to NetBank the income streams in 641 leases. These transactions were evidenced in seven sales and servicing agreements entered into by CMC, NetBank, and Amwest. CMC brought in Amwest as a surety to guarantee the income streams to make the deal more attractive to institutional investors such as NetBank. Although Amwest issued surety bonds as part of this transaction, the Federal Deposit Insurance Corporation (FDIC) is not asserting any claims on those bonds. FDIC is a party to this case in its capacity as the receiver for NetBank, which encountered its own insolvency problems in 2007. FDIC is not asserting any type of government priority; its rights under the agreements are exactly those that NetBank would have had.

Included within the agreements were representations regarding Uniform Commercial Code (U.C.C.) filings. In each

agreement, CMC represented that all necessary filings had been made to grant NetBank a first priority perfected lien or ownership interest in the leases and transferred assets and a first priority perfected security interest in the equipment. In reality, no such filings had been made.

Other clauses in the agreements required that CMC and Amwest take all actions necessary to obtain and maintain a first priority protected security interest in the lease assets. Article X, section 10.2(a), of each agreement states that the "Servicer [Amwest], in all events, shall cause Seller [CMC] to take . . . actions as to protect the Purchaser's [NetBank's] title to and first priority security interest in the Transferred Assets." Thus, some tension exists in the agreements as article X, section 2.4, states that all filings have been made, but section 10.2 states that they will be made.

The agreements did not specify a time in which to perfect the security interests. It is undisputed that Amwest never made any U.C.C. filings to establish NetBank's priority in the collateral.

Also in the agreements, CMC represented to NetBank that the surety guaranteeing the income streams would have a credit rating of A– or better. Amwest eventually fell below this mark. Because of this, at NetBank's request, a surety with the necessary credit rating was brought in to issue additional bonds. On January 2, 2001, the new surety, Royal Indemnity Company (Royal) issued an additional 641 bonds.

Later, on June 7, 2001, the district court entered a liquidation order regarding Amwest.

NetBank continued to receive its payments under the agreements until December 2001. Around May 29, 2002, CMC filed bankruptcy. The bankruptcy court determined that because NetBank did not have a perfected first priority security interest in the lease agreements, the leases were a general asset in the bankruptcy estate. This determination left NetBank with little recourse against CMC.

The Referee's Findings

A few days after the CMC bankruptcy, NetBank filed its claims with the Amwest liquidator. The liquidator overseeing

Amwest's estate denied NetBank's claims. After NetBank objected to the liquidator's denial, a referee heard the matter and denied the claims. The referee concluded that Amwest's obligation to perfect security interests in the lease agreements had merged into its obligation to provide indemnity to NetBank under the Amwest surety bonds. Further, the referee stated that claims must be valued on the date of the liquidation order and that no one had yet defaulted on the payments under the leases on that date. The referee concluded that NetBank's claims under the bonds were not "absolute" on the liquidation order date, stating: "On that date, the claims of NetBank may have been 'incurred' because of the failure to perfect the security interest of NetBank, but they were not known and therefore were unreportable." The referee stated that only claims known on the date of the liquidation order are valid in the liquidation proceedings.

The District Court's Findings

Both parties objected to the referee's report. The district court affirmed the referee's denial of the claims, but for different reasons. The court determined that because the agreements did not provide a time for the perfection to occur, it had to occur within a reasonable time. The court ruled that the duty to "'obtain *and maintain*'" the first priority of NetBank was a continuing obligation. The court stated that the interests could have been perfected at any time before CMC's bankruptcy preference period, which began on or around February 27, 2002, about 18 months after the last agreement. Further, because the court found that the contracts were still executory at the time of the liquidation order, the liquidator, under Neb. Rev. Stat. § 44-4821(1)(m) (Reissue 2001), could affirm or disavow the contracts. The court found that the liquidator had, in fact, disavowed the contracts. Finally, the court found that NetBank had effectively waived any claims against Amwest under the agreements.

ASSIGNMENTS OF ERROR

FDIC assigns that the district court erred in (1) affirming the denial of FDIC's claims under the agreements, (2) finding that a reasonable time to perfect the security interests had not

expired, (3) finding that Amwest was terminated as servicer on January 2, 2001, (4) finding that NetBank had waived its claims, and (5) concluding that the liquidator had effectively disavowed the agreements.

STANDARD OF REVIEW

[1] An insurer liquidation proceeding lies in equity, and we review a liquidation court's determination of claims disputes de novo on the record.[1]

ANALYSIS

A Reasonable Time to Perform Had Elapsed

As noted, the district court found that the duty to perfect NetBank's security interests was a "continuing obligation" under the agreements. It stated that the financing statements could have been filed at any time up to February 27, 2002, when CMC's bankruptcy preference period began. The last agreement was entered into in early September 2000. So, according to the district court's order, a reasonable time for performance had not elapsed despite the passing of nearly 18 months.

FDIC argues that Amwest breached the agreements by not perfecting the security interests in the income streams. It argues that this should have occurred, at the latest, shortly after the closing. It is undisputed that the agreements imposed a duty to perfect upon Amwest. And it is undisputed that no perfection ever occurred. The question is whether Amwest was in breach of the contract before its defenses of waiver or disavowal became applicable.

[2] The agreements do not state a time within which Amwest had to perfect the security interests. The parties agree that "in the absence of a stated time for performance, the law will imply a time of performance within a reasonable time under the circumstances."[2]

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[1] *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 110, 738 N.W.2d 805 (2007).

[2] *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 199, 252 N.W.2d 142, 147 (1977).

[3,4] In analyzing what is a "reasonable time" to perfect a security interest, we begin by noting that the U.C.C. is a "pure race" statute in which a subsequent creditor's notice of prior creditors is irrelevant.[3] As to priority, conflicting perfected security interests rank in the order in which they are filed or perfected.[4] "Filing" refers to the filing of an effective financing statement; "perfection" refers to the acquisition of a perfected security interest.[5] Depending on the collateral secured, perfection can occur in different ways. For example, some interests are perfected automatically upon attachment.[6] Others require a filing.[7] Still others require that the secured party control the collateral to perfect its interest.[8] Perfection by any means, however, requires that the security interest attach to the collateral.[9] Attachment is governed by Neb. U.C.C. § 9-203 (Reissue 2001). And the parties do not appear to dispute that the interests had attached.

Under the U.C.C., a creditor can file its financing statement before he has extended any credit to the debtor.[10] In other words, a party can file a financing statement before the security interest attaches. If a filing predates the attachment, perfection will relate back to the filing.[11] This effectively eliminates any risk of subsequent creditors arising between the time that credit was extended and later perfection. Commentators have referred to the ability to file a financing statement before a party extends credit as "[o]ne of the greatest boons to the secured creditor under Article 9 . . . ."[12]

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[3] See *Todsen v. Runge*, 211 Neb. 226, 318 N.W.2d 88 (1982).

[4] Neb. U.C.C. § 9-322 (Reissue 2001).

[5] *Id.*, comment 4.

[6] Neb. U.C.C. § 9-309 (Reissue 2001).

[7] Neb. U.C.C. § 9-310 (Reissue 2001).

[8] Neb. U.C.C. § 9-314 (Reissue 2001).

[9] Neb. U.C.C. § 9-308 (Reissue 2001).

[10] 1 Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code ¶ 2.13[1] (rev. ed. 2000).

[11] *Id.*

[12] *Id.* at 2-208.

Several sections of the U.C.C. provide guidance on what constitutes a reasonable time. Neb. U.C.C. § 9-312(e), (f), and (g) (Reissue 2001) provide for either automatic perfection or continuing perfection for a short period before the lender needs to perfect by other means. This period of automatic perfection lasts for 20 days, during which time the lender must perfect in another way to maintain his priority after the 20-day period. Similarly, Neb. U.C.C. § 9-315(d) (Reissue 2001) provides that a perfected security interest in proceeds expires after 20 days unless certain conditions are met. Comment 8 to § 9-312 states that 20 days "is the time period generally applicable in this article." From these "grace periods," we infer that the drafters of the U.C.C. considered 20 days to be a sufficient time within which to perfect a security interest.

Other sections in the U.C.C. provide for periods longer than 20 days.[13] These longer periods, however, are only applicable in situations different from what is at issue in this appeal.

[5] Case law also aids us in determining what constitutes a reasonable time. Courts that have considered this issue and others like it have concluded that perfection should follow shortly after the closing. In *Waldrop v. Hurd*,[14] former clients of an attorney brought a malpractice action for an attorney's failure to perfect the clients' security interests. The court dismissed the suit as untimely. But in discussing at what point the statute of limitations began running, the court noted that the filing "should have coincided close in time to the closing of the sale."[15] The Appellate Court of Connecticut held that 8 days was an unreasonable delay in recording a real estate mortgage.[16] The court noted that in other decisions, delays of a day or two had been held to be reasonable, but that "delays measured in months and years [are] unreasonable."[17]

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[13] *E.g.*, Neb. U.C.C. § 9-316 (Reissue 2001).

[14] *Waldrop v. Hurd*, 907 So. 2d 890 (La. App. 2005).

[15] *Id.* at 894.

[16] *Cottiero v. Ifkovic*, 35 Conn. App. 682, 647 A.2d 9 (1994).

[17] *Id.* at 690, 647 A.2d at 13.

Commentators and practice guides also support the view that several months is an unreasonable time to wait to perfect. Commentators are adamant that filing should occur quickly. One commentator warns that a delay in filing can be "painful" or even "fatal" if subsequent creditors arise or if the debtor declares bankruptcy.[18] Most authorities suggest filing before the interest attaches. "In most cases, financing statements are filed at the close of a secured transaction. However, it is advisable to file financing statements . . . before the loan closing."[19] Still others maintain "it is a good habit to engage in the pre-filing of financing statements."[20]

As mentioned, the district court concluded that a reasonable time had not yet passed until the CMC bankruptcy period began, which was about 18 months after the parties entered into the last agreement. Perfection grants a level of protection against subsequent creditors and the possibility that the debtor might go bankrupt. Either could occur moments after the loan is made or not for decades. The failure to perfect a security interest within a reasonable time creates a ticking timebomb. Because of the unpredictable nature of the risk and what is at stake—millions of dollars—we conclude that waiting months to perfect a security interest is unreasonable. The district court erred in finding that a reasonable time had not elapsed.

Even if NetBank Waived Further Performance, It Did Not Waive Its Claim for the Breach

[6-8] The liquidator argues that NetBank waived Amwest's future performance of the agreements when it accepted surety bonds from Royal and replaced Amwest with Royal as surety. "A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by

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[18] 1 Clark, *supra* note 10, ¶ 2.13[1] at 2-209.

[19] Texas Secretary of State, Information on the Texas Business and Commerce Code, http://www.sos.state.tx.us/ucc/tbc-code.shtml (last visited Sept. 9, 2010).

[20] C. Grice McMullan & Kimberly A. Taylor, The New UCC Article 9: A Primer on Attachment and Perfection Under the 2001 Revised Law of Secured Transactions for Real Estate Lawyers, http://state.vipnet.org/vsbar/sections/rp/articles/mcmullan.html (last visited Sept. 28, 2010).

or inferred from a person's conduct."[21] "[T]o establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part."[22] A waiver requires that the waiving party have "full knowledge of all the material facts."[23]

The liquidator argues that a waiver occurred in early January 2001. The liquidator points to a document signed by NetBank's chief financial officer that states Amwest was relieved as servicer and Royal was appointed as servicer. But the liquidator's argument hinges upon a conclusion that a breach had not yet occurred. As we discussed earlier, Amwest was already in breach by this time; whether Amwest was released from future performance is irrelevant.

So, the relevant question is not whether NetBank waived further performance, but rather, whether it waived its cause of action for breach of contract. To show waiver, the liquidator would have to establish that NetBank knew of Amwest's failure to perfect the security interests. The liquidator does not point to anything in the record that shows that NetBank was aware of Amwest's failure to perfect the security interests before CMC's bankruptcy proceedings. Nor has our review of the record uncovered anything showing NetBank's awareness of that failure. Further, nothing exists in the record, before or after the CMC bankruptcy proceedings, that we interpret as a "clear, unequivocal, and decisive" act by which NetBank waived its claims. The liquidator has failed to show that NetBank waived or abandoned its claims for breach of contract.

The Liquidator Could Not Disavow the Agreements Because Amwest Was Already in Breach

The liquidator also argues that he effectively disavowed Amwest's contract with NetBank. Because we have already determined that Amwest had breached the agreements before the liquidation order was entered, Amwest had no duty of

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[21] *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 675, 624 N.W.2d 636, 640-41 (2001).

[22] *Id.* at 675, 624 N.W.2d at 641.

[23] 17B C.J.S. *Contracts* § 423 at 43 (1999).

further performance. There was no contract at that point for the liquidator to disavow. In fact, during oral argument before this court, counsel for the liquidator conceded that if the contracts were breached before the liquidation order, "disavowal would not become an issue."

CONCLUSION

We conclude that Amwest breached its obligation to perfect NetBank's interests in the collateral. We also conclude that Amwest does not have any meritorious defenses. We reverse, and remand to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY A. LAMB, APPELLANT.
789 N.W.2d 918

Filed October 29, 2010. No. S-09-1201.

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: Courts: 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. **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 lower courts.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, entry of judgment occurs with the imposition of a sentence.
6. **Sentences: Probation and Parole: Appeal and Error.** The imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008).
7. **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.

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. **Constitutional Law: Statutes: Standing.** Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right.
10. **Investigative Stops: Search and Seizure.** An investigative stop is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
11. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved.
12. ____: ____: ____. A stop is justified when an officer observes a traffic offense—however minor.
13. **Criminal Law: Police Officers and Sheriffs: Testimony: Corroboration.** When testimony regarding speed is used in connection with a charge other than speeding, the officer's testimony of speeding, if believed, is sufficient and need not be corroborated.
14. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.
15. ____: ____: ____. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.
16. **Investigative Stops: Police Officers and Sheriffs: Drunk Driving: Probable Cause.** An officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests.
17. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. Courts must determine whether reasonable suspicion exists on a case-by-case basis.
18. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention. It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
19. **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.
20. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.

21. **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.
22. **Legislature: Criminal Law: Public Policy: Sentences: Courts.** The Legislature declares the law and public policy by defining crimes and fixing their punishment. The responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.
23. **Drunk Driving: Sentences: Probation and Parole.** Neb. Rev. Stat. § 60-6,197.03(5) (Supp. 2007) provides for the possibility of a sentence of probation.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Thomas R. Lamb, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Jeffrey A. Lamb, appellant, was arrested for driving under the influence (DUI) in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). Prior to trial, Lamb filed a motion to quash in the county court for Lancaster County in which he challenged the constitutionality of Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008) on various bases, all to the effect that this statute improperly prevented the trial court from imposing a sentence of probation. The motion was denied. A subsequent motion to suppress evidence of intoxication was also denied. Lamb was convicted of DUI, second offense, and sentenced to 90 days' incarceration, revocation of his license for 1 year, and a $500 fine. The district court affirmed Lamb's conviction and

sentence. Lamb appeals. Because § 60-6,197.09, about which Lamb complains, does not apply to him, we conclude that Lamb does not have standing to challenge the constitutionality of this statute. We further conclude that the district court did not err when it affirmed Lamb's conviction, and we affirm in part. However, because neither the county court nor the district court considered probation as a sentencing option, we find error in connection with the sentence, and reverse the district court's order in part and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court to resentence Lamb.

STATEMENT OF FACTS

On November 11, 2006, Lamb was stopped by an officer of the Lincoln Police Department in Pioneers Park. The officer stopped Lamb because Lamb had entered Pioneers Park after the park was closed and Lamb appeared to be traveling in excess of the speed limit. The officer approached the vehicle, smelled the odor of alcohol, saw other signs of intoxication, and asked Lamb to exit the vehicle for field sobriety tests. The officer believed that Lamb was under the influence of alcohol. Lamb was arrested and transported to the Lincoln Police Department for a chemical breath test. The result of the test was .20 of 1 gram of alcohol per 210 liters of breath, which exceeded the legal limit. See § 60-6,196(1).

On December 4, 2006, a complaint was filed in the county court for Lancaster County against Lamb for DUI, second offense, in violation of § 60-6,196.

Lamb filed a motion to quash the complaint. In summary, Lamb challenged the constitutionality of § 60-6,197.09 as vague, overbroad, a denial of due process, and inconsistent with other statutes. The essence of the challenge was that § 60-6,197.09 deprived him of an opportunity to be sentenced to probation. On May 23, 2007, the county court denied the motion to quash. In its order, the county court incorporated language from another trial level order which had found that § 60-6,197.09 was constitutional and applicable to a case similar to Lamb's.

Before trial, Lamb also filed a motion to suppress. The county court held a hearing on the motion and ultimately denied the motion to suppress.

A bench trial was held on February 27, 2008, and Lamb was found guilty of DUI, second offense, by the county court on February 28. The county court also found that Lamb's breath alcohol content was more than .15 of 1 gram of alcohol per 210 liters of breath, making the offense a Class I misdemeanor.

On May 23, 2008, Lamb was sentenced to 90 days' incarceration, revocation of his license for 1 year, and a $500 fine. At the enhancement hearing, the State offered an exhibit, received into evidence, which established that Lamb had been previously convicted of DUI in the county court for Saline County on April 6, 2006, and was sentenced to 18 months' probation on July 18.

Lamb appealed his conviction and sentence in this case to the district court for Lancaster County. On appeal, restated, Lamb claimed that (1) § 60-6,197.09 as amended effective July 14, 2006, was unconstitutional; (2) the county court erred when it denied his motion to quash; (3) the county court erred when it denied his motion to suppress; (4) the judgment of conviction was not supported by the evidence; and (5) the sentence imposed was erroneous.

The district court affirmed the judgment of the county court. The district court engaged in a constitutional analysis of § 60-6,197.09, which is not necessary to repeat here. The district court concluded that § 60-6,197.09 was not unconstitutional and that the statutory language precluded a sentence of probation and was applicable to Lamb's case. The district court rejected Lamb's remaining assignments of error and thus affirmed Lamb's conviction and sentence.

Lamb appealed.

ASSIGNMENTS OF ERROR

On appeal, Lamb claims, restated, that the district court erred when it affirmed the orders of the county court which had (1) denied Lamb's motion to quash challenging the constitutionality of § 60-6,197.09; (2) denied Lamb's motion to suppress; (3) found there was sufficient evidence to convict

Lamb of DUI, second offense; and (4) imposed a sentence of 90 days' incarceration, revocation of Lamb's license for 1 year, and a fine of $500.

STANDARDS 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. Prescott, ante* p. 96, 784 N.W.2d 873 (2010). 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.*

[3] 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 lower courts. *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

ANALYSIS

Lamb Does Not Have Standing to Challenge the Constitutionality of § 60-6,197.09.

At issue in this appeal is § 60-6,197.09, which provides:

> Notwithstanding the provisions of section 60-498.02 or 60-6,197.03, a person who commits a violation punishable under subdivision (3)(b) or (c) of section 28-306 or a violation of section 60-6,196, 60-6,197, or 60-6,198 *while participating in criminal proceedings for a violation of section 60-6,196, 60-6,197, or 60-6,198 . . . shall not be eligible to receive a sentence of probation*, a suspended sentence, or an employment driving permit authorized under subsection (2) of section 60-498.02 for either violation committed in this state.

(Emphasis supplied.)

Lamb claims that the district court erred when it affirmed the county court's denial of his motion to quash. In his motion to quash, Lamb challenged the constitutionality of § 60-6,197.09 on various bases, all to the effect that § 60-6,197.09 improperly prevented the trial court from imposing a sentence of probation in this case because, according to Lamb, he was "participating

in criminal proceedings" for the prior DUI case in Saline County when he committed the instant offense.

The State responds that Lamb does not have standing to challenge the constitutionality of § 60-6,197.09. The State refers us to the proposition that an individual who is not affected by the challenged statute lacks standing to bring a constitutional challenge thereto. See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). The State notes that Lamb was on probation from the prior DUI case when he committed the current offense. The State contends that, as a probationer, Lamb was not "participating in criminal proceedings for a violation of section 60-6,196 [the DUI statute]," as that expression is used in § 60-6,197.09, at the time of the current offense, and that therefore, § 60-6,197.09, which precludes a sentence of probation, does not apply to him. We agree with the State.

[4] 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. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009). In reviewing the plain language of § 60-6,197.09, the portion relevant to the State's standing argument provides that a person who commits DUI in violation of § 60-6,196 "while participating in criminal proceedings for a violation of section 60-6,196 . . . shall not be eligible to receive a sentence of probation." The record shows that at the time that Lamb was arrested for the present offense of DUI in violation of § 60-6,196, he was on probation for a prior violation of § 60-6,196 in Saline County. The judgment of 18 months' probation for the prior offense was entered on July 18, 2006, and there is no suggestion that the judgment was appealed. The current offense occurred on November 11, 2006. Accordingly, to determine whether § 60-6,197.09 applies to this case, we must determine whether a defendant who is serving a sentence for a prior DUI when he or she commits a subsequent DUI violation, absent the pendency of an appeal, is "participating in criminal proceedings" for the prior DUI offense for purposes of § 60-6,197.09.

[5,6] We have not previously explained "participating in criminal proceedings" under § 60-6,197.09. However,

elsewhere, we have addressed the definition of "proceeding" and find such exposition useful in reading § 60-6,197.09. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). In *Long*, we relied on the Black's Law Dictionary 1221 (7th ed. 1999) definition of "proceeding," noting that "proceeding" had been defined as "'1. [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.'" 264 Neb. at 90, 645 N.W.2d at 559. In a criminal case, entry of judgment occurs with the imposition of a sentence. See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). Thus, the imposition of the sentence, absent the pendency of an appeal, concludes the "proceedings" referred to in § 60-6,197.09, and a defendant is no longer "participating in criminal proceedings" after the sentence is imposed.

In the instant case, Lamb was sentenced on July 18, 2006, for the prior DUI. When Lamb committed the current offense on November 11, he was serving a sentence for probation and was not "participating in criminal proceedings" with respect to the prior DUI. We conclude that § 60-6,197.09 did not apply to Lamb, and he therefore does not have standing to challenge the statute.

[7,8] 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*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[9] Standing to challenge the constitutionality of a statute under the federal or state Constitution depends upon whether one is, or is about to be, adversely affected by the language in question; to establish standing, the contestant must show that as a consequence of the alleged unconstitutionality, the contestant is, or is about to be, deprived of a protected right. *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005). In

this case, Lamb was not, and was not about to be, adversely affected by the language of the statute or deprived of a right under § 60-6,197.09, because the language of the statute did not apply to Lamb's case. Accordingly, Lamb does not currently have standing to challenge the constitutionality of § 60-6,197.09. We affirm the decision of the district court, albeit for reasons other than those articulated by the district court, which affirmed the order of the county court denying Lamb's motion to quash.

It Was Not Error for the District Court to Affirm the Denial of Lamb's Motion to Suppress.

Lamb claims that the district court erred when it affirmed the county court's denial of his motion to suppress. He argues that the evidence presented at the hearing on the motion to suppress shows that there was a Fourth Amendment violation in connection with the stop of his vehicle. We reject this assignment of error.

[10] An investigative stop is "'limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning.'" *State v. Van Ackeren*, 242 Neb. 479, 486, 495 N.W.2d 630, 636 (1993), quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984). Therefore, while this type of encounter is considered a "seizure" and invokes Fourth Amendment safeguards, because of its less intrusive character, this type of encounter requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *State v. Wollam, ante* p. 43, 783 N.W.2d 612 (2010).

[11,12] The test to determine if an investigative stop was justified is whether the police officer had a reasonable suspicion, based on articulable facts, which indicated that a crime had occurred, was occurring, or was about to occur and that the suspect might be involved. See *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996). In addition, a stop is justified "'[w]hen an officer observes a traffic offense—however minor . . . .'" *State v. Chronister*, 3 Neb. App. 281, 285, 526 N.W.2d 98, 103 (1995), quoting *U.S. v. Cummins*, 920 F.2d 498 (8th Cir. 1990).

[13] At the suppression hearing, the officer testified that he was patrolling the area near Pioneers Park in Lincoln in his marked police cruiser, when he observed a vehicle enter the park after it was closed and further observed that the vehicle was exceeding the posted speed limit. The officer stopped Lamb's vehicle. On this record, Lamb's vehicle was stopped based on the officer's belief that Lamb had committed the criminal activity of entering the park after it had closed and speeding. When testimony regarding speed is used in connection with a charge other than speeding, the officer's testimony of speeding, if believed, is sufficient and need not be corroborated. See *State v. Prescott, ante* p. 96, 784 N.W.2d 873 (2010). See, also, *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997); *State v. Hiemstra*, 6 Neb. App. 940, 579 N.W.2d 550 (1998), *disapproved on other grounds, State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003). We determine in this case that the officer did not violate Lamb's Fourth Amendment rights when he stopped Lamb's vehicle.

[14-18] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Prescott, supra*. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *Id*. We have further held that an officer is required to have only a reasonable, articulable suspicion that a motorist was driving under the influence in order to expand the scope of the initial traffic stop and detain him or her for field sobriety tests. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id*. Courts must determine whether reasonable suspicion exists on a case-by-case basis. *Id*. Reasonable suspicion entails some minimal level of objective justification for detention. *Id*. It is something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*.

Here, the officer who stopped Lamb's vehicle did have a reasonable, articulable suspicion to expand the scope of the initial traffic stop. The officer testified that after stopping the

vehicle, he approached the vehicle and observed that Lamb's movements were very deliberate and that Lamb had to concentrate on what the officer had asked Lamb to provide to the officer. The officer further testified that he smelled the odor of alcohol and that because he suspected alcohol use, he asked Lamb to exit the vehicle to conduct field sobriety tests. Based on Lamb's performance on these tests, the officer believed that Lamb was under the influence of alcohol. The officer arrested Lamb and transported him to the Lincoln Police Department.

Given the record, the officer properly stopped Lamb's vehicle and had a reasonable, articulable suspicion to expand the scope of the stop to conduct field sobriety tests. The district court did not err when it affirmed the county court's denial of Lamb's motion to suppress.

The District Court Did Not Err When It Affirmed the County Court's Finding That the Evidence Was Sufficient to Sustain Lamb's Conviction.

Lamb claims that the evidence adduced at trial was insufficient to sustain a conviction for DUI and that the district court erred when it affirmed the county court's finding of guilt. We reject this assignment of error.

[19-21] 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. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). In making this determination, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. See *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*.

The evidence presented at trial established that Lamb had been driving on a public roadway and that Lamb's breath

alcohol level was .20 of 1 gram of alcohol per 210 liters of his breath. Lamb stipulated to these test results at trial. These results exceed the legal limit. Lamb also stipulated to the fact that the officer who administered the breath test was licensed and followed the requirements of title 177 of the Nebraska Administrative Code. Applying the standards set forth above to the instant case, we conclude that the district court did not err when it affirmed the county court's finding that the evidence of DUI was sufficient.

The District Court Erred When It Affirmed the Sentence Imposed by the County Court.

Lamb claims that the district court erred when it affirmed the sentence imposed by the county court. Lamb argues that, given their understanding of § 60-6,197.09, the lower courts did not consider probation a sentencing option and, as a result, erred in imposing and affirming his sentence. We agree.

[22] It is fundamental that the Legislature declares the law and public policy by defining crimes and "'"'fixing their punishment.'"'" *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 230, 738 N.W.2d 850, 854 (2007). We have stated that "the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature." *State v. Divis*, 256 Neb. 328, 334, 589 N.W.2d 537, 541 (1999).

In this case, the county court denied Lamb's motion to quash and, in the order, incorporated the following language from an order in an unrelated Lancaster County District Court case dealing with a similar issue: "If any Defendant being sentenced for DUI has been arrested for another DUI offense, probation is not an option." This order also states: "The statute [§ 60-6,197.09] [a]ffects all Defendants standing convicted of DUI at sentencing." On appeal, the district court affirmed the denial of the motion to quash and observed that § 60-6,197.09 eliminated the option of probation. When it affirmed the sentence imposed by the county court, the district court considered § 60-6,197.09 applicable to Lamb's case. The record indicates that the lower courts erroneously determined probation was not a sentencing option in this case and that the district court did

not consider the imposition of probation in evaluating the propriety of the sentence actually imposed.

Lamb was convicted of second-offense DUI with a breath alcohol content of more than .15. Neb. Rev. Stat. § 60-6,197.03(5) (Supp. 2007) applies to this case. Section 60-6,197.03(5) provides:

> If such person has had one prior conviction and, as part of the current violation, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath or refused to submit to a test as required under section 60-6,197, such person shall be guilty of a Class I misdemeanor, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of at least one year but not more than fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked. The court shall also sentence such person to serve at least ninety days' imprisonment in the city or county jail or an adult correctional facility.
>
> If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order that the operator's license of such person be revoked or impounded for a period of at least one year but not more than fifteen years from the date ordered by the court unless otherwise authorized by an order issued pursuant to section 60-6,211.05 and shall issue an order pursuant to section 60-6,197.01, and such order of probation or sentence suspension shall also include, as conditions, the payment of a one-thousand-dollar fine and confinement in the city or county jail for thirty days.

[23] We note the phrase "[i]f the court places such person on probation" in the statute quoted immediately above. By its terms, § 60-6,197.03(5) provides for the possibility of a

sentence of probation in a case such as the present one, and as discussed above, § 60-6,197.09 does not preclude the imposition of probation in the present case.

Notwithstanding the availability of probation, the State urges this court to affirm the district court's affirmance of Lamb's sentence. The State argues, inter alia, that because the sentence actually imposed was suitable and did not exceed the statutory limit, we should affirm. We decline to do so.

Given the fact that the lower courts did not consider probation an option, they failed in their duty to consider the statutorily available range of punishments. On appeal, we will not attempt to "'read the mind of the sentencing judge'" in an effort to divine whether the sentencing judge would have imposed probation had she known it was an available option. *State v. Clark*, 278 Neb. 557, 563, 772 N.W.2d 559, 564 (2009).

The county court erred as a matter of law when it did not consider probation at sentencing, and the district court erred when it affirmed the sentence based on the same misperception of the applicable law. We, therefore, reverse that portion of the district court ruling which affirmed the sentence imposed by the county court, and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court for resentencing.

CONCLUSION

Lamb challenged the constitutionality of § 60-6,197.09. However, because this statute did not apply to him, Lamb did not have standing to challenge the constitutionality of this statute. Although our reasoning differs from that of the district court, we affirm the order of the district court which affirmed the county court's denial of Lamb's motion to quash. We affirm the district court's order which affirmed the county court's denial of Lamb's motion to suppress and affirmed the county court's finding that the evidence was sufficient to convict Lamb of DUI, second offense. However, with respect to the sentence imposed on Lamb, the county court and district court incorrectly determined that § 60-6,197.09 precluded probation and applied to Lamb; thus, the lower courts failed to consider probation as a sentencing option. We reverse the portion of

the order of the district court which affirmed the sentence, and remand the cause with directions to the district court to vacate the sentence and remand the case to the county court for resentencing.

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

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RODNEY L. BAKER, APPELLANT.
789 N.W.2d 702

Filed October 29, 2010. No. S-09-1312.

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 such 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, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 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.
4. **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.
5. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
6. **Trial: Testimony: Appeal and Error.** Determinations regarding cross-examination of a witness on specific instances of conduct are specifically entrusted to the discretion of the trial court.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.

8. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
9. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
10. **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.
11. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **Rules of Evidence: Hearsay: Proof.** 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.
13. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
14. **Trial: Hearsay: Proof.** When overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative.
15. **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 guilty verdict rendered in the questioned trial was surely unattributable to the error.

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

STEPHAN, J.

Following a jury trial in the district court for Lancaster County, Rodney L. Baker was convicted and sentenced on one count of first degree sexual assault, a Class II felony, and one count of third degree sexual assault of a child, a Class IIIA felony.[1] In this direct appeal, Baker contends that certain testimony from the victim and her mother was erroneously admitted. We conclude that the district court did not err in receiving the testimony, and we therefore affirm.

I. BACKGROUND

From the summer of 2003 until December 21, 2005, K.B. and her younger sister lived with their mother in a single-family residence in Lincoln, Nebraska. Baker, the mother's boyfriend at the time, also lived at the residence. K.B. was between 11 and 13 years old during this time period.

K.B. wanted to be a massage therapist, and from an early age, she gave back and foot massages to her mother. During the time she lived with Baker, K.B. would usually give these massages to her mother in the evenings, while the family was gathered in the living room. On one of these occasions, Baker was sitting in a chair approximately 5 feet away, outside of K.B.'s line of vision. K.B.'s mother could see Baker and noticed that he was masturbating. The mother testified that this was the first time that she noticed Baker becoming aroused while K.B. was massaging her.

K.B.'s mother testified that sometime after this incident, Baker began instructing her to call K.B. into their bedroom late at night in order to give the mother a massage. This occurred on various occasions for approximately 2 years. Usually, Baker would masturbate while K.B. massaged her mother on the bed. Baker sometimes fondled K.B. and instructed her on how to touch herself in order to receive sexual pleasure. K.B. testified that Baker digitally penetrated her on one occasion and that on more than one occasion, he made her touch his penis, once ejaculating on her hand.

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[1] See Neb. Rev. Stat. §§ 28-319 (Reissue 1995) and 28-320.01 (Cum. Supp. 2004).

On December 21, 2005, through juvenile court proceedings, K.B. and her sister were removed from the home they shared with their mother and Baker. The girls were then placed in various foster care settings. K.B.'s contact with Baker after her removal from the home was limited, especially after February 2008, when her foster parents became her legal guardians. K.B. first reported the sexual assaults by Baker in October 2008.

Both K.B. and her mother testified at trial about their delay in reporting the assaults. In general, both testified that Baker had threatened them with harm if they reported his actions to authorities and that they believed he would carry out the threats, based upon prior acts of domestic violence. This testimony was the subject of a pretrial proceeding pursuant to the Nebraska Evidence Rules, as set forth in greater detail below.

When Baker was initially questioned by police in this matter, he admitted that K.B. had been sexually abused. Baker contended, however, that K.B.'s mother was the actual perpetrator of the abuse and that he was just a bystander. He was convicted after a jury trial and filed this timely direct appeal.

II. ASSIGNMENTS OF ERROR

Baker assigns, restated, that the district court erred in (1) allowing the State to introduce evidence of other crimes, wrongs, or acts which he contends were inadmissible; (2) receiving hearsay testimony from K.B. regarding threats and domestic violence directed at her mother; and (3) permitting the State to utilize extrinsic evidence of the conduct of a witness for the purpose of supporting or impeaching credibility.

III. STANDARD 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 such discretion a factor in determining admissibility.[2] Where the Nebraska Evidence Rules commit

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[2] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[3]

[3] 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.[4]

[4] 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.[5]

[5,6] When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.[6] Determinations regarding cross-examination of a witness on specific instances of conduct are specifically entrusted to the discretion of the trial court.[7]

IV. ANALYSIS

1. Rule 404(2) Issues

(a) Additional Background

Shortly after Baker was arraigned, his counsel filed a motion seeking access to K.B.'s juvenile court records. In a hearing on the motion, counsel argued that he needed the confidential

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[3] *Id.*; *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Floyd, supra* note 2.

[5] *State v. Epp, supra* note 4; *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[6] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[7] Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008); *State v. Schreiner, supra* note 6. See, also, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

records in order to confirm his belief that K.B. had not reported sexual abuse by Baker during counseling which she received in 2005 and 2006 and that she had assured counselors that she would report such abuse if it had occurred. Baker's counsel argued that he needed this information in order to effectively cross-examine K.B. and her mother at trial. After an in camera review of the juvenile court records, the court determined that portions thereof should be disclosed to the defense and provided copies of those records to Baker's counsel.

After that ruling but prior to trial, the State filed notice that pursuant to rule 404(2), it intended to offer evidence of Baker's physical abuse of and threats of harm directed at K.B. and her mother for the purpose of (1) showing that K.B. and her mother feared Baker, (2) showing that such fear was real and not imagined, and (3) explaining the failure of K.B. and her mother to promptly report the conduct which formed the bases of the charges against Baker. Baker filed an objection. The district court conducted a pretrial hearing and ultimately determined (1) that the mother's testimony about what she did and why she did it on the nights of the alleged assaults was not rule 404 evidence and (2) that the remainder of this evidence was admissible for the purposes proposed by the State.

During the trial, K.B. testified that Baker told her he would kill her and her mother if she reported the assaults. K.B. testified over Baker's continuing rule 404 objection that she believed Baker would carry out the threats because she had observed her mother with body bruises and black eyes at various times while they lived with Baker. K.B. believed these injuries were inflicted by Baker because she had seen her mother enter a room with Baker and come out with a black eye. K.B. also testified that she was afraid of Baker because he once grabbed her when she wanted to run away and squeezed her arms so hard he left indentations. Immediately prior to this testimony, the court instructed the jury that the testimony regarding Baker's physically assaulting K.B. and her mother was being received

> for the limited purpose of helping you evaluate [K.B.'s] testimony regarding the delay in reporting the allegations of sexual abuse that are the subject of this case and

> [K.B.'s mother's] testimony regarding her failure to report or take other steps to stop the alleged sexual abuse. You may consider this evidence for that limited purpose only and for no other purpose.

K.B.'s mother also testified that Baker threatened to kill her or tell police she was responsible for everything if she reported the assaults. The mother testified that if she refused to bring K.B. into the bedroom after Baker told her to do so, Baker would beat or choke her, and at times threatened her with a knife. On one occasion when the mother confronted Baker about the sexual abuse of K.B., he choked her until she lost consciousness. The mother further testified that Baker was physically abusive to her throughout the time they lived together. The abuse included choking and striking her with his fist, resulting in black eyes on multiple occasions. Prior to this testimony, the district court gave a limiting instruction similar to the one given during K.B.'s testimony, as quoted above.

After both K.B. and her mother testified that K.B. often gave her mother evening massages in the living room, the State sought to elicit testimony from the mother regarding the first time she noticed Baker becoming sexually aroused while K.B. was massaging her. Baker asserted a rule 404 objection and argued that the evidence was inadmissible as a prior bad act. The court overruled Baker's objection, reasoning that the evidence was not rule 404 evidence and was admissible because it was "part of the whole story" of the charged crimes. The court specifically directed the State to connect the evidence regarding the living room incident with the subsequent events that occurred in the bedroom. In the prosecutor's summation, he argued from this evidence that Baker was sexually aroused by watching K.B. administer massages to her mother, thus making it more likely that the sexual abuse was committed by Baker and not K.B.'s mother, as Baker claimed in his statement to police.

In addition to the limiting instructions given during the testimony of K.B. and her mother, the court's final instructions to the jury included a statement that the evidence of physical violence perpetrated upon K.B. or her mother was received

"for the limited purpose of helping you evaluate [K.B.'s] testimony regarding her delay in reporting the allegations of sexual abuse" and the mother's "testimony regarding her failure to report or take other steps to stop the alleged sexual abuse." The jury was again instructed that it could consider such evidence "for that limited purpose and for no other."

(b) Disposition

[7-10] Baker contends that the evidence summarized above was inadmissible under rule 404(2), which governs the admissibility of what has been characterized as "other crimes" or "similar acts" evidence.[8] Rule 404(2) provides:

> Evidence 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.

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[9] But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[10] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[11] 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

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[8] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[9] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Sanchez, supra* note 8.

[10] *State v. McPherson, supra* note 9; *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[11] *State v. Aguilar, supra* note 10; *State v. Sanchez, supra* note 8.

to consider the evidence only for the limited purpose for which it was admitted.[12]

[11] Our first task is to determine what portion of the challenged evidence is governed by rule 404(2). Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under rule 404(2).[13] For example, in *State v. McPherson*,[14] the defendant was convicted on two counts of child abuse and two counts of first degree sexual assault on a child. The victims were his minor daughters, who testified regarding sexual activity occurring in their home. On appeal, the defendant argued that evidence about sexual devices and sexually explicit videos in the home was inadmissible under rule 404(2). We concluded that the evidence was "so closely intertwined with both crimes charged that it cannot be considered extrinsic" and therefore was not governed by rule 404(2) and was properly received.[15]

Here, K.B.'s testimony that Baker threatened her with harm if she reported his conduct is inextricably intertwined with the charged offenses and therefore is not subject to rule 404(2). The same is true with regard to the mother's testimony that Baker threatened and physically assaulted her if she did not bring K.B. to the bedroom when he instructed her to do so. And, likewise, the mother's testimony regarding the first time she observed Baker become sexually aroused while watching K.B. administer a massage is "part of the whole story" of the charged offenses and not governed by rule 404(2). All of this evidence was within the "coherent picture of the facts of the crimes charged"[16] which the State was entitled to present. It was not offered to prove that Baker had the propensity or character to act in a certain way. The district court did not abuse its discretion in receiving this evidence.

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[12] *State v. Epp, supra* note 4; *State v. Floyd, supra* note 2.

[13] *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[14] *State v. McPherson, supra* note 9.

[15] *Id.* at 744, 668 N.W.2d at 513.

[16] *Id.* at 743, 668 N.W.2d at 513.

But all of the remaining testimony of K.B. and her mother regarding threats and domestic violence does constitute rule 404(2) evidence. As required by *State v. Sanchez*,[17] the State identified the specific purposes for which this evidence was being offered: to show that K.B. and her mother feared Baker, to establish that their fear was "real and not imaginary," and to explain the failure of K.B. and her mother to make a prompt complaint. Likewise, the district court ruled that the evidence would be received solely for explaining the delay in reporting the crimes, and so instructed the jury.

This court has upheld the admissibility of rule 404(2) evidence on similar grounds. In *State v. Hitt*,[18] an appeal from a sexual assault conviction where the victim was the defendant's minor child, we held that evidence that the defendant had struck the victim with a paddle and had hit a younger sibling on the knees with a hammer was properly received to establish that the children were genuinely afraid of the defendant, thereby explaining their failure to make a prompt complaint. In *State v. Wilson*,[19] we held that evidence of the defendant's conversations with a witness about his connections with persons involved in criminal activity was properly received to corroborate the witness' testimony that she did not immediately come forward to report the defendant's involvement in a fatal shooting because she feared retaliation by the defendant.

Applying evidence rules similar to rule 404(2), other courts have admitted "other crimes" evidence for the limited purpose of explaining the failure of a victim or other witness to promptly report a crime. In *Brock v. State*,[20] a Georgia appellate court held that a child's testimony that she had seen her stepfather strike and point a gun at her mother was properly received to explain why the child did not immediately report the fact that she had been sexually molested by her stepfather.

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[17] *State v. Sanchez, supra* note 8.

[18] *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

[19] *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987).

[20] *Brock v. State*, 183 Ga. App. 277, 358 S.E.2d 613 (1987).

A federal appeals court held in *U.S. v. Davidson*[21] that the trial court had not abused its discretion in receiving witnesses' testimony regarding prior criminal activity by the defendant for the limited purpose of showing that the witnesses were afraid of the defendant and therefore did not come forward sooner to report the charged offense. And in *U.S. v. Powers*,[22] another federal appeals court held that evidence of the defendant's violent conduct directed at the victim and her family was properly received in the government's case in chief under the federal counterpart of rule 404(2) to explain the child victim's submission to sexual abuse by her father and her delay in reporting it.

In arguing that the rule 404(2) evidence was erroneously received at his trial, Baker relies upon our opinions in *State v. Sanchez*[23] and *State v. Trotter*[24] and the Nebraska Court of Appeals' opinion in *State v. Sutton*.[25] In *Sanchez*, a prosecution for sexual assault upon a 13-year-old girl, we held that evidence of uncharged sexual assaults upon other females under the age of 16 lacked independent relevance on the issues of intent, opportunity, motive, and identity, which were the only purposes for which the evidence was offered. In *Trotter*, an appeal from convictions for child abuse, child abuse resulting in death, and manslaughter, we held that evidence that the defendant had physically abused two former spouses offered by the prosecutor to prove the defendant's "'violent tendencies towards the people living in his household'" was improperly admitted to prove the defendant's propensity to commit the crimes charged.[26] Similarly, in *Sutton*, the Court of Appeals held that evidence that the defendant had been previously convicted for assaulting the alleged victim of the offenses for which he was

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[21] *U.S. v. Davidson*, 122 F.3d 531 (8th Cir. 1997).

[22] *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995).

[23] *State v. Sanchez, supra* note 8.

[24] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[25] *State v. Sutton*, 16 Neb. App. 185, 741 N.W.2d 713 (2007), *modified on denial of rehearing* 16 Neb. App. 287, 741 N.W.2d 713.

[26] *State v. Trotter, supra* note 24, 262 Neb. at 453, 632 N.W.2d at 335.

being tried was erroneously received for purposes of showing motive and intent, in that its only probative value was to show the defendant's propensity to use violence as a means of controlling others. All of these cases are distinguishable from the instant case in that none dealt with evidence of the defendant's prior acts offered and received for the limited purpose of explaining a victim's delay in reporting a crime.

In this case, it was clear from the outset that the credibility of K.B. and her mother would be contested and likely determinative issues at trial. In addressing these issues during its case in chief, the State had a legitimate interest in explaining why the charged offenses were not reported until more than 3 years after they were allegedly committed. The district court did not abuse its discretion in determining that Baker's prior acts of domestic violence had independent relevance to show that K.B. and her mother had a genuine and legitimate basis for believing that Baker would carry out his threats to harm them if they reported the crimes and that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice or other factors enumerated in rule 403. By its limiting instructions, the district court correctly informed the jury of the narrow purpose for which it could consider the evidence. Baker's first assignment of error is without merit.

2. Hearsay Issue

During her direct examination, K.B. testified that she had not observed Baker touch her mother in an aggressive manner. The prosecutor then asked if her mother ever told her that he had done so. Upon Baker's hearsay objection, the court inquired if the prosecutor was offering the mother's statement to prove its truth, and he responded in the negative. The court ruled that it would receive evidence of the mother's statement "only for the fact that it was said, not whether what was said was true." K.B. then testified that her mother told her that Baker had given her a black eye and that she was afraid of him. The prosecutor also asked K.B. if her mother ever told her that Baker had threatened her. Over Baker's hearsay objection, the court again received K.B.'s testimony about her mother's statement for the fact that a statement was made, but not for the truth of

that statement. K.B. then testified that her mother told her that Baker had threatened to hurt both of them if K.B. "said anything." Baker assigns and argues that the mother's statements were inadmissible hearsay erroneously received.

[12] 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."[27] K.B.'s testimony about the threat made by Baker to her mother and related by her mother to her involves two out-of-court statements, that of Baker to the mother and that of the mother to K.B. A statement is not hearsay if it is "offered against a party and is . . . his own statement."[28] Baker's threatening statement to K.B.'s mother constituted his own statement offered against him and, accordingly, was not hearsay.

[13,14] We therefore focus on the mother's statement relating Baker's threat to K.B. and the mother's statement to K.B. that Baker had given her a black eye. If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.[29] But it does not necessarily follow that such a statement is admissible in a particular case. The admissibility of the statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.[30] Unless the proponent of the statement identifies the nonhearsay purpose for which it is offered, the opposing party may have an insufficient basis upon which to determine whether to make a relevance objection. And by overruling a hearsay objection and receiving such a statement not for its truth but "only for the fact that it was said," a trial court risks confusing a jury

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[27] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[28] Rule 801(4)(b)(i). See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[29] *State v. Morrow*, 273 Neb. 592, 731 N.W.2d 558 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[30] See, 4 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 24.21 (7th ed. 2000); R. Collin Mangrum, Mangrum on Nebraska Evidence 688-94 (2010).

as to the purpose for which it should consider the statement and depriving an appellate court of a meaningful basis upon which to review the statement's admissibility. As one commentator notes, such a ruling "doesn't really explain why the mere *making* of the statement (regardless of its truth) is relevant."[31] Accordingly, when overruling a hearsay objection on the ground that testimony about an out-of-court statement is received not for its truth but only to prove that the statement was made, a trial court should identify the specific nonhearsay purpose for which the making of the statement is relevant and probative.

[15] In this case, the district court did not identify the nonhearsay purpose for which the making of the statements in question was relevant, but any error in this regard was harmless beyond a reasonable doubt. 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 guilty verdict rendered in the questioned trial was surely unattributable to the error.[32] The statements objected to as hearsay pertained to the same evidence of threats and domestic violence which was properly received under rule 404(2). Just prior to her testimony regarding the statements, K.B. testified that Baker had threatened her with harm if she reported his conduct and that she had observed her mother with a black eye after the mother was alone in a room with Baker. Subsequently, K.B.'s mother testified that Baker had threatened her and that he had punched her, resulting in black eyes and bruises. As noted, the testimony of both K.B. and her mother on the subject of physical abuse was preceded by a limiting instruction informing the jury of the purpose for which it could consider the testimony, and a third limiting instruction was given at the close of the case. Because the subject matter of the statements challenged as hearsay was established by other testimony, properly received and limited as to purpose, we conclude that the guilty verdict was surely

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[31] 4 Fishman, *supra* note 30, § 24.21 at 251.

[32] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

unattributable to any error in admitting the statements over a hearsay objection.

3. Rule 608 Issue

During cross-examination of K.B., Baker's counsel asked, "Do you have an opinion about the truthfulness of your mother?" When K.B. responded that she did, counsel asked, "Is that opinion that she — that opinion that you have, is it that she is not a truthful person?" K.B. responded, "On occasion, yes." On redirect, the prosecutor asked K.B. what led her to that opinion. Baker objected, and after an unrecorded sidebar conference, the court overruled the objection. The prosecutor then asked K.B., "What was the basis for your opinion?" She responded, "I was basing it on that she broke her promise about him not touching me anymore." K.B. then confirmed that this was the only basis for her opinion regarding her mother's truthfulness.

In his third assignment of error, Baker argues that the admission of this testimony violated rule 608. While the specific grounds of Baker's objection at trial were not stated, we are satisfied from the context that it was based upon rule 608(2), which provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

We find no merit in Baker's argument that K.B.'s explanation of why she considered her mother to be untruthful violated this rule. Rule 608(2) does not prohibit inquiry into specific instances of a witness' conduct; it only prohibits proof of that conduct by extrinsic evidence.[33] Extrinsic evidence is evidence

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

"[f]rom outside sources."[34] K.B.'s testimony regarding the basis for her opinion about her mother's truthfulness was not from an outside source, and the State was not prohibited by rule 608(2) from conducting this inquiry on redirect examination.[35] The district court did not abuse its discretion in receiving this testimony over Baker's objection.

V. CONCLUSION

For the reasons discussed, we find no merit in any of Baker's assignments of error and therefore affirm the judgment of the district court.

AFFIRMED.

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[34] Black's Law Dictionary 666 (9th ed. 2009).

[35] See, generally, Mangrum, *supra* note 30, 434-35.

TFF, INC., A NEBRASKA CORPORATION, APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 59 OF SARPY COUNTY AND BROOK VALLEY LIMITED PARTNERSHIP, APPELLEES.

790 N.W.2d 427

Filed November 5, 2010. No. S-09-843.

1. **Equity: Estoppel.** Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.
2. **Judgments: Estoppel: Appeal and Error.** An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.
3. **Estoppel.** When a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.
4. ____. Judicial estoppel applies to bar an inconsistent claim against a different party because the doctrine protects the integrity of the judicial process, not the parties' interests.
5. ____. Within a single action, a court should apply judicial estoppel with caution to avoid imputing bad faith to a party that has made a strategic decision to plead alternative claims, particularly against separate parties.
6. **Actions: Pleadings.** Although parties can plead inconsistent claims, once they have obtained a judgment on one claim by asserting a legal or factual position,

they cannot obtain another judgment for the same injury based on a theory inconsistent with the previous position.

7. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
8. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
9. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal regardless of whether a party asked for attorney fees from the trial court.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Kristopher J. Covi and Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Scott D. Jochim, Robert J. Huck, and Elizabeth A. Elwell, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Sanitary and Improvement District No. 59 of Sarpy County.

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

CONNOLLY, J.

The appellant, TFF, Inc., sued Brook Valley Limited Partnership (Brook Valley) for breach of contract because it failed to pay special assessments on the real estate it purchased. In the same lawsuit, TFF sued the Sanitary and Improvement District No. 59 of Sarpy County (SID) to void the assessments or, in the alternative, for damages that equaled the amount of the assessments. The district court granted TFF a default judgment against Brook Valley for $51,177.67, the amount of special assessments. After obtaining the default judgment, TFF pursued SID. Applying judicial estoppel, the district court granted SID's motion for summary judgment. We affirm.

BACKGROUND

In 1992, Brook Valley purchased 130 acres of property that it planned to sell as individual commercial lots. At the time

of Brook Valley's purchase, the SID had not made public improvements. The SID completed the first phase of roads and sewers about 1994 and the second phase by 1998. The SID did not levy special assessments after completing the first phase because the SID and Brook Valley disagreed over the formula to be used in calculating the assessments.

In 1996, TFF purchased a commercial lot from Brook Valley. In the purchase agreement, Brook Valley agreed to "pay any assessments for public improvements previously constructed, or ordered or required to be constructed by the public authority, but not yet assessed." Brook Valley's managing partner also submitted an affidavit with the purchase agreement. The affidavit declared that "[t]here are no public improvement[s] in the vicinity of the premises under construction, completed but not assessed, or contemplated, which could be a basis for any special assessment being levied after closing against the premises. All current assessments have been paid."

In February 2000, the SID's board voted to levy assessments, without giving notice to property owners that it would consider the assessments at the meeting. TFF alleged that it did not learn of the assessments until 2004, when it received a delinquency notice.

In April 2006, TFF sued Brook Valley and the SID. In its complaint, TFF alleged that Brook Valley breached its contract by failing to pay the special assessments levied against TFF's lot by the SID. In the same complaint, TFF also asserted claims against the SID, seeking to void the assessments or, in the alternative, $51,177.67 in damages for the assessments.

On July 13, 2006, TFF moved for default judgment against Brook Valley, which was, by this time, bankrupt. The district court granted default judgment against Brook Valley on August 22, awarding TFF $51,177.67 plus interest and costs.

In March 2009, the SID moved for summary judgment on the remainder of TFF's claims. After a hearing on the SID's motion, at which time evidence was offered and received, TFF filed its own cross-motion for summary judgment. Later, the district court granted summary judgment for SID on judicial estoppel grounds.

ASSIGNMENTS OF ERROR

TFF assigns that the district court erred in (1) determining that the doctrine of judicial estoppel bars TFF's claims against the SID, (2) sustaining the SID's motion for summary judgment, and (3) overruling TFF's motion for summary judgment.

The SID is now seeking litigation costs under Neb. Rev. Stat. § 25-824 (Reissue 2008).

STANDARD OF REVIEW

[1,2] Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.[1] So we review a court's application of judicial estoppel to the facts of a case for abuse of discretion and review its underlying factual findings for clear error.[2]

ANALYSIS

The SID argues that judicial estoppel bars TFF's claims against the SID. The district court determined that judicial estoppel barred both TFF's claim that the levied assessments against TFF's property were invalid and its negligence claim against the SID. TFF argues that judicial estoppel should not bar its declaratory action for two reasons: Judicial estoppel does not apply to positions taken in the same proceedings; and the district court had the power to vacate its earlier default judgment against Brook Valley. Additionally, TFF argues that success of its negligence claim does not rely on the validity of the assessments.

Judicial Estoppel

[3,4] We have held that when a party has unequivocally asserted a position in a proceeding and a court accepts that

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[1] See *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

[2] See, e.g., *Perry v. Blum*, 629 F.3d 1 (1st Cir. 2010); *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010); *Capella University v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040 (8th Cir. 2010); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010); *Wagner v. Professional Eng'rs in Cal. Gov't*, 354 F.3d 1036 (9th Cir. 2004).

position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.[3] Judicial estoppel applies to bar an inconsistent claim against a different party because the doctrine protects the integrity of the judicial process, not the parties' interests.[4] In adopting the doctrine of judicial estoppel, we have set forth principles for its application:

> The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. . . . The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. . . . It has been said that unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. . . . However, the doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. . . . Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists.[5]

TFF argues that judicial estoppel should not apply to inconsistent positions in the same proceeding. It argues that the court granted a default judgment against Brook Valley for breach of contract as part of the same proceeding. And it argues that this court has previously only applied judicial estoppel to preclude a party's inconsistent positions in different proceedings.

Contrary to TFF's argument, we agree with the court that TFF's claims against Brook Valley and the SID were

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[3] See, *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009); *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998).

[4] See, e.g., *Lang v. Hougan*, 136 Wash. App. 708, 150 P.3d 622 (2007).

[5] *Melcher v. Bank of Madison*, 248 Neb. 793, 798, 539 N.W.2d 837, 842 (1995) (citations omitted). Accord, *Jardine, supra* note 3; *Vowers & Sons, Inc., supra* note 3.

inconsistent. TFF premised its breach of contract claim against Brook Valley on its theory that the SID's assessments were valid. In contrast, in its declaratory judgment claim against the SID, it alleged that the assessments were invalid for lack of notice. Similarly, in its negligence claim against the SID, TFF alleged that it could not contest the assessments because the SID failed to give notice. So, TFF's negligence claim also depended upon its ability to show that the assessments were invalid.

It is true that we have never applied the doctrine of judicial estoppel when a party asserted inconsistent positions in the same proceeding. But neither have we held that its application is inappropriate in that circumstance.[6] And other courts, including the U.S. Supreme Court,[7] have held that a court can apply judicial estoppel to preclude a party from asserting a position inconsistent with the party's previous position in the same or a subsequent proceeding.[8]

[5] We recognize that rule 8(e) of the Nebraska Court Rules of Pleading in Civil Cases[9] permits a party to plead "as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds." Legal commentators have noted that there is a tension between modern pleading rules and the doctrine of judicial estoppel.[10] And we agree that within a single action, a court should apply judicial estoppel with caution to avoid imputing bad faith to a party that has made a strategic

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[6] See *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[7] See, *New Hampshire, supra* note 1; *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

[8] See, e.g., *Farmers High Line Canal v. City of Golden*, 975 P.2d 189 (Colo. 1999); *Bank of Wichitas v. Ledford*, 151 P.3d 103 (Okla. 2006); *Philadelphia Suburban Water v. PUC*, 808 A.2d 1044 (Pa. Commw. 2002); *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004); *Riggs v. University Hospitals*, 221 W. Va. 646, 656 S.E.2d 91 (2007).

[9] See Neb. Ct. R. Pldg. § 6-1108(e)(2).

[10] See, e.g., *Bates v. Long Island R. Co.*, 997 F.2d 1028 (2d Cir. 1993); 18B Charles Alan Wright et al., Federal Practice and Procedure § 4477 (2d ed. 2002).

decision to plead alternative claims, particularly against separate parties. Usually, courts apply judicial estoppel within a single action only when a party has misled a court through cynical gamesmanship.[11]

[6] Nonetheless, although parties can plead inconsistent claims, once they have obtained a judgment on one claim by asserting a legal or factual position, they cannot obtain another judgment for the same injury based on a theory inconsistent with the previous position.[12] Because TFF had already obtained a judgment against Brook Valley on its theory that the assessments were valid, it could not obtain an inconsistent judgment against the SID on theories that required it to show that the assessments were invalid.

Bad Faith and Frivolous Claim

The SID argues that it is entitled to litigation costs. It argues that TFF has continued to pursue its claims against the SID even after the district court's "clear admonishment that [TFF's] present inconsistent position against [the SID] both 'defies reason' and 'makes a mockery of the judicial process.'"[13]

[7-9] Section 25-824(2) provides that

> in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the

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[11] See, *New Hampshire, supra* note 1; *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009).

[12] See, e.g., *U.S. v. Newell*, 239 F.3d 917 (7th Cir. 2001); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982).

[13] Brief for appellee at 47 (quoting opinion and order of Sarpy County District Court).

litigant's position.[14] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[15] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[16] An appellate court may award attorney fees on appeal regardless of whether a party asked for attorney fees from the trial court.[17]

Because this court has never applied judicial estoppel in the same proceeding, TFF made a valid, although unpersuasive, argument. We reject SID's bad faith argument.

CONCLUSION

The district court did not err in granting the SID's motion for summary judgment. TFF is judicially estopped from pursuing its claims against the SID because such claims are inconsistent with the district court's award of default judgment against Brook Valley for the assessments levied by the SID. But TFF's claim was not frivolous or brought in bad faith.

AFFIRMED.

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[14] See, *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003); *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[15] See, *Cornett, supra* note 14; *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[16] *Cornett, supra* note 14; *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

[17] See, *Cox, supra* note 16; *Schuelke, supra* note 14.

STATE OF NEBRASKA, APPELLEE, V.
JEFF BOPPRE, APPELLANT.
790 N.W.2d 417

Filed November 5, 2010. No. S-09-906.

1. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the

DNA Testing Act is addressed to the discretion of the trial court. Absent an abuse of discretion, the court's determination will not be disturbed.

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. **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.
5. **Motions for New Trial: DNA Testing: Time.** The DNA Testing Act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new trial based upon newly discovered evidence has expired.
6. **Judgments: Motions to Vacate: DNA Testing.** If results obtained under the DNA Testing Act exonerate the defendant, the court may vacate and set aside the judgment and release the person.
7. **Motions for New Trial: DNA Testing.** If results obtained under the DNA Testing Act do not exonerate the defendant, but are exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
8. **Postconviction: Constitutional Law: Time.** Although there is no time limit to bringing a postconviction motion, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.
9. **Postconviction: Constitutional Law: Judgments: Jurisdiction.** 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.
10. **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.
11. **Postconviction: Pleadings.** A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.
12. **Postconviction.** Postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.
13. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
14. ____: ____. 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.
15. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

NATURE OF CASE

More than 15 years after Jeff Boppre was convicted of two counts of first degree murder for the deaths of Richard Valdez and Sharon Condon, the case was reopened when Boppre filed a motion for forensic testing pursuant to Nebraska's DNA Testing Act.[1] Based on the DNA test results, Boppre filed a motion for new trial and a petition for postconviction relief. He now appeals from the denial of the motion for new trial, the denial of his motion for postconviction relief, and the denial of an evidentiary hearing on the postconviction motion. We affirm.

BACKGROUND

The facts as adduced at Boppre's trial are contained in *State v. Boppre* (*Boppre I*)[2] and are not repeated herein, except as otherwise indicated. In March 1989, Boppre was convicted of two counts of first degree murder for the deaths of Valdez and Condon. Boppre's convictions and sentences were affirmed on direct appeal.[3] Boppre filed his first motion for a new trial based on newly discovered evidence on March 13, 1992. We affirmed the denial of that motion in *State v. Boppre* (*Boppre II*).[4] On August 17, 1995, Boppre filed his first motion

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[1] Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008).

[2] *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[3] *Id.*

[4] *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

for postconviction relief, claiming trial counsel was constitutionally deficient during his trial. We affirmed the denial of postconviction relief in *State v. Boppre* (*Boppre III*).[5] On October 21, 2002, Boppre filed a second motion for postconviction relief, claiming prosecutors withheld exculpatory evidence. We summarily affirmed the denial of the second postconviction motion, without a written opinion.[6]

On May 16, 2005, Boppre filed a motion for forensic testing pursuant to the DNA Testing Act, which motion began the proceedings being considered in this appeal. Boppre alleged such testing would produce noncumulative, exculpatory evidence. Boppre's motion for DNA testing focused primarily on Valdez' "dying declarations" and a pair of blue jeans believed to contain bloodstains from one or both victims. The jeans were found at the trailer home of two of the State's key witnesses, Kenard Wasmer and Alan Niemann.

At the original trial, the State presented evidence that Valdez made two dying declarations identifying Boppre as his murderer. Specifically, the State alleged Valdez used his finger to write on the floor with grease the letters "'J-F-F B-O-P-E'" and on the living room door casement with suspected blood the letters "'J-E-F-F.'"[7] The pair of jeans which Boppre believed to contain bloodstains was not introduced at trial.

In his motion for DNA testing, Boppre contended that he was framed by Wasmer and Niemann after they murdered Valdez and Condon. He asserted the dying declarations should be tested for epithelial cells left behind by the person who wrote them with his or her finger.

Regarding the jeans, Boppre alleged they belonged to and were worn by Wasmer. Boppre theorized that if DNA test results showed Wasmer was the "habitual wearer" of the jeans and if the victims' DNA was found on the jeans, it would implicate Wasmer in the murders.

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[5] *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[6] *State v. Boppre*, 267 Neb. xxi (No. S-03-541, Dec. 30, 2003).

[7] *Boppre I, supra* note 2, 234 Neb. at 929, 453 N.W.2d at 416.

An inventory of evidence was prepared pursuant to § 29-4120(4). The court ordered appropriate DNA testing on the following items:

> (1) Pair of blue jeans from the Wasmer-Niemann home to include "habitual wearer analysis". . . .
> (2) Flooring containing grease letters . . . .
> (3) Suspected blood stain on [living room] door frame . . . .
> (4) Suspected blood sample on [kitchen] door frame . . . .
> (5) Two towels . . . .
> (6) Suspected blood splatters on door and curtain . . . .
> (7) Suspected blood sample on carpet . . . .
> (8) Blood samples of . . . Valdez, . . . Con[d]on, . . . Wasmer, and . . . Niemann . . . .

Laboratory testing was performed on the jeans seized from the Wasmer-Niemann mobile home and cuttings taken from the jeans in preparation for trial, but an insufficient amount of DNA was present to obtain a complete DNA profile. Accordingly, DNA testing failed to establish Wasmer as the habitual wearer of the jeans. The DNA profile obtained from the jeans cuttings was consistent with the DNA profile obtained from Wasmer. Neither the jeans nor the jeans cuttings produced a DNA profile consistent with the DNA profile of either Valdez or Condon. Accordingly, DNA testing failed to establish the victims' blood on the jeans.

The letters and grease located on the flooring of the Valdez residence also failed to yield a sufficient amount of DNA to obtain a DNA profile. Thus, the DNA testing failed to definitively identify the author of the letters or contradict the State's theory that Valdez was the author.

The DNA report disclosed Condon to be the donor of the DNA profile obtained from a sample collected from a piece of wood from the north kitchen door frame at the Valdez-Condon residence. Additionally, a partial DNA profile obtained from a towel found at the Wasmer-Niemann trailer home was consistent with that of Niemann.

All other tested items resulted in an insufficient amount of DNA to obtain a full DNA profile. However, a partial DNA

profile from an unknown male was obtained from a bloodstain on the south entrance door to the Valdez-Condon residence near the doorknob. The DNA results obtained from the bloodstain near the doorknob only revealed a partial profile; however, enough genetic markers were present to search for a match. The search revealed that the genetic markers contained in the partial profile obtained near the doorknob were consistent with John Yellowboy's DNA profile.

Additional DNA testing was ordered on three brown or black hairs collected from the flooring. Boppre, Valdez, Wasmer, and Niemann were excluded as possible contributors. Condon and her maternal relatives could not be excluded as possible contributors, as maternally related relatives share identical mitochondrial DNA profiles. Yellowboy is maternally related to Condon.

Following completion of all DNA testing, the State filed a motion to dismiss, while Boppre filed an amended motion to vacate and set aside the judgment pursuant to § 29-4123(2); at issue was whether the DNA results "exonerate or exculpate" Boppre. An evidentiary hearing was held on August 5, 2008. By stipulation of the parties, the court withheld its ruling until all other pending motions were heard in order to effectuate one appeal rather than multiple appeals.

The motion for new trial was heard on February 10, 2009. The court indicated that the hearing was limited to the motion for new trial; issues presented in the petition for postconviction relief were not addressed. No further hearings were held.

On August 17, 2009, the district court (1) sustained the State's motion to dismiss; (2) overruled Boppre's motion to vacate and set aside judgment; (3) overruled Boppre's motion for new trial; (4) overruled Boppre's petition for postconviction relief; and (5) overruled all other relief requested by either party. Boppre appeals the denial of a new trial on the basis of newly discovered DNA evidence and the denial of his motion for postconviction relief without an evidentiary hearing.

ASSIGNMENTS OF ERROR

Boppre assigns that the district court erred in (1) considering only the DNA laboratory test results in the context of the

original trial record when ruling on the motion for new trial; (2) refusing to order a new trial; and (3) failing to conduct an evidentiary hearing on allegations contained in Boppre's motion for postconviction relief, and denying postconviction relief.

STANDARD OF REVIEW

[1] In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[8]

[2] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court.[9] Absent an abuse of discretion, the court's determination will not be disturbed.[10]

[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.[11]

[4] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[12]

ANALYSIS

DNA Testing Act

[5-7] In this case, we examine the decision made by the district court pursuant to § 29-4120 of the DNA Testing Act. The act permits the testing of relevant biological material and provides the means by which a person in custody may seek relief based upon newly discovered exculpatory DNA test results obtained after the statutory time period for requesting a new

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[8] *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009).

[9] See Neb. Rev. Stat. § 29-2101(6) (Reissue 2008).

[10] *State v. Pratt, supra* note 8.

[11] *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[12] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified on denial of rehearing* 276 Neb. 965, 767 N.W.2d 68 (2009).

trial based upon newly discovered evidence has expired.[13] If the final testing results exonerate the defendant, the court may vacate and set aside the judgment and release the person.[14] If the evidence does not exonerate the defendant, but is exculpatory, the court may order a new trial if the newly discovered exculpatory DNA evidence is of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[15]

Boppre does not argue that the DNA evidence exonerates him. Instead, he asserts that the DNA evidence is exculpatory, and he seeks a new trial. Thus, at issue is whether the DNA evidence was of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[16] In considering this question, we review the trial court's decision for an abuse of discretion.[17] Unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[18]

The district court found that DNA testing disproved Boppre's hypothesis that the victims' blood or the victims' DNA would be found on Wasmer's jeans. At the trial in 1988, a forensic serologist had testified that several small bloodstains on the jeans could have come from Condon, but that she could not make a definitive determination. The DNA laboratory testing failed to disclose Valdez' or Condon's DNA on the seized jeans or jeans cuttings. At best, the DNA results support a finding that Wasmer's blood was on Wasmer's jeans at Wasmer's trailer home.

The laboratory also tested the letters and grease located on the flooring of the Valdez residence. An insufficient amount of DNA was present to obtain a DNA profile. The district

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[13] *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005).

[14] See *id.* See, also, *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[15] See, *State v. Buckman, supra* note 14; *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

[16] See *id.*

[17] *State v. Bronson, supra* note 15.

[18] See *id.*

court found that the DNA testing failed to identify the author of the letters as anyone other than Valdez. Accordingly, the court found that the evidence neither exonerated nor exculpated Boppre.

The DNA report disclosed Condon to be the donor of the DNA sample collected from a piece of wood which was part of the north kitchen doorframe at the Valdez-Condon residence. The testing results of the three hairs found on the flooring showed Condon and her maternal relatives could not be excluded as possible contributors; Yellowboy was a maternal relative of Condon. Yellowboy's DNA was also found at the residence. Condon lived part time at the residence, and Yellowboy was a frequent visitor. The district court found the presence of Condon's and Yellowboy's DNA at the residence was not exculpatory.

As described above, DNA effectively disproved the majority of Boppre's assertions in his motion for forensic testing. But Boppre contends the forensic DNA indicates that Wasmer and Niemann testified falsely at trial, and also implicates Niemann and Yellowboy as the actual perpetrators of the crimes. These contentions appear to be based on the fact that neither Wasmer nor Niemann testified that Yellowboy was present during the commission of the crime and on the theory that impeaching these witnesses with Yellowboy's DNA would have swayed the jury to believe Boppre's version of the events. Aside from this argument, Boppre fails to allege any other way in which the DNA results are exculpatory in light of the trial record.

We find the district court did not err in its determination that the DNA results neither exonerate nor exculpate Boppre. The results obtained from the three hairs and the presence of Yellowboy's DNA do not support Boppre's argument. Boppre's reliance on these results is without merit. Condon was killed in the residence, her maternal relatives were likely visitors to the residence, and Yellowboy was a frequent visitor to the residence. The presence of hairs matching Condon or her maternal relatives neither exonerates nor exculpates Boppre. Yellowboy admitted to being at the Valdez-Condon residence on the night of the murders. Because Valdez sold drugs from his home, the residence frequently had visitors coming and going.

In its order, the district court concluded the DNA test results failed to show the dying declarations were authored by anyone other than Valdez. The DNA test results failed to confirm that Wasmer was the habitual wearer of the jeans seized from his residence or that the victims' blood was on the jeans. The DNA tests merely showed that Condon, a part-time resident, and Yellowboy, a frequent visitor, had been in the Valdez home at some point in time prior to the murder investigation. That evidence neither exonerated nor exculpated Boppre.

We need not address Boppre's first assignment of error that the district court erred in considering only the DNA test results in the context of the original trial and not also in light of the other evidence presented by Boppre. Even if the court had considered the DNA results in light of all relevant evidence, the DNA results would still not be exculpatory. Considering the record before us, we find that the district court did not abuse its discretion in denying the motion for new trial.

Second Successive Motion for Postconviction Relief

Boppre also asserts that his allegations of prosecutorial misconduct and claim of ineffective assistance of counsel merited both an evidentiary hearing and relief from the conviction. Boppre argues that these allegations, if true, amount to a violation of due process. Although the district court stated in its order denying the motion that it had granted an evidentiary hearing on February 10, 2009, our review of that hearing reveals that the February 10 hearing was limited to the motion for new trial and did not encompass the issues raised in the petition for postconviction relief. We thus must determine whether the district court erred in denying Boppre's motion for postconviction relief without an evidentiary hearing.

[8,9] Although there is no time limit to bringing a postconviction motion, postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[19] Absent a factual circumstance whereby the judgment is

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[19] See, *State v. Lotter, supra* note 12; *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief.[20]

[10-12] 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.[21] But, this court has 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.[22] 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.[23]

[13,14] In his brief, Boppre concedes that the sole issue to be decided at this time is whether Boppre's current postconviction motion affirmatively alleges that the basis for relief was not available at the time of the first petition. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.[24] 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.[25] 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.[26]

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[20] *State v. Lotter, supra* note 12. See, also, *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007).

[21] *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[22] *Id.*

[23] See *id*.

[24] *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[25] *State v. Lotter, supra* note 12; *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

[26] *State v. Thomas, supra* note 11.

Boppre's current motion for postconviction relief alleges in part:

> The prosecutors withheld exculpatory evidence; to wit: 1) that . . . Condon's blood, which was type A, was found on Wasmer's jeans and a towel found in Wasmer's house; 2) that Wasmer and Niemann's blood was tested less than 60 days prior to trial and they both had type "O" blood; 3) the existence of [M.M.], as well as all other evidence which would have led trial counsel to [M.M.], i.e., law enforcement's interviews with [M.M. and two other persons]; and information surrounding [M.M.'s] being moved to a foster home in North Platte; 4) the unedited version of the crime scene video which shows law enforcement looking under the body of Valdez and declaring that the door had been kicked in rather than being opened by Valdez as testified to by Niemann; and 5) crime scene photographs which would show, *inter alia*, that there were slivers of wood from the kicked in door under the body of . . . Valdez.

None of the facts alleged in the current motion could prove that the State withheld favorable evidence that was material to Boppre's guilt, as required to show a violation of due process.[27] The DNA results proved that Condon's blood was not on Wasmer's jeans. The other allegations were previously the subject of motions for new trial and postconviction relief. The past dispositions show these claims, on the merits, do not amount to a violation of Boppre's constitutional right to due process.[28]

Even assuming Boppre's due process claim can rest on the above allegations, his current motion is procedurally barred. The motion fails to allege when he discovered the alleged prosecutorial withholding of the aforementioned evidence. The motion for postconviction relief broadly states that it "is based in part upon information which has been recently received and

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[27] See, *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[28] See *Boppre II, supra* note 4.

is not requesting review of issues already litigated or decided." The motion also incorporates portions of M.M.'s "recently obtained sworn statement." Boppre fails to allege, however, that the information contained in this affidavit was unavailable before any of the numerous challenges already made to his convictions and sentences.

Boppre also contends that trial counsel provided him ineffective assistance of counsel. But Boppre raised the issue of ineffective assistance of counsel in a previous motion for postconviction relief.[29] In his brief, Boppre argues that "[i]f original trial counsel failed to identify and call an eyewitness to the murder and that eyewitness identified [Yellowboy] as being present, then there is not conceivable trial strategy that could explain the failure to call that witness."[30] Boppre fails to further identify in his brief any basis for his assertion that trial counsel was ineffective. Further, the current petition for postconviction relief fails to specify which allegations, if any, were unavailable at the time Boppre filed his prior motions.

Boppre relies on *State v. Ryan*,[31] in which this court determined that newly discovered ex parte contacts by the trial judge with the victim's family were not procedurally barred in the defendant's successive postconviction motion. The holding in *Ryan* was based on the presence of newly discovered evidence that was not available to the defendant during his direct appeal or his first postconviction motion.[32] Boppre fails to explain how *Ryan* is analogous to the present case. Neither Boppre's current petition for postconviction relief nor his brief identifies any newly discovered evidence that Boppre was prevented from obtaining at the time of his previous motions and appeals.

[15] Boppre's current motion for postconviction relief fails to affirmatively show that he could not have presented the allegations of prosecutorial misconduct and ineffective assistance of counsel at the time he filed his prior motions. Therefore,

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[29] See *Boppre III, supra* note 5.

[30] Brief for appellant at 47.

[31] *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[32] *Id.*

these claims are procedurally barred by Boppre's failure to raise them in his previous motions.[33] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[34] As previously noted, this 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.[35] On its face, Boppre's current motion for postconviction relief fails to affirmatively show that he could not have raised these issues on direct appeal or during prior motions for new trial and postconviction relief. We conclude that the district court did not err in denying relief without an evidentiary hearing.

CONCLUSION

The newly discovered DNA evidence is not of such a nature that it probably would have produced a substantially different result if it had been offered and admitted at trial. Therefore, the district court did not abuse its discretion in concluding that Boppre was not entitled to relief pursuant to the DNA Testing Act. Boppre's second successive motion for postconviction relief was also without merit because it failed to affirmatively show that it was not procedurally barred. The judgment of the district court is affirmed.

AFFIRMED.

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[33] See *State v. Marshall, supra* note 25.

[34] *State v. Lotter, supra* note 12.

[35] *Id.*

FRED H. KELLER, JR., ET AL., PLAINTIFFS, V.
CITY OF FREMONT, DEFENDANT.

MARIO MARTINEZ, JR., ET AL., PLAINTIFFS, V.
CITY OF FREMONT ET AL., DEFENDANTS.

790 N.W.2d 711

Filed November 5, 2010. No. S-33-100018.

Certified Question from the U.S. District Court for the District of Nebraska. Certification request denied.

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

PER CURIAM.

This matter is before the court on a "Certification Request" filed in this court by the U.S. District Court for the District of Nebraska under Neb. Rev. Stat. § 24-219 et seq. (Reissue 2008). The federal district court's request involves two federal cases consolidated under the lead case docketed in federal district court as case No. 8:10CV270. The court has certified the following question:

> May a Nebraska city of the first class, that is not a "home rule" city under Article XI of the Nebraska Constitution and has not passed a home rule charter, promulgate an ordinance placing conditions on persons' eligibility to occupy dwellings, landlords' ability to rent dwellings, or business owners' authority to hire and employ workers, consistent with Chapters 16, 18, and 19 of the Revised Statutes of Nebraska?

Section 24-221 requires that a certification request set forth (1) the questions of law to be answered and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

The question certified is a general question. It concerns a city of the first class' authority under various state statutes to enact an ordinance "*placing conditions on*" residential property rentals or business hiring and employment decisions. The question offers no particulars as to the nature or extent of the "conditions" which have been or may be imposed. But the question

asks us to answer the legal question through an exploration of chapters 16, 18, and 19 of the Nebraska Revised Statutes.

Although the certified question does not specify the conditions that the city seeks to impose, the facts and showing submitted under § 24-221(2) consist of the following: (1) a copy of "Fremont Ordinance 5156" out of which "[t]his controversy arose"; (2) a statement that voters adopted the ordinance on June 21, 2010, to become effective on June 29, 2010; and (3) a statement that the Fremont City Council voted on June 27 to stay its enforcement. Thus, the "conditions" to which the certified question refers are those imposed by "Fremont Ordinance 5156." Regarding the controversy, however, the showing filed under § 24-221(2) states only that the controversy centers on the plaintiffs' challenge to "the legality of the Ordinance on grounds of both state and federal law."

Under § 24-219, this court may answer certified questions when (1) a proceeding before the federal certifying court involves a question of state law which may be determinative of the pending cause and (2) the certifying court believes that there is no controlling precedent in the state. However, under § 24-219, this court may "in its absolute discretion, accept or reject such request for certification."

In interpreting the certified request and deciding whether to accept it, we are guided by the following principles. Section 24-219 requires a federal certified question to present a question of state law that is undecided. But the U.S. Supreme Court has held that federal courts are not required to obtain a state court's construction of a state statute or ordinance before deciding a federal constitutional challenge to the law and should not certify such question unless the law is fairly susceptible to a narrowing construction.[1] Also, the Court has held that it is "manifestly inappropriate to certify a question in a case where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim."[2] The same is

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[1] See, *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000); *Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

[2] *Houston, supra* note 1, 482 U.S. at 471.

true under § 24-219, which requires us to consider whether the certified question may be determinative of the pending federal cause. The "determinative" requirement is also consistent with state courts' holdings declining to answer certified questions asking for advisory opinions.[3]

Here, although § 24-221 requires a statement of facts showing the nature of the controversy, the request does not specify the plaintiffs' challenge to the ordinance on state law grounds. Nor does it identify any state statutes or state constitutional provisions that were allegedly violated in the plaintiffs' complaints. These omissions require us to make assumptions about the plaintiffs' state law challenge and imply that it is a constitutional challenge.

Obviously, even if this court held that the ordinance did not violate a state statute or the state Constitution, that holding would not be determinative of a federal constitutional challenge to the ordinance.[4] And the request does not ask us to consider whether any authorizing statute raised by the complaint is subject to a construction that would limit the statute's or ordinance's reach and thus resolve the pending federal challenge. Nor does it ask us to decide whether the ordinance violated any specific statute. Thus, we assume that the plaintiffs have alleged that the ordinance offends state and federal constitutional protections or conflicts with federal immigration law, rather than violating specific state statutes.

We have stated that "'"[i]n the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to

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[3] See, e.g., *CSX Transp., Inc. v. City of Garden City*, 279 Ga. 655, 619 S.E.2d 597 (2005); *Carle Foundation v. Illinois Dept. Revenue*, 396 Ill. App. 3d 329, 917 N.E.2d 1136, 335 Ill. Dec. 72 (2009); *Darney v. Dragon Products Co., LLC*, 994 A.2d 804 (Me. 2010); *State v. Arends*, 786 N.W.2d 885 (Minn. App. 2010).

[4] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006), quoting *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

when and how such police power should be exercised." . . .'"[5] But because the request does not identify any state constitutional provision implicated by the controversy that is unique to Nebraska, we assume the plaintiffs' state constitutional challenge coincides with federal constitutional provisions.

The most common constitutional challenges to these types of ordinances have been due process, equal protection, and federal preemption challenges.[6] We have interpreted the Nebraska Constitution's due process and equal protection clauses to afford protections coextensive to those of the federal Constitution.[7] Because we have not afforded greater state constitutional protections, no state constitutional questions are determinative of the pending federal claims. If the plaintiffs have instead claimed that the ordinance is preempted by federal immigration laws, preemption of a state law under the Supremacy Clause presents a federal question.[8]

Even assuming that there could be state law issues in the federal case that we have not considered here, we could not decide those issues without knowing the nature of the challenge. Thus, we decline to accept the federal district court's certified question.

It is therefore ordered that the certification request by the U.S. District Court for the District of Nebraska is denied.

CERTIFICATION REQUEST DENIED.

WRIGHT, J., not participating.

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[5] *Wolf v. City of Omaha*, 177 Neb. 545, 555-56, 129 N.W.2d 501, 508 (1964).

[6] See *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010).

[7] See, e.g., *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007); *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006); *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[8] See, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983); *Lozano, supra* note 6.

MILLER-LERMAN, J., concurring.

I concur with the opinion of this court that the certification request should be declined. I write separately because my

reasoning differs. In particular, to the extent the opinion states otherwise, I do not agree that the lack of specificity in the certified question and showing implies only the presence of a constitutional challenge and I do not agree that because the showing regarding the nature of the controversy is not informative, we must assume that the pending federal consolidated case not only involves constitutional issues but cannot be determined on the basis of state statutory law.

The U.S. District Court for the District of Nebraska, pursuant to Neb. Rev. Stat. § 24-219 et seq. (Reissue 2008), certified this question:

> May a Nebraska city of the first class, that is not a "home rule" city under Article XI of the Nebraska Constitution and has not passed a home rule charter, promulgate an ordinance placing conditions on persons' eligibility to occupy dwellings, landlords' ability to rent dwellings, or business owners' authority to hire and employ workers, consistent with Chapters 16, 18, and 19 of the Revised Statutes of Nebraska?

The request asks this court to determine if a Nebraska city of the first class can promulgate an ordinance, such as Fremont ordinance No. 5156, consistent with chapters 16, 18, and 19 of the Nebraska Revised Statutes. Chapters 16, 18, and 19 contain about 1,200 separately numbered statutes which, in the printed version, run about 500 pages. The certified question filed under § 24-221(1) fails to identify any particular statute. Furthermore, the showing filed under § 24-221(2) does not identify a state statute or focus on a series of state statutes which form the basis of the controversy which would inform the certified question. The question does, however, suggest by its terms that we are being asked a question about state statutory law.

The opinion assumes, based on what is known about other cases challenging these types of ordinances, that the lack of specificity in the question and showing implies that the pending federal consolidated case involves federal constitutional challenges or federal question issues which will wholly determine the outcome of the case, making an opinion by Nebraska's highest state court unnecessary. Under Nebraska's

certification of questions of law statute, § 24-219, the federal certifying court may request an answer to a question of law if "there are involved in any proceeding before [the federal court] questions of law of this state." Contrary to the opinion, I would not rule out the possibility that an issue has been raised in the federal consolidated case which questions the scope of the authority of cities to promulgate certain ordinances under Nebraska statutory law which the Nebraska Supreme Court is best equipped to assess. In my view, there are possible "questions of [statutory] law of this state" in the federal case "which may be determinative of the cause . . . pending in the certifying court." *Id.*

Certification is useful where an interpretation of state statutory law might avoid a need to decide a federal question. See 17A Charles Alan Wright et al., Federal Practice and Procedure § 4248 (3d ed. 2007 & Supp. 2010). The showing at issue suggests as much where it states that if the "Nebraska Supreme Court . . . suggests that the Ordinance is invalid under state law, this [federal] Court will entertain a motion to dismiss the remaining federal questions as moot." Further, the request indicates the presence of a significant state law issue where it states that if this court declines the request, the federal court "will consider whether [*Pullman*-type] abstention is appropriate . . . to enable the parties to pursue available state remedies." See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Consistent with the opinion, it has been observed that "[a] federal court may not impose on a state court the responsibility for determining a federal question." *Imel v. United States*, 523 F.2d 853, 857 (10th Cir. 1975). For several reasons, including the request's reference to "*Pullman*-type" abstention, I agree with the opinion that the request implies the presence of a federal constitutional issue. Contrary to the inference in the opinion, however, there is authority for the proposition that this court may answer a question about the meaning of a state law while not opining on the issue of the law's constitutionality pending in federal court. See *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983). See, similarly, *Baird v. Belotti*, 428 F. Supp. 854 (D. Mass. 1977).

Although it would admittedly require us to be careful, I believe, for the "benefits of comity and harmony," see *Cuesnongle v. Ramos*, 835 F.2d 1486, 1494 (1st Cir. 1987), between federal and state courts, we should not foreclose accepting and answering a focused certified question asking us to construe a state statute while explicitly reserving comment on the constitutional implications. See *Orr, supra*. Indeed, we have done so where a certified question required construction of a statute but did not request consideration of the statute's constitutionality. See *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991).

With respect to the scope of our potential inquiry, I note that although the Nebraska version of the certification of questions of law act states that a question can be certified "which may be determinative of the cause" in federal court, see § 24-219, the 1995 replacement to the Uniform Certification of Questions of Law Act (1967) requires only that the question "may be determinative of an issue in pending litigation." See Unif. Certification of Questions of Law (1995) § 3, 12 U.L.A. 53 (2008). In any event, "determinative of the cause" has been read by other state courts, not as meaning that the answer entirely disposes of the federal case, but, rather, that the answer to a pretrial certified question will materially advance the ultimate termination of the federal litigation. E.g., *Schlieter v. Carlos*, 108 N.M. 507, 775 P.2d 709 (1989). The majority of state courts seem to read "determinative of the cause" as determining at least one claim in the federal case. See, *Volvo Cars of North America v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006) (collecting cases discussing "determinative of the cause"); *Western Helicopter Services v. Rogerson Aircraft*, 311 Or. 361, 811 P.2d 627 (1991). To the extent the opinion implies that a certified question will only be accepted if it determines the outcome of the entire federal case, I read that implication as dictum.

Finally, with respect to preemption, the ordinance by its terms is directed at the "harboring of illegal aliens or hiring of unauthorized aliens"; these subjects implicate federal concerns. The opinion mentions preemption and the recently decided case of *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) (concluding that employment provisions

of similar ordinance were conflict preempted whereas housing provisions were field preempted). I agree with the opinion that an issue of preemption is no doubt present in the federal cases, and poses federal questions, and that the resolution of the preemption issue, in the absence of a state law claim, may well resolve the entire federal controversy. I would not assume the preemption outcome to be the same with respect to the distinct issues regarding housing and employment and would not assume for certification purposes that construction of state law necessarily lacks relevance in equal measure as to housing and employment.

Because the showing in this request lacks specificity regarding the nature of the challenge in the federal consolidated case and the question does not direct us to the specific state law at issue, I agree with the opinion which declines this request.

Countryside Cooperative and Michigan Millers Mutual Insurance Company, appellees and cross-appellants, v. The Harry A. Koch Co., appellant and cross-appellee.

790 N.W.2d 873

Filed November 12, 2010. No. S-09-896.

1. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
3. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
4. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
5. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
6. **Actions: Parties: Statutes: Public Policy.** Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that every action shall be prosecuted in the name of the real party in interest. The purpose of the statute is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause. The statute also

discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.

7. **Actions: Parties: Standing.** The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
8. **Insurance: Brokers: Principal and Agent.** An insurance broker acts as an agent of the insured.
9. **Trial: Evidence: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.
10. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
11. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
12. ____: ____. Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
13. **Subrogation: Liability.** The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property.
14. ____: ____. To be entitled to subrogation, one must pay a debt for which another is liable.
15. **Insurance: Contracts: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
16. **Insurance: Contracts: Claims: Time.** A claims-made policy provides coverage only where a claim is made and reported to the insurance carrier during the policy period or a specified period thereafter.
17. ____: ____: ____: ____. Where an insurance policy requires that a claim be made and reported during the policy period or an extended reporting period in order for the loss to be treated as falling within the coverage of the policy, failure to comply with the reporting requirement is sufficient to defeat coverage without a showing of prejudice to the insurer in the absence of a specific policy provision to the contrary.
18. **Insurance: Brokers: Principal and Agent.** As a general principle, it is not necessary for an insured, in order to recover from the broker or agent, to show that he or she has sued the insurance company.
19. **Laches: Equity: Estoppel.** In Nebraska, both laches and equitable estoppel are affirmative defenses.

20. **Pleadings.** An affirmative defense must be specifically pled to be considered.
21. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
22. **Prejudgment Interest: Appeal and Error.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2004), and whether prejudgment interest should be awarded is reviewed de novo on appeal.
23. **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. A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Chad G. Marzen and Dan H. Ketcham, of Engles, Ketcham, Olson & Keith, P.C., and Kenneth R. Rothschild and Audrey L. Shields, of Golden, Rothschild, Spagnola, Lundell, Levitt & Boylan, P.C., for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

STEPHAN, J.

This is a negligence action against The Harry A. Koch Co. (Koch), an insurance broker. Countryside Cooperative (Countryside) and Michigan Millers Mutual Insurance Company (Michigan Millers) allege that they sustained damages when Koch failed to timely report a personal injury claim against Countryside to the company that insured Countryside under a claims-made policy. Koch appeals from a judgment in favor of Countryside and Michigan Millers, and Countryside and Michigan Millers cross-appeal. We affirm the judgment of the district court.

I. BACKGROUND

In late October 2004, William Boden was working on his property in rural Lancaster County. A tank owned by Countryside and filled with anhydrous ammonia was mounted

on a trailer and parked on land adjacent to the property where Boden was working. Boden subsequently sued Countryside, alleging that the tank leaked and that he suffered extensive physical injuries as a result of his exposure to the anhydrous ammonia.

At the time of this incident, Countryside, formerly known as Firth Cooperative Co., Inc., was insured under two liability insurance policies: a commercial general liability policy issued by Michigan Millers and a commercial pollution legal liability policy issued by American International Specialty Lines Insurance Company (American International). The American International policy was a claims-made policy, and Koch was the broker for Countryside on the policy. Countryside timely notified Koch of the Boden claim, but Koch did not notify American International until several days after the reporting period in the American International policy had expired. Michigan Millers was timely notified of the Boden claim.

American International subsequently refused to defend Countryside against Boden's claim on grounds that (1) Boden's claim was not reported within the time periods specified in the policy, (2) Countryside was not an insured under the policy, (3) an underground tank exclusion in the policy applied, and (4) a "known contamination" exclusion in the policy applied. Michigan Millers defended Countryside under its policy and eventually settled Boden's claim for $900,000.

After the settlement with Boden was concluded, Countryside and Michigan Millers entered into a "Memorandum of Understanding" in which they agreed to jointly sue Koch based upon Koch's alleged negligence in failing to timely report the Boden claim to American International. Michigan Millers agreed to control the litigation and pay all attorney fees and costs, and Countryside agreed to cooperate fully in the prosecution of the action and execute any necessary documents. It was also agreed that Countryside would receive 2 percent of the net proceeds of a judgment or settlement and that Michigan Millers would receive the remaining 98 percent.

Countryside and Michigan Millers filed this action against Koch on December 12, 2006, alleging that Koch's negligence

in failing to timely report the Boden claim to American International resulted in damages because Countryside lost the benefit of the American International policy. After Koch answered, both parties filed motions for summary judgment on the issue of Koch's liability. The district court denied both motions after an evidentiary hearing, ruling in part that genuine issues of material fact existed as to whether the American International policy would have applied to the Boden claim but for Koch's failure to give timely notice. But in its order, the district court determined that Michigan Millers sustained a loss by reason of defending and settling the Boden claim and, pursuant to the memorandum of understanding, had standing to bring the action. The court also rejected Koch's contention that Countryside had not suffered any loss because Michigan Millers had defended Boden's lawsuit and paid the settlement, noting that the memorandum of understanding and the collateral source rule refuted this contention. The court also determined that because the action was brought under a negligence theory, American International was not a necessary party.

The parties subsequently filed renewed motions for summary judgment. After reviewing the previously submitted evidence and receiving one additional exhibit, the district court determined (1) that no genuine issues of material fact existed, (2) that Countryside was a named insured under the American International policy, (3) that none of the policy exclusions applied, (4) that Countryside's right to coverage under the American International policy "was lost due to Koch's failure to notify [American International] within the policy period or extended reporting period," and (5) that American International would have been obligated to defend Countryside on the Boden claim if proper notice had been given by Koch. The court reiterated its previous determinations regarding the standing of Countryside and Michigan Millers to maintain the action.

The parties then waived a jury trial and submitted the issue of damages to the court on a stipulation of facts. The court determined that both the Michigan Millers and the American International policies included "other insurance" clauses which

provided that if each policy was primary, then the loss would be shared equally up to the policy limits. The court held that both policies were primary, and therefore awarded Countryside and Michigan Millers one-half of the $900,000 settlement amount, one-half of the $37,445.49 incurred by Michigan Millers defending the Boden claim, and attorney fees incurred by Countryside in the amount of $9,514.39, for a total judgment against Koch of $478,237.14. After Koch's motion for new trial or to reconsider was overruled, it filed this timely appeal. We granted a petition to bypass filed by Countryside and Michigan Millers.

II. ASSIGNMENTS OF ERROR

Koch assigns that the district court erred in entering judgment for Countryside and Michigan Millers, because (1) there was no valid assignment of rights from Countryside to Michigan Millers, (2) Koch did not owe any duty to Michigan Millers, (3) Countryside did not sustain a loss, (4) the American International policy was a windfall policy to Michigan Millers and therefore Michigan Millers had no right to assert coverage or receive the benefit of the American International policy, and (5) Michigan Millers failed to pursue American International's denial of the Boden claim.

On cross-appeal, Countryside and Michigan Millers assign that the district court erred in failing to award as damages the full amount of the Boden settlement and in failing to award prejudgment interest.

III. STANDARD OF REVIEW

[1,2] Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[2]

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[1] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009); *Burnison v. Johnston*, 277 Neb. 622, 764 N.W.2d 96 (2009).

[2] *Id.*

[3,4] The interpretation of an insurance policy is a question of law.[3] In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.[4]

[5] An appellate court will affirm a lower court's granting of summary judgment 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.[5]

IV. ANALYSIS

1. Koch's Appeal

(a) Real Party in Interest

For various reasons, Koch contends that neither Countryside nor Michigan Millers possessed rights or interests which would entitle either of them to recover damages in this case. We generally interpret these arguments to assert that neither Countryside nor Michigan Millers is a real party in interest in this case.

[6,7] Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ." The purpose of the statute is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[6] The statute also discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.[7] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable

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[3] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010); *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009).

[4] *Id.*

[5] *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

[6] *Schmidt v. Henke*, 192 Neb. 408, 222 N.W.2d 114 (1974); *Scholting v. Alley*, 185 Neb. 549, 178 N.W.2d 273 (1970).

[7] *Id.*

right, title, or interest in the subject matter of the controversy.[8] The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[9] We examine Koch's arguments with respect to each party separately.

(i) Countryside

[8] It is uncontroverted that Koch acted as a broker with respect to the American International policy issued to Countryside. An insurance broker acts as an agent of the insured.[10] We have recognized that a broker who agrees to obtain insurance coverage for another but fails to do so is liable for damage proximately caused by such negligence, including the amount that would have been due under such policy if it had been obtained.[11] In this case, Countryside alleged that it reported the Boden claim to Koch and that Koch undertook to report the claim to American International within the time period specified in its policy but negligently failed to do so. Koch does not dispute that it had a duty to Countryside to timely report the Boden claim to American International or that it breached such duty. Rather, it argues that because the Boden claim and related defense costs were paid by Michigan Millers under its policy, Countryside did not suffer a loss and therefore could not maintain this action.

[9] The district court rejected Koch's argument that Countryside had suffered no loss by relying upon the collateral source rule. Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set

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[8] See, *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005); *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995).

[9] *Id.*

[10] See, *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008); *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992). See 3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 45:1 (2007).

[11] *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

up by the wrongdoer in mitigation of damages.[12] The collateral source rule

> "provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice."[13]

Here, Countryside alleged that because of Koch's negligence, it lost coverage for the Boden claim which would otherwise have been provided under the American International policy, for which Countryside paid a premium. The provision of coverage under the Michigan Millers policy, for which Countryside also paid a premium, is a collateral source with respect to Countryside's negligence claim against Koch. Koch, as the alleged tort-feasor, cannot escape liability to Countryside on the basis of the benefits paid under the Michigan Millers policy.

[10] We also note that the complaint included a claim for defense costs incurred by Countryside on the Boden claim which were not paid by Michigan Millers, and these costs were included in the final judgment for damages. Although Koch argues in its brief that these costs should not have been included in the award of damages, Koch makes no corresponding assignment of error. We therefore do not address this issue further because of the established principle that errors argued but not assigned will not be considered on appeal.[14]

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[12] *Fickle v. State*, 274 Neb. 267, 759 N.W.2d 113 (2007); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997); *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

[13] *Mahoney v. Nebraska Methodist Hosp., supra* note 12, 251 Neb. at 847, 560 N.W.2d at 456, quoting *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989).

[14] *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

We conclude from the record that Countryside had rights and interests which could be benefited by the relief sought in this action and was therefore a real party in interest.

(ii) Michigan Millers

Koch argues that Michigan Millers cannot be a real party in interest "because there is no privity of contract between Koch and Michigan Millers, nor did Koch owe any legal duty to Michigan Millers."[15] But in making this argument, Koch concedes that it owed a duty to Countryside. The district court regarded the memorandum of understanding as an assignment of Countryside's claim against Koch to Michigan Millers. In its appellate brief, Koch assigns as error that "[t]here was no valid assignment of rights from Countryside to Michigan Millers," but includes no argument on this point. Because this alleged error was not both specifically assigned and specifically argued in Koch's brief, we do not reach it in this appeal.[16] Instead, for purposes of this appeal, we regard the memorandum of understanding as an assignment pursuant to which Michigan Millers could maintain the action against Koch.[17]

[11-15] Michigan Millers also has standing because of its subrogation right arising from its payment of the Boden claim. In *Midwest PMS v. Olsen*,[18] an insurance carrier which had paid a workers' compensation claim on behalf of its insured sought reimbursement from another insurance carrier which it alleged to be liable for a portion of the settlement. We characterized the claim as one of subrogation and summarized the applicable principles as follows:

> Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. It is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted

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[15] Brief for appellant at 19.

[16] See *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[17] See, Neb. Rev. Stat. § 25-302 (Reissue 2008); *Eli's Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[18] *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010).

> succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property. To be entitled to subrogation, one must pay a debt for which another is liable.[19]

In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.[20]

In this case, it is claimed that but for Koch's negligence, the American International policy would have provided liability coverage to Countryside for the Boden claim. Had that occurred, Michigan Millers' liability to Countryside on the Boden claim would have been diminished by operation of the "other insurance" clause in the Michigan Millers policy. Therefore, to the extent that Michigan Millers paid more to Countryside on the Boden claim than it would have been required to pay if both policies had been in force, it is subrogated to Countryside's claim against Koch for negligently failing to report the Boden claim to American International. Recovery on the subrogation claim does not constitute an "[u]nbargained for [w]indfall"[21] to Michigan Millers, as Koch contends, because Michigan Millers' policy specifically provides for a diminished exposure in the event that its insured, Countryside, had other insurance coverage applicable to a claim which was also covered under the Michigan Millers policy. For all of these reasons, Michigan Millers is a real party in interest.

(b) Denial of Coverage by American International

Koch argues that the claims of Countryside and Michigan Millers must fail because there has never been a judicial

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[19] *Id.* at 498, 778 N.W.2d at 732.

[20] *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004); *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

[21] Brief for appellant at 27.

determination that the American International policy would have applied to the Boden claim but for Koch's failure to timely report the claim. We address each of Koch's arguments in turn.

(i) Alternative Grounds for American International's Denial of Coverage

Koch argues that the late report was only one of four reasons given by American International for denying coverage on the Boden claim and that Countryside and Michigan Millers did not establish that the other three reasons given by American International were invalid. We find no merit to this argument.

The American International policy provided coverage for "[b]odily [i]njury" resulting from "[p]ollution [c]onditions." The policy defined "pollution conditions" as "the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant." The plain language of the policy therefore clearly covered Boden's claim that he was physically injured by exposure to anhydrous ammonia leaking from a tank owned by Countryside.

The first alternative reason which American International gave for denying coverage was that Countryside was not an insured under its policy. The record shows that the policy was originally issued to "Firth Cooperative Co., Inc." as the named insured. But after Firth Cooperative Co. changed its name to "Countryside Cooperative," an endorsement was added to the policy effective December 1, 2003, identifying the named insured as "Countryside Cooperative." We find nothing in the record to contradict this evidence. Thus, the record establishes as a matter of law that Countryside was the named insured under the American International policy.

The second alternative reason given by American International for denying coverage was an exclusion for claims arising from "Pollution Conditions resulting from an Underground Storage Tank" located on Countryside's property. But Countryside's president averred that the Boden claim "was based upon alleged release of anhydrous ammonia from a portable tank mounted upon a trailer; it did not in any way involve underground

storage tanks." His deposition testimony further substantiated this fact. And in responses to requests for admissions, Koch admitted that the Boden claim "involved an allegation of ammonia escaping from an above ground tank." We find no evidence in the record from which a reasonable inference could be drawn that the Boden claim involved an underground storage tank. The record thus establishes as a matter of law that this exclusion did not apply.

The third alternative reason given by American International for denying coverage was an exclusion applicable to claims arising from a "known contamination" on Countryside's premises as described in a 1995 report which is specifically identified in the exclusion. The evidence discussed above establishes as a matter of law that Boden's claim involved an alleged leak in a portable anhydrous ammonia tank which occurred on October 28, 2004, and was not in any way related to the 1995 contamination described in the policy exclusion. The record establishes as a matter of law that this exclusion did not apply.

(ii) Effect of Untimely Report of Claim

The American International policy obligated it to pay, on behalf of Countryside, claims for bodily injury, property damage, or cleanup costs resulting from pollution conditions commencing after December 13, 2002, "provided such Claims are first made against the Insured and reported to the Company, in writing, during the Policy Period, or during the Extended Reporting Period if applicable." The policy period ended on December 13, 2004, and there was an automatic extended reporting period of 60 days. The extended reporting period therefore expired on February 11, 2005. There is undisputed evidence that a representative of Countryside reported the Boden claim to Koch on November 17, 2004, and requested that it be submitted to American International. There is also undisputed evidence that despite assuring Countryside that Koch would timely report the claim to American International, Koch did not do so until February 14, 2005. In denying coverage for the Boden claim, American International cited the fact that this report was not received within the time periods required under its claims-made policy. Koch argues that the district court erred

in concluding as a matter of law that American International was entitled to deny coverage on this basis, because there was no showing that American International was prejudiced by the delay.

[16] We have held that failure to give timely notice of a claim to an insurer is not a defense to the claim unless there is evidence of collusion or it is shown that the insurer has been prejudiced in its handling of the claim.[22] Our cases applying this principle have involved "occurrence" policies which provide coverage where the event resulting in liability occurs during the policy period.[23] As Koch correctly notes, we have not addressed the applicability of this principle to a claims-made policy such as the American International policy. A claims-made policy provides coverage only where a claim is made and reported to the insurance carrier during the policy period or a specified period thereafter.[24]

Koch relies on *Rentmeester v. Wis. Lawyers Mut. Ins.*[25] in arguing that its untimely reporting of the Boden claim could not justify American International's denial of coverage in the absence of a showing of prejudice. But in that case, the policy included a provision specifically stating that failure to provide notice of a claim within the time period specified in the policy "'shall not invalidate or reduce a claim unless we are prejudiced thereby, and it was reasonably possible to meet the time limits.'"[26] The American International policy includes no such language, and *Rentmeester* is therefore distinguishable and unpersuasive.

A majority of courts addressing the issue have held that the failure to report a claim within the time periods specified in a claims-made policy is sufficient to defeat coverage without

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[22] *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008); *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 584 N.W.2d 805 (1998).

[23] See *id.*

[24] See *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422 (8th Cir. 1989).

[25] *Rentmeester v. Wis. Lawyers Mut. Ins.*, 164 Wis. 2d 1, 473 N.W.2d 160 (Wis. App. 1991).

[26] *Id.* at 8, 473 N.W.2d at 163.

a showing of prejudice to the insurer.[27] These holdings reflect the essential difference between an occurrence policy and a claims-made policy. As stated in *Lexington Ins. Co. v. St. Louis University*[28]:

> Both types of policies require the insured to promptly notify the insurer of possible covered losses. With a claims made policy, however, that notice is not simply part of the insured's duty to cooperate. It defines the limits of the insurer's obligation—if there is no timely notice, there is no coverage.

Under a claims-made policy, "the very description of the risk covered include[s] the requirement that claims be both made and reported within the policy period."[29] Other courts characterize the timely reporting of the claim to the insurer as "the most important characteristic"[30] and the "essence"[31] of a claims-made policy, so that "failure to give timely notice forfeits coverage under [a] claims-made policy as a matter of law."[32] Because of this essential difference between occurrence and claims-made policies, "allow[ing] an extension of reporting time where the insurer failed to demonstrate prejudice in a claims-made policy would extend the coverage the parties contracted for and, in

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[27] See, *Lexington Ins. Co. v. St. Louis University*, 88 F.3d 632 (8th Cir. 1996); *Esmailzadeh v. Johnson and Speakman, supra* note 24; *Simundson v. United Coastal Ins. Co.*, 951 F. Supp. 165 (D.N.D. 1997); *CMC v. Executive Risk Indem., Inc.*, 151 N.H. 699, 867 A.2d 453 (2005); *Tenovsky v. Alliance Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144 (1997); *Gulf Ins. Co. v. Dolan, Fertig and Curtis*, 433 So. 2d 512 (Fla. 1983); *Thoracic Cardio. Assoc. v. St. Paul Fire*, 181 Ariz. 449, 891 P.2d 916 (Ariz. App. 1994); *Campbell & Co. v. Utica Mut. Ins. Co.*, 36 Ark. App. 143, 820 S.W.2d 284 (1991). See, also, 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 186:13 (2005).

[28] *Lexington Ins. Co. v. St. Louis University, supra* note 27, 88 F.3d at 634.

[29] *Esmailzadeh v. Johnson and Speakman, supra* note 24, 869 F.2d at 425.

[30] *Simundson v. United Coastal Ins. Co., supra* note 27, 951 F. Supp. at 167.

[31] *Gulf Ins. Co. v. Dolan, Fertig and Curtis, supra* note 27, 433 So. 2d at 514.

[32] *CMC v. Executive Risk Indem., Inc., supra* note 27, 151 N.H. at 704, 867 A.2d at 458.

effect, rewrite the contract between the parties."[33] Other courts have reached similar conclusions.[34]

[17] We agree with the reasoning of these cases and hold that where an insurance policy requires that a claim be made and reported during the policy period or an extended reporting period in order for the loss to be treated as falling within the coverage of the policy, failure to comply with the reporting requirement is sufficient to defeat coverage without a showing of prejudice to the insurer in the absence of a specific policy provision to the contrary. The district court did not err in concluding as a matter of law that Koch's failure to timely report the Boden claim was the sole reason that the claim was not covered under the American International policy.

(c) Other Defenses

(i) Exhaustion of Remedies

[18] Koch makes a general exhaustion of remedies argument, contending that the claims against it were barred by the fact that Countryside and Michigan Millers did not first sue American International in order to obtain a judicial determination of American International's liability under the claims-made policy. We are not persuaded by this argument. As noted, Countryside and Michigan Millers proved *in this action* that American International acted with justification in denying coverage for the Boden claim because of Koch's failure to report the claim as required by the policy. Koch does not contend that the settlement of the Boden claim was unreasonable, and it stipulated that if called, appropriate witnesses would testify in the form of opinion that the amount paid to Boden, as well as the amount of attorney fees and costs paid by Countryside and Michigan Millers, was fair, reasonable, and necessary. Everything necessary to establish Koch's liability and the amount of resulting damages was alleged and proved in this action. As a general principle, "[i]t is not necessary for [an]

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[33] *Campbell & Co. v. Utica Mut. Ins. Co., supra* note 27, 36 Ark. App. at 150, 820 S.W.2d at 288.

[34] *Simundson v. United Coastal Ins. Co., supra* note 27; *Gulf Ins. Co. v. Dolan, Fertig and Curtis, supra* note 27.

insured, in order to recover from the broker or agent, to show that he or she has sued the insurance company."[35] We see no reason to depart from this principle here.

(ii) Laches and Equitable Estoppel

[19-21] Koch also argues that the claim asserted by Countryside and Michigan Millers in this action is barred by the doctrines of laches and equitable estoppel. In Nebraska, both laches and equitable estoppel are affirmative defenses.[36] An affirmative defense must be specifically pled to be considered.[37] Koch did not specifically plead laches or equitable estoppel in its answer, nor did it allege facts upon which the defenses could reasonably be based. And the district court did not address these issues. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[38] We therefore do not address Koch's argument with respect to these issues.

(iii) Failure of Michigan Millers to Pursue American International's Denial of Claim Pursuant to Equitable Subrogation

Koch makes a rather confusing argument that because Michigan Millers was aware of the American International policy but did not pursue a subrogation claim against American International, it should be barred from recovery against Koch. We find no merit in this argument. Neither Countryside nor Michigan Millers could have recovered from American

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[35] 44 C.J.S. *Insurance* § 312 at 431 (2007). See, *Long Is. Lighting v. Steel Derrick Barge FSC 99*, 725 F.2d 839 (2d Cir. 1984); *Wolfswinkel v. Gesink*, 180 N.W.2d 452 (Iowa 1970).

[36] See, *Appleby v. Andreasen*, 276 Neb. 926, 758 N.W.2d 615 (2008) (laches); *Vanice v. Oehm*, 255 Neb. 166, 582 N.W.2d 615 (1998) (laches); *Hughes Co. v. Farmers Union Produce Co.*, 110 Neb. 736, 194 N.W. 872 (1923) (equitable estoppel); *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W.2d 306 (2000) (equitable estoppel).

[37] *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994); *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993).

[38] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009); *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004).

International, because coverage under its policy was negated by the failure of Koch to report the Boden claim in the time periods required by the policy. Having paid amounts which should have been paid by American International but for Koch's negligence, Michigan Millers was entitled to assert its subrogation claim in this action, as explained more fully above.

(d) Summary

For the reasons discussed, we find no merit in any of Koch's assignments of error.

2. Cross-Appeal

(a) Total Policy Insuring Intent Rule

In their complaint, Countryside and Michigan Millers sought the full amount of the Boden settlement and related defense costs paid by Michigan Millers as damages in their claim against Koch. In their cross-appeal, they argue that the district court erred in awarding only 50 percent of this amount.

Some additional background on this issue is necessary. Both the Michigan Millers policy and the American International policy contain similar "other insurance" clauses. The clause in Michigan Millers' policy provided that the insurance was primary, except in limited circumstances not applicable to this case. It further provided that if another applicable policy was also primary, it would contribute by equal shares. The clause in American International's policy also provided that the insurance was primary, and that if another policy was also primary, it would contribute by equal shares.

In its order awarding damages, the district court noted the similarity of the "other insurance" clauses of both policies, and determined that both policies were primary, thus obligating each insurer for an equal amount of the claim. The court concluded: "While the 'total policy insuring intent' theory advocated by [Countryside and Michigan Millers], which has been applied by the Minnesota courts, has some logic, this court will defer to the appellate courts of this state if such a theory is to be adopted here."

The "total policy insuring intent rule" originated in a circumstance where two insurance policies applicable to a

claim contained conflicting "other insurance" clauses.[39] In that circumstance, the Minnesota Supreme Court concluded that instead of attempting to reconcile the policies, a better approach is "to allocate respective policy coverages in the light of the total policy insuring intent, as determined by the primary policy risks upon which each policy's premiums were based and as determined by the primary function of each policy."[40] Under the total policy insuring intent rule, if two applicable insurance policies have conflicting "other insurance" clauses, the court will disregard both clauses entirely, and instead attempt to ascertain which policy was meant to cover the risk at issue by looking at the primary function and intent of each policy.[41] Under the total policy insuring intent test, "a policy designed to cover the risk in question takes precedence over a policy which only incidentally covers that risk."[42]

While they do not contend that the "other insurance" clauses found in the Michigan Millers and American International policies are in conflict, Countryside and Michigan Millers argue that this should not preclude application of the "total policy insuring intent rule" under more recent cases which arguably apply the rule in the absence of conflicting policy provisions.[43] They argue that because the American International policy specifically insured against injury caused by pollution and the Michigan Millers policy insured only against general liability, the American International policy would have provided primary coverage for the Boden claim but for Koch's negligence, and that therefore the full amount which would

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[39] *Federal Insurance Co. v. Prestemon*, 278 Minn. 218, 153 N.W.2d 429 (1967).

[40] *Id.* at 231, 153 N.W.2d at 437.

[41] See, *Bettenburg v. Employers Liability Assurance Corp., Ltd.*, 350 F. Supp. 873 (D. Minn. 1972); *Federal Insurance Co. v. Prestemon, supra* note 39; *Redeemer Covenant Church v. Church Mut.*, 567 N.W.2d 71 (Minn. App. 1997).

[42] 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 219:44 at 219-52 to 219-53 (2005).

[43] See *Redeemer Covenant Church v. Church Mut., supra* note 41.

have been paid under that policy should be the measure of damages for which Koch is liable.

Koch argues that in the absence of conflicting "other insurance" clauses, Michigan Millers would have been responsible for 50 percent of the Boden claim under the principle, well established in our jurisprudence, that where the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning.[44] We agree with this argument and the observation of one commentator that "[it] is unnecessary to apply the total policy insuring intent test . . . where the 'other insurance' clauses in overlapping insurance policies provide a clear and consistent answer as to allocation of primary and excess coverage."[45] Michigan Millers' policy clearly provides that if it and another policy are both primary, it will be obligated for an equal share of a covered loss. That is precisely how the district court computed the damage award, and it did not err in doing so.

(b) Prejudgment Interest

[22] Countryside and Michigan Millers also contend in their cross-appeal that the district court erred in not awarding prejudgment interest. Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2004),[46] and whether prejudgment interest should be awarded is reviewed de novo on appeal.[47]

[23] 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.[48] A two-pronged inquiry is

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[44] See, *Rickerl v. Farmers Ins. Exch., supra* note 3; *Steffensmeier v. Le Mars Mut. Ins. Co., supra* note 22.

[45] 15 Russ & Segalla, *supra* note 42, § 219.44 at 219-53.

[46] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007); *IBP, Inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

[47] *Travelers Indemnity Co. v. International Nutrition, supra* note 46; *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

[48] *Id.*

required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.[49] We conclude that there was a reasonable controversy with respect to both Koch's liability and the amount of potential damages, and accordingly, the district court did not err in refusing to award prejudgment interest under § 45-103.02.

V. CONCLUSION

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

AFFIRMED.

WRIGHT, J., not participating.

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[49] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM L. SWITZER, JR., RESPONDENT.

790 N.W.2d 433

Filed November 12, 2010. No. S-09-1095.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
5. ____. 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.
6. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in the light of its particular facts and circumstances.

7. ____. In 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.
8. ____. When determining appropriate discipline of an attorney, the Nebraska Supreme Court considers aggravating and mitigating factors.
9. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.
10. ____. In a disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered a mitigating factor.
11. ____. Cooperation during attorney disciplinary proceedings and remorse are relevant mitigating factors.
12. ____. In a disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.
13. **Disciplinary Proceedings: Proof.** To establish depression as a mitigating factor in a proceeding to discipline an attorney, the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct. These are questions of fact.
14. **Disciplinary Proceedings.** When depression is established as a mitigating factor, it does not automatically result in a less severe punishment.
15. ____. In a disciplinary proceeding, failure to comply with Neb. Ct. R. § 3-316 places one in contempt of court and constitutes an aggravating circumstance.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Michael D. McClellan, of Gast & McClellan, for respondent.

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

PER CURIAM.

In 2008, we suspended William L. Switzer, Jr., from the practice of law for 18 months for violating the professional rules and his oath of office.[1] Switzer, however, did not comply with our decision. He agreed to represent new and existing clients

[1] *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

and took fees from new clients. The Counsel for Discipline soon filed formal charges against Switzer for his conduct after his suspension. Switzer does not deny the charges; instead, he argues that his depression should mitigate any discipline we impose. We conclude that even if his depression is mitigation, it is not sufficient mitigation considering Switzer's history and conduct. We disbar Switzer.

BACKGROUND

Switzer was admitted to the bar in 1987. He has been disciplined before. The first instance occurred in 1994, when he was reprimanded for neglecting a client's dental malpractice case and misrepresenting the progress of the case to the client. Switzer told his client that he had filed the lawsuit when he had not. He also said that he had talked to the dentist about potential settlements when he had not done so. He was privately reprimanded for violations of Canon 1, DR 1-102(A)(1) and (6), and Canon 6, DR 6-101(A), of the former Code of Professional Responsibility. In 1999, Switzer was again in trouble. He failed to timely withdraw his appearance in a case after the client had discharged him. This violated DR 1-102(A)(1) and Canon 2, DR 2-110(B)(4), of the Code of Professional Responsibility, and he was privately reprimanded.

The events leading up to the present matter began in 2005. They were the subject of our opinion in *State ex rel. Counsel for Dis. v. Switzer*.[2] Switzer had been retained by two clients to draft and file the necessary paperwork to have the clients named as their mother's coguardians and coconservators. Shortly after they retained Switzer, another party was named guardian and conservator. Switzer was aware of this but failed to name the party when he filed an ex parte emergency action to have his clients named as coguardians and coconservators. When this omission was discovered, the clients' appointment was terminated. Switzer failed to timely notify his clients of their termination. He was also evasive when the clients called to speak to him—in one instance, leaving the client on hold for an hour.

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[2] *Id.*

The clients wrote to Switzer to terminate the attorney-client relationship. They requested an accounting of services rendered, which he never gave. The clients then hired new counsel, who requested the file. Switzer never complied.

The clients then contacted the Counsel for Discipline, who in turn contacted Switzer. In his communications with the Counsel for Discipline, Switzer often failed to respond "'properly and adequately.'"[3] At one point, Switzer attempted to mislead the Counsel for Discipline by fabricating a letter.

We concluded that Switzer's conduct violated several rules of professional conduct and his oath of office. The referee suggested a 1-year suspension, but we rejected that suggestion and instead imposed an 18-month suspension that began immediately on June 13, 2008. The federal courts suspended Switzer shortly thereafter.

The current charges against Switzer stem from his conduct after his suspension. In count I, the Counsel for Discipline alleges that Switzer continued to represent a client after his suspension. He told the client in September 2008—during his suspension—that he would file a bankruptcy petition. Switzer failed to inform his clients that his license had been suspended. When Switzer was served with the grievance, he failed to file an answer within the required period. The Counsel for Discipline charged Switzer with violating his oath of office as an attorney, Neb. Ct. R. § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

Count II alleges similar facts with different clients, namely that during Switzer's suspension, he said he would file a bankruptcy petition for his clients. He failed to communicate with his clients. Count II is different from count I in that it alleges that Switzer accepted fees during his suspension. Switzer again failed to answer the grievance filed regarding this incident. Switzer did refund the fees to the clients after the grievances were filed. The Counsel for Discipline alleges that these acts violated Switzer's oath of office, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct:

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[3] *Id.* at 886, 750 N.W.2d at 685.

§§ 3-501.3, 3-501.4, and 3-508.4, and Neb. Ct. R. of Prof. Cond. § 3-501.15.

Count III again alleges similar facts. It alleges that Switzer took fees and agreed to file a bankruptcy petition for a client during his suspension but did not tell the client that he was suspended. And he again failed to communicate with the client regarding the bankruptcy petition. When the client found out about Switzer's suspension, he placed a stop order on the checks he had written to Switzer. This cost the client $90. The Nebraska State Bar Association's client assistance fund reimbursed the client for these costs, and Switzer later reimbursed the client assistance fund. But he again failed to respond to the grievance filed against him. The Counsel for Discipline claims that Switzer's conduct violated his oath of office, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

Count IV alleges that Switzer was hired to represent a client in a divorce proceeding during his suspension and that he received a fee. Switzer failed to tell the client that his license had been suspended and failed to return telephone calls to keep the client informed. When the client learned of Switzer's suspension, he asked the client assistance fund to reimburse his fees, which it did. Switzer later reimbursed the fund for the fees. Like all the other counts in this proceeding, when served with the initial grievance, Switzer failed to respond. The Counsel for Discipline alleges that by these acts and omissions, Switzer violated his oath of office as an attorney, § 3-309(E), and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-501.15, 3-505.5, and 3-508.4.

In June 2010, a referee issued a report and recommendation. The referee found by clear and convincing evidence that Switzer had violated his oath of office and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.3, 3-501.4, 3-505.5, and 3-508.4.

In determining what discipline to recommend, the referee stated that "[t]his case tests the boundaries of the interplay between mitigation and punishment in lawyer discipline cases."

The referee stated that there is no doubt Switzer committed the violations, but there is also no doubt that Switzer suffers from severe depression. The referee noted that a prior suspension was not enough to stop Switzer's misconduct. He also expressed doubt that further treatment for depression would reduce the risk of further misconduct. The referee said that "[a]t some point, mitigation must yield to considerations of protection of the public." The referee, while acknowledging the difficulties that Switzer has suffered and will continue to suffer, ultimately recommended disbarment.

As noted previously, Switzer does not deny the material allegations of the charges against him. Instead, he argues that because his depression is a mitigating factor, we should temper any discipline by suspending him, instead of disbarring him.

ASSIGNMENTS OF ERROR

The Counsel for Discipline does not take exceptions to the referee's report. Switzer, however, has made four. They relate to (1) the referee's finding that treatment for Switzer's major depressive disorder and general anxiety disorder would not substantially reduce the risk of further misconduct; (2) the referee's recommendation of disbarment, which Switzer claims is too severe; (3) the referee's viewing the proceeding as an issue of punishment; and (4) the referee's finding that Switzer has been receiving treatment for his condition since 1993.

STANDARD OF REVIEW

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[4] To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.[5] When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive.[6]

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[4] *State ex rel. Counsel for Dis. v. Gilner, ante* p. 82, 783 N.W.2d 790 (2010); *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009).

[5] See *Gilner, supra* note 4.

[6] *Id.*; *State ex rel. Counsel for Dis. v. Nich*, 279 Neb. 533, 780 N.W.2d 638 (2010).

ANALYSIS

[4] The basic issues in a disciplinary proceeding against an attorney are whether we should impose discipline and, if so, the appropriate discipline under the circumstances.[7] Switzer does not deny the allegations and concedes that discipline should be imposed. Because he does not take exceptions to the referee's findings that he violated the rules, we may consider such findings final and conclusive, which we do.[8] Thus, we limit our discussion to what is the appropriate discipline.

[5] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[9]

[6,7] In imposing attorney discipline, we evaluate each case in the light of its particular facts and circumstances.[10] And in determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding.[11]

[8,9] When determining appropriate discipline, we consider aggravating and mitigating factors.[12] We have considered prior reprimands as aggravators.[13] Because cumulative acts of

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[7] See, *Gilner, supra* note 4; *Nich, supra* note 6; *Bouda, supra* note 4; *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003).

[8] See, *Gilner, supra* note 4; *Nich, supra* note 6.

[9] *Gilner, supra* note 4; *Bouda, supra* note 4; *State ex rel. Counsel for Dis. v. Koenig*, 278 Neb. 204, 769 N.W.2d 378 (2009); *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[10] See, *Gilner, supra* note 4; *Nich, supra* note 6; *Bouda, supra* note 4; *Koenig, supra* note 9.

[11] *Id.*

[12] See, *Nich, supra* note 6; *Koenig, supra* note 9; *Wintroub, supra* note 9; *State ex rel. Counsel for Dis. v. Swan*, 277 Neb. 728, 764 N.W.2d 641 (2009).

[13] *Nich, supra* note 6.

attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[14] We have previously said "cumulative acts of misconduct can, and often do, lead to disbarment."[15]

[10,11] Regarding mitigation, we have stated that an isolated incident not representing a pattern of conduct is considered a mitigating factor.[16] Cooperation during disciplinary proceedings is also a mitigating factor.[17] Finally, we have stated that remorse is also a relevant mitigating factor.[18]

[12] We have also said that it is necessary to consider the discipline that we imposed in cases presenting similar circumstances.[19] And we have previously disciplined attorneys who continued to practice after being suspended. In *State ex rel. Counsel for Dis. v. Carbullido*,[20] there were allegations that the attorney had engaged in the unauthorized practice of law after we suspended her license. She was also convicted of several driving under the influence offenses and driving with a suspended license. We disbarred the attorney. In *State ex rel. NSBA v. Thierstein*,[21] we disciplined an attorney who continued to practice law after being suspended. We disbarred him. We also disbarred an attorney who continued to practice with his suspended license in *State ex rel. NSBA v. Frank*.[22]

Switzer's primary argument is that we should consider his depression as a mitigating factor and that because of this, we

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[14] See, *id.*; *Wintroub, supra* note 9.

[15] *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 725-26, 773 N.W.2d 141, 145 (2009).

[16] See *Swan, supra* note 12.

[17] See *id.*

[18] *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[19] See, *Swan, supra* note 12; *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[20] *Carbullido, supra* note 15.

[21] *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984).

[22] *State ex rel. NSBA v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985).

should not disbar him. It is true that in *State ex rel. Counsel for Dis. v. Thompson*,[23] we found that depression is a mitigating factor and suspended Gary Thompson. Thompson faced three formal charges, the allegations of which he admitted. The first involved his failure to conduct discovery in a suit in federal court, which resulted in the dismissal of the suit. Despite this dismissal, Thompson continued to tell his client that the case was progressing normally. In the second charge, it was also alleged that Thompson misrepresented progress in a lawsuit to a client. In addition, Thompson was also neglectful in failing to answer several letters and telephone calls from the client. The third charge again alleged that Thompson was neglectful in pursuing the claims of his client.

[13] As mentioned, Thompson did not contest the allegations in the charges. He did, however, allege depression as a mitigating factor. We noted that Thompson's "serious ethical breaches . . . would ordinarily result in a severe sanction."[24] But we also recognized that mitigating factors are a necessary consideration. We put forward a test to establish depression as a mitigating factor. To satisfy the test, "the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct."[25] We noted that these elements were questions of fact. And we have applied this test in other cases.[26]

Here, the referee considered the *Thompson* test. The referee found that Switzer met the first two elements of the test. Regarding the third element, the referee stated that he could not conclude with any degree of confidence whether

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[23] *State ex rel. Counsel for Dis. v. Thompson*, 264 Neb. 831, 652 N.W.2d 593 (2002).

[24] *Id.* at 840, 652 N.W.2d at 599.

[25] *Id.* at 841, 652 N.W.2d at 600.

[26] *State ex rel. Counsel for Dis. v. Widtfeldt*, 269 Neb. 289, 691 N.W.2d 531 (2005); *Wintroub, supra* note 18; *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

treatment would substantially reduce the likelihood of future misconduct. Switzer takes exception to this finding by the referee.

[14] We do not believe it is necessary to parse the testimony to determine the likelihood of further misconduct. Even if Switzer can satisfy the *Thompson* test, his depression is just one mitigating factor. We balance it with other mitigating factors as well as aggravating factors. In short, when the *Thompson* test is satisfied, it does not automatically result in a less severe punishment.

[15] We now consider the aggravating and mitigating factors. As for aggravating factors, we note that Switzer has been reprimanded twice and suspended once for his misconduct. As mentioned previously, cumulative acts of misconduct justify harsher sanctions than isolated incidents. We also note that Switzer was initially uncooperative with the disciplinary proceedings; he failed to respond to any of the grievances that were filed against him. We have previously held that failure to cooperate can be an aggravating factor.[27] Further, we note that Switzer failed to comply with Neb. Ct. R. § 3-316 after his suspension. We have previously said that "[f]ailure to comply with [§ 3-316] places one in contempt of court and constitutes an aggravating circumstance."[28]

Regarding mitigation, we accept, for the sake of argument, that Switzer's depression meets the *Thompson* test. We also note Switzer does seem remorseful and does appear to have a sincere hope to improve his condition.

And it is true that we stated in *Thompson* that "[i]n cases involving depression as a mitigating factor, a period of mandatory suspension coupled with terms of reinstatement will often be appropriate."[29] Yet, this was not intended to imply that suspension will be given whenever depression is present as a mitigating factor. Depression may be sufficient mitigation to reduce

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[27] *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[28] *Id.* at 482, 704 N.W.2d at 226.

[29] *Thompson, supra* note 23, 264 Neb. at 843, 652 N.W.2d at 602.

a punishment in many cases. But as the referee said, "[a]t some point, mitigation must yield to considerations of protection of the public." We have passed that point.

In sum, we cannot ignore that Switzer disobeyed a direct order of this court. We previously suspended Switzer, but he continued to practice, flouting our previous ruling. A suspension order is a command, not a suggestion. The offenses admitted are serious, and the need to deter others from this type of conduct weighs heavily. If attorneys ignore our suspension orders without consequence, it undermines the authority of this court. We determine that the only appropriate discipline is disbarment.

CONCLUSION

We adopt the referee's recommendation. We find that Switzer violated his oath of office and several rules governing attorneys. It is the judgment of this court that Switzer should be disbarred from the practice of law.

JUDGMENT OF DISBARMENT.

FREEDOM FINANCIAL GROUP, INC., ET AL., APPELLANTS, V. JANICE M. WOOLLEY, INDIVIDUALLY, ET AL., APPELLEES.

792 N.W.2d 134

Filed November 12, 2010. No. S-09-1302.

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. **Corporations: Actions: Parties.** As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.

4. **Corporations: Actions: Parties: Proof.** If a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims.
5. ____: ____: ____: ____. In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder.
6. **Corporations: Actions: Parties: Damages.** Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders.
7. ____: ____: ____: ____. If a shareholder is permitted to bring an action personally to recover his or her proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him or her.
8. **Corporations: Actions: Parties.** Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.
9. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
10. **Attorney and Client: Parties.** A lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them.
11. **Attorney and Client: Parties: Negligence: Liability.** A common set of cohesive principles for determining the extent of an attorney's duty, if any, to a third party includes: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., 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

Freedom Financial Group, Inc. (FFG), as well as related entities, Bethel Enterprises Limited Liability Company (Bethel Enterprises); Freedom Group, Inc.; Freedom Financial, Inc.; Freedom Asset Management, Inc.; Mid-America Employment Services, Inc.; and U.S. Securities Management, LLC (collectively appellants), appeal the decision of the Douglas County District Court granting summary judgment to Janice M. Woolley, individually; Marks Clare & Richards, L.L.C. (Marks Clare); and Janice M. Woolley, P.C., L.L.O. (collectively appellees). FFG filed a legal malpractice action against appellees, alleging that Woolley failed to provide competent legal services, resulting in monetary loss to appellants.

The district court determined that Woolley owed no legal duty to the related entities and entered summary judgment against them. The district court also held that FFG was prohibited from recovering damages rightly accruing to Presidents Trust Company, L.L.C. (Presidents Trust), or that were common to all members of Presidents Trust. Upon finding that FFG did not allege individual damages, the district court granted appellees' motion for summary judgment.

FACTS

Presidents Trust was an independent, nondepository limited liability company (LLC) chartered in South Dakota. FFG was the sole shareholder of Presidents Trust. Bethel Enterprises is the parent company to FFG, Freedom Group, Freedom Financial, Freedom Asset Management, Mid-America Employment Services, and U.S. Securities Management. Simply stated, Bethel Enterprises owned FFG, which was in turn the sole owner of Presidents Trust.

On or about July 10, 2003, Presidents Trust, through various marketing agents, began soliciting individuals to invest in its "Fixed Income Trust" concept (FIT Program). David Klasna, president of both FFG and Presidents Trust, stated in his deposition that Presidents Trust was the only entity allowed to market the FIT Program, an investment concept.

The marketing materials for the FIT Program made reference only to Presidents Trust.

On July 18, 2003, Presidents Trust sought legal counsel from Woolley, of Marks Clare, regarding the legalities of the FIT Program. Woolley and Marks Clare provided an opinion letter to Presidents Trust, addressed to Klasna. In that letter, Woolley stated that the FIT Program was exempt from registration under South Dakota statutes. In the opinion letter, Woolley indicated that she and Marks Clare had "confined our review to the South Dakota statutes, administrative rules and Federal statutes." Subsequent to the issuing of the opinion letter, Presidents Trust began marketing the FIT Program in earnest. The Securities Exchange Commission (SEC) began an investigation shortly thereafter.

The FIT Program, as marketed through Presidents Trust, was identified as "an individual Income Trust . . . designed to provide a secured income." The marketing materials state that the FIT Program is "established by [the investor] with Presidents Trust Company as trustee. [Presidents Trust] is a South Dakota Chartered Trust Company and subject to all Banking Regulations and Compliance of the State." The documentation provided for the FIT Program by Presidents Trust made no mention of any parent or sister company.

On September 4, 2003, the SEC sent a cease-and-desist letter to Presidents Trust. The SEC determined that the FIT Program was selling unsecured promissory notes and was an unregistered investment company. The SEC also determined that the investment program had been misrepresented to investors, that it was a highly risky venture, and that Presidents Trust was strapped for cash. The SEC determined that Presidents Trust had advertised the program through both independent sales agents and an affiliated broker-dealer network known as Freedom Financial, one of the related entities. Presidents Trust was placed into receivership in South Dakota, and a receiver was appointed pursuant to South Dakota state law.

On January 13, 2006, appellants filed suit against appellees, alleging that Woolley had been negligent in opining that the FIT Program was not a security. FFG and the related entities

claimed that their reliance on Woolley's advice resulted in significant damages to all of the companies.

Jon Patrick Pierce, president of Bethel Enterprises, stated in his deposition that over the telephone and in e-mails, he had requested Woolley to look into the securities issues. Pierce said that Woolley met with some of the investors after questions were raised regarding whether the FIT Program was a security. Pierce claimed that Woolley assured him that the FIT Program was exempt from registration.

In his affidavit, Pierce stated that Presidents Trust was a wholly owned subsidiary of FFG and that Presidents Trust was a "'pass through' entity," so that all profits and losses would pass through Presidents Trust to FFG. Presidents Trust was intended to provide administrative services for the FIT Program. Pierce stated that Freedom Financial was also a wholly owned subsidiary of FFG and served as a broker-dealer for the FIT Program and FFG. Pierce claimed that Woolley was aware of the interrelationships between the companies.

Pierce alleged that Woolley's advice led to the failure of the FIT Program and the financial collapse of the companies. Pierce stated that FFG was the company that had originally hired Woolley and Marks Clare to give legal advice regarding the FIT Program. Pierce provided affidavits from two attorneys who opined that Woolley's advice failed to meet the professional standard for an attorney under the circumstances and that the FIT Program could have been marketed in such a way to meet the federal securities regulations.

In Klasna's deposition, he also stated that he had asked Woolley to look at federal securities law as well as South Dakota state banking law, but that there is no record of that request. Klasna stated that he was aware that "things of this nature were regulated as securities" and that they were hoping to find an exemption. He also claimed to have said as much to Woolley. Klasna admitted that he did not remember whether he had specifically asked Woolley to look into securities law, but he said that it was implied, if not stated outright.

Klasna stated that FFG had collected funds for the sale of the FIT Program before Woolley rendered her opinion, but that those funds were put in safekeeping until they were certain the

FIT Program could be released. Klasna admitted that they did not ask Woolley whether the FIT Program was a security until after investors raised the issue. Klasna alleged that even after investors questioned whether the FIT Program required registration, Woolley continued to assure him that the FIT Program met the definition of a trust and was exempt. Klasna also stated he did not believe that Woolley understood the FIT Program or the potential securities problems.

One of the agents for FFG stated that Woolley was adamant that the FIT Program was not a security. He also stated that he was under the impression that Woolley did not truly understand the FIT Program and that he felt a second opinion was needed. The agent stated that Woolley's opinion letter was utilized in the marketing material for the FIT Program.

Various experts were called to testify for appellants, including an expert witness who said that he believed the loss to FFG was $2,124,557. He testified that his calculations were based on the assumption that Presidents Trust would have sold over $49 million worth of product and that his interest rate calculations were correct. Another expert witness was also deposed on FFG's behalf and testified in his deposition that Presidents Trust would have seen a return of at least 24 percent. Another expert witness also agreed that the FIT Program had been very successful before being shut down. An attorney testified that a competent attorney would have noted that Presidents Trust raised a security issue and would have notified the client of such.

In Woolley's deposition, she stated that she did not remember discussing securities with FFG or Presidents Trust. Woolley said that she did not recall reviewing securities law because the primary issues FFG had were with banking and trust law. Woolley stated that she knew FFG had consulted with another law firm on pieces of the FIT Program, so she did not consider federal securities law. Woolley stated that her understanding was that FFG's concern regarding securities law was limited to South Dakota state law. Woolley claimed that she was asked to determine what the ramifications would be if any part of the FIT Program was determined to be a security.

The district court granted Woolley's motion for summary judgment, finding that neither FFG nor the related entities had standing to sue. We affirm.

ASSIGNMENTS OF ERROR

Appellants assign, consolidated and restated, that the district court erred when it (1) determined that FFG could not bring a direct action for its lost earnings as the sole member of an LLC and (2) determined that Woolley did not owe a duty to the related entities.

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] 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]

ANALYSIS

FFG Has No Standing to Sue

We first turn to whether FFG has standing to bring this suit. It is undisputed that Woolley had an attorney-client relationship with both Presidents Trust and FFG. As noted, Presidents Trust, an LLC, is a wholly owned subsidiary of FFG. Presidents Trust is not a party to this suit, and the South Dakota receiver declined to pursue a professional negligence action against Woolley or Marks Clare.

FFG claims that it lost profits which would flow through Presidents Trust to FFG as the sole member of the LLC. FFG also claims that it lost the value of its investment in Presidents Trust, which was allegedly rendered worthless when Presidents Trust was placed in receivership in South Dakota. The district

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[1] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

[2] *Id.*

court determined that FFG was attempting to recover damages belonging to Presidents Trust and its receiver, or that were common to all members of Presidents Trust, and concluded that FFG did not have standing to bring suit. We agree.

[3] As a general rule, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property. Such a cause of action is in the corporation and not the shareholders. The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.[3]

[4-6] In *Meyerson v. Coopers & Lybrand*,[4] we held that if a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims. In order to establish an individual harm, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder.[5] Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders.[6]

FFG argues that the district court failed to correctly apply the factors found in *Meyerson* as to when a shareholder may recover in a direct suit. FFG also argues that because it had a special relationship to Woolley, its suit falls into an exception to the rule that a shareholder cannot recover for a wrong done to a corporation.[7] We find the damages FFG alleges belong in total to the receiver for Presidents Trust.

South Dakota banking law provides that the receiver is the "owner" of any Presidents Trust assets, including claims against third parties. The applicable South Dakota statute provides in part that "[t]he receiver, under the direction of the director,

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[3] *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] See *id.*

shall take charge of any insolvent trust company and all of its assets and property and liquidate the affairs and business for the benefit of clients, creditors, and owners."[8] FFG claims that it can recover lost profits because those profits would "pass through" Presidents Trust and accrue to FFG; but those alleged profits now belong to the receiver for Presidents Trust under South Dakota law.

[7] We note that *Meyerson*, while applicable to the case at bar, is not helpful to FFG's claim. In that case, we stated that "'[i]f a stockholder is permitted to bring an action personally to recover his proportionate share of the damages suffered by the corporation, a subsequent recovery by or for the corporation would be equivalent to a double recovery for him.'"[9]

[8] A "'diminution in value of a stockholder's investment is a concomitant of the corporate injuries resulting in lost profits.'"[10] We stated that "[e]ven though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation."[11]

FFG has also failed to establish that Woolley owed it a special duty. In *Meyerson*, we found that a special duty existed, because we assumed that the plaintiffs "alleged conduct on the part of [the defendant] outside the scope of the auditing contracts, for which conduct [the defendant] owed plaintiffs a direct duty of care."[12] The same reasoning as applied to attorneys and what constitutes a special duty can be found in *Livingston v. Adams & Fouts, P.L.L.C.*,[13] where the court found that a law firm owed a fiduciary duty to the plaintiff and two closely held corporations. The court determined that the duty owed by the law firm did not rise to the level

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[8] S.D. Codified Laws § 51A-6A-45 (2004).

[9] *Meyerson, supra* note 3, 233 Neb. at 763-64, 448 N.W.2d at 134.

[10] *Id.* at 764-65, 448 N.W.2d at 134.

[11] *Id.* at 765, 448 N.W.2d at 135.

[12] *Id.* at 766, 448 N.W.2d at 135.

[13] *Livingston v. Adams & Fouts, P.L.L.C.*, 163 N.C. App. 397, 594 S.E.2d 44 (2004).

of a "special duty," however, because the duty owed to the plaintiff was not "separate and distinct" from that owed to the other entities.[14] We find the reasoning of *Livingston* to be persuasive, and we adopt that definition of "special duty" within this context.

Applying the definition of "special duty" to the present case, FFG cannot demonstrate that Woolley owed it a special duty. FFG alleges that it was harmed because it relied on the advice Woolley provided, but Woolley rendered the same opinion letter to both FFG and Presidents Trust. Woolley's duty to FFG is therefore neither separate nor distinct from the duty owed to Presidents Trust. As such, FFG has failed to show that it can recover any damages.

We also note that FFG's argument would allow a member of an LLC to use the corporate form as a shield to protect itself from personal liability for acts taken by an LLC while still allowing an individual to collect damages, such as lost profits, incurred by the LLC. Under Neb. Rev. Stat. § 21-2629 (Reissue 2007), "[a] member of [an LLC] shall not be a proper party to proceedings by or against [an LLC] except when the object is to enforce a member's right against or liability to the [LLC]." As a member of an LLC, FFG is not a proper party to this suit, because Woolley's alleged liability is to Presidents Trust and any potential damages would also belong to Presidents Trust. FFG may not attempt to use the corporate form of the LLC to shield itself from liability and then use the same corporate form as a sword to recover damages or enforce liability to the LLC.

We therefore find that FFG did not have standing, and FFG's first assignment of error is without merit.

Woolley Did Not Owe Duty to Related Entities

[9] In its second assignment of error, FFG claims the district court erred when it determined that Woolley did not owe a duty to any of the other related companies and that the related entities did not have standing. In a civil action for

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[14] *Id.* at 405, 594 S.E.2d at 50.

legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.[15] No one disputes that FFG and Presidents Trust were the only parties that had an attorney-client relationship with Woolley. Instead, appellants argue that Woolley owed a duty to the related entities as third-party beneficiaries.

[10,11] "In Nebraska, a lawyer owes a duty to his or her client to use reasonable care and skill in the discharge of his or her duties, but ordinarily this duty does not extend to third parties, absent facts establishing a duty to them."[16] In *Perez v. Stern*,[17] we outlined a common set of cohesive principles for determining the extent of an attorney's duty, if any, to a third party: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. We also stated that "when an attorney is retained specifically to advance the interests of third parties, absent countervailing circumstances," as in *Perez*, we will impose a duty.[18]

Appellants cite three pieces of evidence they say support their claim that the related entities were third-party beneficiaries: the fact that (1) Presidents Trust's marketing material listed "affiliated entities" that included three of the related entities, (2) Pierce showed Woolley an organizational chart that demonstrated the relationship between the entities, and (3) Woolley had contact with one of the employees of Freedom Financial. But none of the factors found in *Perez* weigh in favor

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[15] *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

[16] *Perez v. Stern*, 279 Neb. 187, 191, 777 N.W.2d 545, 550 (2010).

[17] *Perez, supra*.

[18] *Id*. at 193, 777 N.W.2d at 551.

of finding that Woolley and Marks Clare owed a duty to anyone other than FFG and Presidents Trust.

Unlike the plaintiffs in *Perez*, FFG has not demonstrated that Woolley knew her opinion would benefit the related entities or that the alleged harm to the related entities was foreseeable. FFG has also failed to specifically allege damages suffered by the related entities and has been unable to allege a sufficiently close connection between Woolley's actions and the claimed damages. FFG has been unable to demonstrate that imposing liability under these circumstances would prevent future harm. And, finally, we find that imposing liability under the circumstances would impose an undue burden on the legal profession. Therefore, FFG's second assignment of error is also without merit.

CONCLUSION

We find that FFG did not have standing to sue, because any damages would go to the receiver and not to FFG. We also find that FFG did not demonstrate that Woolley owed it a "special duty" separate and distinct from the duty Woolley owed Presidents Trust. FFG cannot use the corporate form of an LLC as a shield from liability while still attempting to recover profits it claims to have lost. We also find that the related entities do not have standing to sue because there was no attorney-client relationship between the related entities and Woolley, and we decline to impose liability on the basis that the related entities were third-party beneficiaries.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH E. TAMAYO, APPELLANT.
791 N.W.2d 152

Filed November 19, 2010. No. S-09-223.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.

2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) to determine the last day the defendant can be tried.
4. ____. Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.
5. **Speedy Trial: Mental Competency: Case Disapproved.** To the extent that *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982), suggests that psychiatric treatment is generally excludable as "other proceedings concerning the defendant" under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008), *Bolton* is disapproved.
6. **Speedy Trial: Mental Competency.** An "examination and hearing on competency" within the meaning of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008) is the statutory procedure for determining competency to stand trial established by Neb. Rev. Stat. § 29-1823 (Reissue 2008).

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals affirmed as modified, and cause remanded with direction.

James J. Regan for appellant.

Jon Bruning, Attorney General, James D. Smith, and Nathan A. Liss for appellee.

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

GERRARD, J.

Joseph E. Tamayo was charged with murder and a weapons charge and, before trial, filed a motion to have a psychiatric expert appointed to evaluate him. The motion was granted, and the psychiatric evaluation took several months. The issue presented in this appeal is whether the State proved that the time associated with that evaluation was an automatically excludable period under Nebraska's speedy trial statutes.[1] We find

[1] See Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008).

that it did not, and affirm the judgment of the Nebraska Court of Appeals to that effect. But we modify the Court of Appeals' decision to provide that the trial court should consider, upon remand, whether there was nonetheless good cause for the delay in bringing Tamayo to trial.

BACKGROUND

Tamayo was charged on January 18, 2008, with the crimes of first degree murder and use of a deadly weapon to commit a felony. On April 7, he filed a "Motion for Psychiatric Expert," for the purposes of determining his "mental capacity to waive his Miranda rights and/or to voluntarily provide a statement to law enforcement officers" and determining his "mental capacity as it relates to the defense of not responsible by reason of insanity under Nebraska law." (Emphasis in original.)

On April 11, 2008, the district court sustained Tamayo's motion on his "request to hire the services of a psychiatrist . . . as it relates to his ability to provide a voluntary statement and to the possible defense of not responsible by reason of insanity." Tamayo, who was indigent, was "authorized to engage the services of a psychiatrist for the above-stated purposes." No hearing on that motion appears in the record, and neither the motion nor the court's order expressly mentions any issue of Tamayo's competence to stand trial.

Dr. Bruce Gutnik, a psychiatrist, was hired to evaluate Tamayo. At some point, it was evidently decided that Gutnik should also evaluate Tamayo's competence to stand trial. The record contains a letter from Gutnik to Tamayo's counsel referring to a September 22, 2008, telephone call during which Tamayo's counsel had apparently asked for "an additional report addressing . . . Tamayo's competence to stand trial." Gutnik authored a "competence evaluation" dated September 24, 2008, in which Gutnik stated that Tamayo was seen, at the request of his attorney, "to provide an independent psychiatric evaluation to determine his sanity at the time of the alleged crime and competence to stand trial and to give statements to the police." In the end, Gutnik opined that Tamayo was "marginally competent to stand trial."

On October 15, 2008, a hearing was held on the report. The court opened the hearing by stating that the court had "entered an order regarding the allowance of a psychiatrist, by [Tamayo], to determine possible defenses in this case. And I think that perhaps that order's been expanded upon." The State replied by explaining that "in prior discussions it was somewhat regarding insanity but also kind of a general mental state of [Tamayo]. And in that regard the issue of competency was raised and was addressed by [Gutnik]." Tamayo's counsel agreed that Tamayo was examined for competence to assist in his defense and stand trial "pursuant to my request and the Court's order." Gutnik's report was entered into evidence, and on October 20, the court entered an order finding Tamayo competent to stand trial.

On January 30, 2009, Tamayo filed a motion for absolute discharge. The dispositive issue was the extent to which the time attributable to Tamayo's psychiatric evaluation was excludable from the 6-month calculation. The district court found it "clear from the time of [Tamayo's] counsel['s] request for the appointment of a psychiatrist that such an appointment was for the purpose of determining [Tamayo's] competency to stand trial in addition to other related matters regarding statements he may have given to police." Accordingly, the court concluded that the entire period from April 8 to October 20, 2008, was excludable under § 29-1207(4)(a), which excludes from speedy trial calculations "[t]he period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial . . . ." The court found that the period was excludable as "an examination and hearing on competency" and overruled the motion to discharge.

The Court of Appeals reversed that decision.[2] The district court's finding that Tamayo's competency had been at issue from April 8, 2008, onward was, according to the Court of Appeals, "simply and clearly wrong."[3] The Court of Appeals found that the earliest suggestion in the record that Tamayo's

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[2] *State v. Tamayo*, 18 Neb. App. 430, 783 N.W.2d 240 (2010).

[3] *Id.* at 437, 783 N.W.2d at 246.

competency to stand trial was at issue was the September 22 telephone call to Gutnik from Tamayo's counsel, asking Gutnik to opine on Tamayo's competency to stand trial.

The Court of Appeals also acknowledged this court's decision in *State v. Bolton*,[4] which the Court of Appeals conceded suggests that a defendant's psychiatric evaluation or treatment is generally excludable under § 29-1207(4)(a), not as "an examination and hearing on competency," but as "other proceedings concerning the defendant." However, the Court of Appeals found "[n]o other case" using "this expansive notion that merely because a defendant is undergoing psychiatric evaluation or treatment, the speedy trial clock is tolled."[5] Instead, the Court of Appeals found that *Bolton* was inconsistent with a definition of "proceeding" we later explained in *State v. Murphy*.[6] So, the Court of Appeals reversed the decision of the district court and ordered Tamayo's absolute discharge.[7] We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred by concluding that Tamayo was entitled to a statutory discharge.

STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[8] But 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.[9]

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[4] *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982).

[5] *Tamayo, supra* note 2, 18 Neb. App. at 444, 783 N.W.2d at 250.

[6] *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998).

[7] See *Tamayo, supra* note 2.

[8] *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009).

[9] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010), *cert. denied* 560 U.S. 945, 130 S. Ct. 3364, 176 L. Ed. 2d 1256.

ANALYSIS

[3,4] Nebraska's speedy trial statutes provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section."[10] To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.[11] And, under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.[12] We are aware that the speedy trial statutes were amended operative July 15, 2010—we have referred in this opinion to the version of the statutes that was in effect at the time of the trial court proceedings, but note that the amendments would not have affected our analysis.

In this case, Tamayo was charged on January 18, 2008. The district court found, and neither party disputes, that 107 days were excludable due to Tamayo's pretrial filings of a plea in abatement and a motion to suppress evidence. With those 107 days added, the State had until Monday, November 3, to bring Tamayo to trial.[13]

Tamayo filed his motion to discharge on January 30, 2009. So, the critical issue is whether any time associated with Tamayo's psychiatric evaluation is excludable from the 6-month speedy trial calculation. The State contends it is. Specifically, the State makes three arguments in support of its assignment of error: (1) *State v. Bolton*[14] is controlling, (2) § 29-1207(4)(a) is not limited to determinations of competency to stand trial, and (3) the Court of Appeals did not properly follow the correct standard of review. We consider each argument in turn.

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[10] § 29-1207(1).

[11] *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010).

[12] *Id.*

[13] See *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[14] *Bolton, supra* note 4.

STATE v. BOLTON

We note that the State's reliance on *Bolton* has been raised for the first time on further review—the State's brief to the Court of Appeals did not cite the case. But, because the Court of Appeals discussed *Bolton* in its opinion, we will consider it as well.

As noted above, § 29-1207(4)(a) provides that a defendant's speedy trial clock is tolled during "[t]he period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial . . . ." That provision was at issue in *Bolton*, in which the defendant was charged with assault. A capias was issued after the defendant did not cooperate with counsel in seeking a psychiatric evaluation. But before the defendant could be arrested, his family filed a petition to have him committed as a mentally ill dangerous person, and on February 27, 1980, he was placed in the county hospital by the county board of mental health. The defendant was diagnosed with possible schizophrenia and transferred to the Lincoln Regional Center.

On December 18, 1980, the superintendant of the regional center sent a status update to the district court, which included a psychologist's note dated April 29, 1980, opining that the defendant was competent to stand trial. On February 4, 1981, after further examinations and a hearing, the court found the defendant competent to stand trial. A bench trial was held on February 25, and the defendant was convicted.

On appeal, the defendant claimed he had not received a speedy trial. He argued, among other things, that the period excludable due to his incompetency ended on April 29, 1980, when his psychologist had opined that he was competent. But we rejected that argument, noting that according to the medical records, the defendant was still participating in mental health treatment well after that. This court explained that during the entire period between the defendant's commitment and the court's finding that he was competent, the defendant "was engaged in treatment programs for his psychiatric condition."[15]

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[15] *Id.* at 699, 316 N.W.2d at 622.

So, we concluded, the entire period between February 27, 1980, and February 4, 1981, was "attributable to psychiatric evaluations and treatment" and was "excludable as an 'other proceeding' under the provisions of § 29-1207(4)(a)."[16] We also stated, as an alternative basis for our decision, that the defendant's incompetency ended only when the district court found him competent to stand trial.[17]

But we revisited § 29-1207(4)(a), although not in the context of mental health treatment, in *State v. Murphy*.[18] The issue in *Murphy* was the period of time excludable due to the defendant's depositions. Specifically, the defendant had filed a motion to take depositions, which was sustained. The defendant took the depositions, then later filed a motion to discharge on speedy trial grounds, which was overruled. On appeal from the denial of his motion to discharge, the defendant argued that the period of time excludable under § 29-1207(4)(a) due to his motion to take depositions ended when the motion was granted—not, as the State contended, when the depositions were complete.

We agreed, holding that while the time until the depositions were complete was not automatically excluded under § 29-1207(4)(a), it *could* be excludable (with appropriate findings) under § 29-1207(4)(f), which excludes "periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause." In particular, we explained that

> § 29-1207(4)(a) refers only to "proceedings." Black's Law Dictionary 1204 (6th ed. 1990) states that a "proceeding" is "[i]n a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." If the term "proceedings" was read broadly, rather than in its "particular sense," § 29-1207(4)(a) would include any delay

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[16] *Id.*

[17] See *id.*

[18] *Murphy, supra* note 6.

> at trial that "concerns" the defendant. If the Legislature had intended that the term "proceeding" encompass such a broad purview, there would have been little reason for the Legislature to have provided for exclusion under § 29-1207(4)(f), the "catchall provision."[19] Thus, the term "proceeding" must be read narrowly.
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> Clearly, a motion for depositions is an "application to a court of justice" and, thus, is a "proceeding," as the statute specifically provides. However, once that application has been granted, no further application to a court of justice is required to obtain the depositions. Of course, a defendant may later make a motion to compel the taking of depositions. Such a motion would be a "proceeding" under § 29-1207(4)(a), and the time required for its disposition would be automatically excluded. Nonetheless, to the extent the parties rely on their own devices to secure the necessary depositions, the taking of the depositions is not a "proceeding" within the meaning of § 29-1207(4)(a).
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> Thus, the period of time from the trial court's ruling on a motion for depositions until the depositions are concluded is not excludable under § 29-1207(4)(a). . . . However, such a period may or may not be excluded under § 29-1207(4)(f), with the inquiry turning upon whether there is "good cause" for the delay.[20]

[5] We agree with the Court of Appeals that our language in *Bolton* is inconsistent with our more recent decision in *Murphy*. As noted above, in *Bolton*, the "other proceeding" at issue was the psychiatric treatment the defendant was receiving after his family had him committed—even though that treatment was not initiated pursuant to an "application to a court of justice." *Bolton* clearly relies on the broader understanding of "proceeding" that we expressly repudiated in *Murphy*. And *Murphy* is the more recent, and more definitive, construction of § 29-1207(4)(a). So, to the extent that *Bolton* suggests

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[19] *State v. Turner*, 252 Neb. 620, 629, 564 N.W.2d 231, 237 (1997).

[20] *Murphy, supra* note 6, 255 Neb. at 803-04, 587 N.W.2d at 389.

that psychiatric treatment is generally excludable as "other proceedings concerning the defendant" under § 29-1207(4)(a), *Bolton* is disapproved.

Examination and Hearing on Competency

The State also argues that even if Tamayo's psychiatric evaluation is not an "other proceeding," it is still excluded under § 29-1207(4)(a) as a period of delay resulting from "an examination and hearing on competency." The State contends that the phrase "examination and hearing on competency" does not specify competency *to stand trial*. So, the State argues, evaluation of Tamayo's competency to do other things is also excludable under that provision.

We, however, reject the State's argument because it is inconsistent with the context of the language upon which it relies, and with the statute as a whole. Section 29-1207(4)(a) excludes "an examination and hearing on competency and the period during which [the defendant] is incompetent to stand trial." In that context, it is difficult to read "competency" as intending anything other than competency to stand trial. And the other specific exclusions set forth in § 29-1207(4)(a)—such as the "time from filing until final disposition of pretrial motions of the defendant" and the "time consumed in the trial of other charges against the defendant"—are all consistent with the definition of "proceeding" adopted in *Murphy*, because they require a specific application to the court that requires formal judicial disposition. This permits a period of time excluded under § 29-1207(4)(a) to be readily calculated, because the beginning and end of an excludable period are clearly defined. Similarly, an examination on competency to stand trial is a specific statutory "proceeding" initiated when the question is brought to the attention of the court and concluded when and if the court finds the defendant competent to stand trial.[21]

Were we to construe § 29-1207(4)(a) as suggested by the State, on the other hand, the periods of time excludable due to evaluations for various "general competency" or "insanity"

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[21] See Neb. Rev. Stat. § 29-1823 (Reissue 2008).

determinations would be, in many cases, quite unclear. Many such evaluations would not, for instance, require inpatient hospitalization, nor would the court necessarily be informed of particular evaluations arranged by privately retained counsel. Oftentimes the defense relies on its own devices to secure mental evaluations for various purposes—sometimes culminating in issues at trial, sometimes not. The trial court in this case was aware of the pending examination only because Tamayo, as an indigent defendant, needed the court's approval to hire an expert.

And it would not be clear when the time excludable due to such evaluations would end. For example, under circumstances such as those of the instant case, a defendant may choose to go forward with an insanity defense or a defense based on the voluntariness of his statements to law enforcement, or he may, at some point, choose to abandon one or both of those defenses. There is no clear point in time at which the "proceedings" associated with a general competency/insanity evaluation would conclude. Therefore, using § 29-1207(4)(a) to exclude the time for evaluations relating to various "general competency" and "insanity" determinations would be to automatically exclude a potentially indeterminate period of time. It would be inconsistent with the purpose and structure of § 29-1207(4)(a) to read an "examination and hearing on competency" to include the vague and often undefined periods that would be implicated by any sort of evaluation that could be described as involving "competency."

[6] In short, we hold that an "examination and hearing on competency" within the meaning of § 29-1207(4)(a) is the well-defined statutory procedure for determining competency to stand trial established by § 29-1823, because it is consistent with the other provisions of the statute and our decision in *Murphy*. Therefore, we find no merit to the State's contention that § 29-1207(4)(a) should be read to encompass any other determinations that could conceivably be characterized in terms of "competency." As discussed more completely below, other types of psychiatric evaluation or treatment are more appropriately considered under the catchall provision of § 29-1207(4)(f), with the inquiry turning upon whether the

defendant's evaluation or treatment provided good cause for any delay in bringing the defendant to trial.[22]

Standard of Review

Finally, the State argues that the Court of Appeals did not abide by the correct standard of review which, as noted above, requires an appellate court to affirm a trial court's factual findings unless they are clearly erroneous.[23] The State argues that the trial court was entitled to rely upon the statement of Tamayo's counsel that Tamayo was examined for competency to stand trial. But we agree with the Court of Appeals. As explained above, the issue is not what sort of evaluation Gutnik was actually performing—it is the time period that can be excluded due to an "examination and hearing on competency" pursuant to §§ 29-1207(4)(a) and 29-1823.

The record establishes beyond reasonable dispute that the first time any question as to Tamayo's competency to stand trial was brought before the trial court—in other words, when the "proceeding" on competency was initiated by application to the court—was October 15, 2008. That proceeding was concluded on October 20, when the court entered its order finding Tamayo competent to stand trial. This results in an excludable period of 5 days, which is well short of what would be necessary to bring Tamayo's trial within the statutory time limit.

Good Cause for Delay

We note, however, that although general psychiatric evaluation and treatment are not automatically excludable under § 29-1207(4)(a), such a period might be excluded under § 29-1207(4)(f), which permits exclusion of "[o]ther periods of delay not specifically enumerated in this section, but only if the court finds that they are for good cause." And given the issues implicated by Tamayo's motion to appoint a psychiatrist, and the related representations made by counsel, it is certainly possible that the State would be able to demonstrate that

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[22] See *Murphy, supra* note 6.

[23] *Wells, supra* note 8.

Tamayo's psychiatric evaluation provided good cause to delay bringing him to trial.[24]

But because the trial court in this case decided Tamayo's motion to discharge on the basis of § 29-1207(4)(a), it had no reason to make the specific findings as to good cause or causes which are required if a court relies on § 29-1207(4)(f).[25] Accordingly, although we affirm the judgment of the Court of Appeals reversing the trial court's decision, the trial court should be instructed, upon remand, to determine whether any of the delay in bringing Tamayo to trial is excludable for good cause, and we modify the Court of Appeals' judgment to that extent.[26]

CONCLUSION

We conclude that the trial court erred in overruling Tamayo's motion to discharge based on § 29-1207(4)(a), and for that reason, we affirm the Court of Appeals' judgment reversing the trial court's order. But we modify the Court of Appeals' judgment to reflect that the trial court should be instructed, upon remand, to determine whether Tamayo's psychiatric evaluation provided good cause for any delay in bringing Tamayo to trial.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTION.

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[24] See, e.g., *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

[25] See, e.g., *Murphy, supra* note 6.

[26] See *id.*

HEAVICAN, C.J., dissenting.

I respectfully dissent from the decision of the majority affirming as modified, and remanding with direction, the decision of the Nebraska Court of Appeals.

In reaching this conclusion, I concur with Judge Cassel's dissent to the Court of Appeals' decision in this case. In his dissent, Judge Cassel reasoned that the standard of review in this case places a high burden on the defendant and that Tamayo was unable to overcome this burden and show that the district court clearly erred in its factual finding regarding

whether the evaluation period in question was a "competency proceeding."

In reaching his conclusion, Judge Cassel noted that Tamayo's counsel stated, in part, that the purpose of the evaluation at issue was to examine Tamayo "'for competence to assist me in his defense and to stand trial.'"[1] I agree that this was a judicial admission on the part of Tamayo. And when this admission is considered with other evidence suggesting Tamayo was also being evaluated for competence, it is clear to me that the district court did not clearly err in reaching its conclusion that a "competency proceeding" was held from April 8 to October 20, 2008.

I would reverse the judgment of the Court of Appeals and instead affirm the judgment of the district court denying the motion to discharge.

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[1] *State v. Tamayo*, 18 Neb. App. 430, 447, 783 N.W.2d 240, 252 (2010) (Cassel, Judge, dissenting) (emphasis omitted).

STATE OF NEBRASKA, APPELLEE, V.
RAYMOND MATA, JR., APPELLANT.
790 N.W.2d 716

Filed November 19, 2010. No. S-10-121.

1. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
2. **Postconviction: Right to Counsel.** In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.
3. ____: ____. Where the record shows that a justiciable issue of law or fact is presented in a postconviction action, an indigent defendant is entitled to the appointment of counsel.
4. **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.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed and remanded with directions.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case presents an appeal from the denial of a motion for postconviction relief without an evidentiary hearing. The defendant, Raymond Mata, Jr., sought to show an infringement of his constitutional rights in relation to his conviction of murder and his sentence of death. On appeal, he does not assert that the allegations in his motion were sufficient to warrant an evidentiary hearing, but, rather, that the court should have appointed counsel and allowed him to amend.

BACKGROUND

Mata was found guilty of first degree premeditated murder, first degree felony murder, and kidnapping in association with the death of 3-year-old Adam Gomez. Mata was sentenced to life imprisonment for kidnapping and sentenced to death for first degree premeditated murder. In *State v. Mata*,[1] we affirmed the convictions of first degree premeditated murder and kidnapping, and we affirmed the sentence of life imprisonment for the kidnapping. Based on *Ring v. Arizona*,[2] we vacated his death sentence. We remanded the cause with directions for a new penalty phase hearing and resentencing on the conviction of first degree premeditated murder.

On remand, Mata was again sentenced to death on the conviction of first degree premeditated murder. He appealed,

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[1] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

and in an opinion issued February 8, 2008, we affirmed the imposition of the death sentence.[3] However, we concluded that electrocution, as a means of carrying out that sentence, was cruel and unusual punishment in violation of the Nebraska Constitution, article I, § 9. Accordingly, we issued an indefinite stay of Mata's execution.

On July 2, 2009, Mata filed a pro se verified motion for postconviction relief and request for appointment of counsel. The State filed its response on October 2. On October 20, the district court held a preliminary hearing to determine whether to grant the request for counsel and whether to grant an evidentiary hearing. Mata participated telephonically. Mata explained to the court that he believed the motion for an evidentiary hearing was premature because he was not "ready." Mata wished for the court to first consider whether to appoint him counsel. He hoped that counsel could assist him in evaluating the record and in amending his motion for postconviction relief before the merits of the motion would be determined.

Mata explained that he filed the motion for postconviction relief without first fully reviewing the record because he needed to toll the 1-year statute of limitations for filing an application for a writ of habeas corpus in federal court.[4] He claimed that our indefinite stay of his execution had placed him in a legal "limbo" which prevented him from filing a habeas action within a year from the final judgment. The motion for postconviction relief had been prepared by Mata's trial counsel, but the seven alleged grounds for relief included claims of ineffective assistance at trial. Mata emphasized at the hearing that his main purpose was to obtain appointment of counsel to assist him in further developing these and other claims. Mata stated he would like an opportunity to amend his motion, with or without counsel.

After the State argued that Mata's petition failed to raise a justiciable issue, Mata reiterated that he "would like a chance to go through the record preferably with counsel and

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[3] See *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[4] See 28 U.S.C. § 2244(d)(1) (2006). See, also, *Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007).

have a chance to amend this." The following colloquy then took place:

> [Mata]: Okay. I have one question. What if you were to decide not to give me legal counsel? Can I still — well, do you think you can consider letting me amend it even if I have to go through the record on my own?
>
> THE COURT: You can make that request. I can't tell you whether I would grant the request here today.
>
> [Mata]: Okay.
>
> THE COURT: That's a request that you could make.
>
> [Mata]: Okay. Well, I would like to make that request because I think there is a lot of stuff — well, I think once I go — because I really don't know much about it, but there is [sic] people around here that I could probably get, you know, to get to help me to go through the record and — because I think there is a lot more in there, that because those issues that were raised were just — I think they were last-minute issues that they put together so we could get the clock stopped because we wasted already eight or nine months of it. So just keep that in mind. I would appreciate it, your Honor.
>
> THE COURT: Well . . . are you asking me for permission to amend this motion on an immediate basis? I mean, is that something that you are asking to do now?
>
> [Mata]: Well, no. I was asking if for some reason if you decided not to appoint counsel, would you let me go through the record and amend it to see what constitutional issues I could find that any of my constitutional issues that, you know, that I could find in there.
>
> THE COURT: If . . . you still have something pending in front of this Court, you can proceed on your own without counsel if you wish to. So I think the answer to your question is probably yes, if I did not appoint you an attorney and there was [sic] still issues for me to decide as a judge, you could act on your own behalf, yes.
>
> [Mata]: Okay. Well, see, honestly, I don't know anything about this process. I know what people are telling me here and there and I really don't know a whole lot about it.

THE COURT: All right. Well . . . I have to examine this record in order to make this decision —

[Mata]: Okay.

Thereafter, in a single final order, the district court denied both an evidentiary hearing on the postconviction motion and Mata's request for appointment of counsel. The court did not specifically determine whether the motion for postconviction relief presented any justiciable issue which would entitle Mata to appointment of counsel.[5] Instead, relying on the standard for determining whether a motion for postconviction relief may be denied without an evidentiary hearing,[6] the court found that the files and records of the case affirmatively showed that Mata was entitled to no relief, based on the allegations in his motion. Presumably because there was no longer anything pending before the district court, Mata did not again ask to amend his motion for postconviction relief. He instead appealed to this court.

ASSIGNMENTS OF ERROR

Mata alleges that the district court erred by refusing to (1) appoint an attorney to assist him and (2) allow him to amend his motion for postconviction relief.

STANDARD OF REVIEW

[1] The decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.[7]

ANALYSIS

[2,3] In the absence of a showing of an abuse of discretion, the failure to provide court-appointed counsel in postconviction proceedings is not error.[8] However, where the record shows that a justiciable issue of law or fact is presented in a

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[5] See, e.g., *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998); *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997).

[6] See, e.g., *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005).

[7] *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

[8] *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

postconviction action, an indigent defendant is entitled to the appointment of counsel.[9] In this case, Mata argues that the court erred in failing to grant him leave to amend his petition to state a justiciable issue.

While the State asserts that Mata withdrew his motion to amend, we disagree with its reading of the record. It is clear that Mata wished to amend his motion for postconviction relief and that based on his discussion with the court, he believed the court would consider whether to allow him to amend after determining his request for appointment of counsel. Mata stated: "I was asking if for some reason if you decided not to appoint counsel, would you let me go through the record and amend it to see what constitutional issues I could find that any of my constitutional issues that, you know, that I could find in there." The court responded: "So I think the answer to your question is probably yes . . . ."

Mata's ability to amend his petition is governed by Neb. Ct. R. Pldg. § 6-1115(a), which states that a party may amend "the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served." By the time of the hearing on Mata's motion for postconviction relief, the period of amendment as a matter of course had elapsed and Mata could amend his pleading only by leave of court or written consent of the adverse party.[10]

We review the district court's decision refusing to grant leave to amend under such circumstances for abuse of discretion.[11] However, § 6-1115(a) also states that "leave shall be freely given when justice so requires." Because Nebraska's

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[9] *State v. Wiley*, 228 Neb. 608, 423 N.W.2d 477 (1988).

[10] See Neb. Ct. R. Pldg. § 6-1115(a).

[11] See, e.g., *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263 (3d Cir. 2008); *Carroll v. Fort James Corp.*, 470 F.3d 1171 (5th Cir. 2006); *Porat v. Lincoln Towers Community Ass'n*, 464 F.3d 274 (2d Cir. 2006); *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183 (1st Cir. 2006); *Kaba v. Stepp*, 458 F.3d 678 (7th Cir. 2006); *Inge v. Rock Financial Corp.*, 388 F.3d 930 (6th Cir. 2004); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

current notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal decisions for guidance.[12] Federal courts interpreting this provision have explained that the liberal pleading philosophy of the federal rules limits a district court's discretion to deny leave to amend.[13] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[14] More specifically, federal decisions have held that it is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.[15]

[4] In this case, Mata attempted to explain the circumstances which necessitated leave to amend, and no prejudice to the State was established which would justify the denial of leave to amend. Counsel appointed for purposes of this appeal argues that Mata has viable ineffective assistance of counsel and other claims and that if he is not allowed to amend his motion, he will be procedurally barred from ever bringing those claims before being put to death. 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 agree that under the circumstances of this case, it was an abuse of discretion for the district court to deny Mata leave to amend his motion for postconviction relief. We therefore reverse the judgment of the

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[12] *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[13] See, *Bjorgung v. Whitetail Resort, LP, supra* note 11; *Theme Promotions v. News America Marketing FSI*, 546 F.3d 991 (9th Cir. 2008).

[14] *Roberson v. Hayti Police Dept.*, 241 F.3d 992 (8th Cir. 2001); *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). See, also, *Kills on Top v. State*, 279 Mont. 384, 928 P.2d 182 (1996) (applying similar standard in postconviction action).

[15] See, e.g., *Ellison v. Ford Motor Co.*, 847 F.2d 297 (6th Cir. 1988).

[16] *State v. Thorpe, ante* p. 11, 783 N.W.2d 749 (2010).

district court and remand the cause with directions to appoint counsel for Mata and grant him leave to amend.

CONCLUSION

For the foregoing reasons, we reverse, and remand with directions to appoint Mata counsel and grant him leave to amend his motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KIM D. ERWIN-LONCKE, RESPONDENT.

790 N.W.2d 721

Filed November 19, 2010. No. S-10-1071.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Kim D. Erwin-Loncke, on November 2, 2010. The court accepts respondent's surrender of her license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on July 26, 2007, and has maintained an office in Omaha, Nebraska. On August 2, 2010, the Counsel for Discipline of the Nebraska Supreme Court received an overdraft notice with respect to the respondent's trust account. In addition, the record shows that on September 14, the Counsel for Discipline received a grievance against respondent from a health care provider claiming that respondent had failed to pay a bill on behalf of an individual for whom respondent was acting as a conservator. At the time respondent filed her voluntary

surrender on November 2, the Counsel for Discipline was investigating respondent for possible misuse of funds that were held in her client trust account.

On November 2, 2010, respondent filed with this court a voluntary surrender surrendering her license to practice law in the State of Nebraska. In this pleading, respondent does not challenge or contest the truth of the allegations made against her. In addition to surrendering her license, respondent consented to the entry of an order of disbarment and waived her right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Respondent filed a pleading pursuant to § 3-315 of the disciplinary rules. In this pleading, respondent has voluntarily surrendered her license to practice law and knowingly does not challenge or contest the truth of the allegations made against her with respect to the trust account violations. Respondent has waived all proceedings against her. Respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that she freely, knowingly, and voluntarily does not contest the allegations that she misused funds held in her client trust account. The court accepts respondent's surrender of her license to practice law, finds that respondent should be disbarred, and hereby orders

her disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, she shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1597, APPELLEE, V. BILL SACK, HOWARD COUNTY COMMISSIONER, ET AL., APPELLANTS.

793 N.W.2d 147

Filed December 3, 2010. No. S-09-1245.

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: Administrative Law.** The Commission of Industrial Relations has authority to decide industrial disputes.
3. **Labor and Labor Relations.** Industrial disputes include not just those disputes involving wages, terms, and conditions of employment, but also any controversy concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.
4. **Commission of Industrial Relations: Jurisdiction: Pleadings.** In order to invoke the jurisdiction of the Commission of Industrial Relations with regard to an industrial dispute, any employer, employee, or labor organization must file a petition with the commission.
5. **Labor and Labor Relations: Public Officers and Employees.** Under the Industrial Relations Act, public employers are authorized to recognize employee organizations for the purpose of negotiating collectively in the determination

of and administration of grievances arising under the terms and conditions of employment of their public employees as provided in the act.

6. **Commission of Industrial Relations: Labor and Labor Relations: Employer and Employee.** The Commission of Industrial Relations, as well as the National Labor Relations Board and the federal courts, has excluded from bargaining units so-called confidential employees.
7. **Labor and Labor Relations: Employer and Employee: Words and Phrases.** Under the "labor-nexus" test adopted by the National Labor Relations Board and the U.S. Supreme Court, an employee is confidential if he or she has access to confidential labor relations information of the employer.
8. **Labor and Labor Relations: Federal Acts: Statutes.** Federal case law regarding the National Labor Relations Act is relevant in deciding issues under Nebraska's Industrial Relations Act.
9. **Employer and Employee: Words and Phrases: Appeal and Error.** An appellate court should utilize a three-part test for determining supervisory status: Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer.

Appeal from the Commission of Industrial Relations. Affirmed in part, and in part reversed.

Vincent Valentino for appellants.

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

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

HEAVICAN, C.J.

I. INTRODUCTION

The Commission of Industrial Relations (CIR) certified a bargaining unit as proposed by the appellee, International Brotherhood of Electrical Workers, Local Union No. 1597 (IBEW). The appellants, Howard County, Nebraska; the individual members of the Howard County Board of Commissioners; and the Howard County assessor, clerk, treasurer, and sheriff (collectively the County), appeal. We affirm in part, and in part reverse.

II. FACTUAL BACKGROUND

IBEW filed a petition with the CIR on March 26, 2009, seeking a CIR order requiring an election among certain employees

of Howard County. The purpose of the election was to determine whether those employees desired to have IBEW exclusively represent them as a collective bargaining agent.

The County filed an answer to IBEW's amended petition. In that answer, the County objected to the bargaining unit's inclusion of the secretary to the county sheriff and the office manager for the county extension office, as well as the deputy county assessor, the deputy county clerk, the deputy county treasurer, and the clerk employees of those offices. The County's view was that all the employees at issue except the office manager for the county extension office were "confidential" employees, and thus excluded on that basis. The County also alleged that the office manager and deputy employees were statutory supervisors and excludable for that reason.

Following the hearing, the CIR entered an order concluding that all disputed positions should be included in the bargaining unit and ordered that an election be held. In so doing, the CIR concluded that none of the positions were "confidential" and that the office manager and deputy employees were not statutory supervisors. Balloting was held, and the bargaining unit was approved in a 13-to-0 vote. The unit was certified by the CIR on December 4, 2009. The County appeals.

III. ASSIGNMENTS OF ERROR

On appeal, the County assigns, restated, that the CIR erred in (1) finding that the office manager for the county extension office and the deputy employees in the offices of the county assessor, clerk, and treasurer were not statutory supervisors; (2) finding that the secretary to the county sheriff and the deputy and clerical employees in the offices of the county assessor, clerk, and treasurer were not "confidential" employees; and (3) assigning to the County the burden of proof to show that the positions in question were supervisory and/or "confidential."

IV. STANDARD 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.[1]

V. ANALYSIS

1. Relevant Law

[2-4] The CIR has authority to decide industrial disputes.[2] Industrial disputes include not just those disputes involving wages, terms, and conditions of employment, but also "any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment."[3] In order to invoke the CIR's jurisdiction with regard to an industrial dispute, any employer, employee, or labor organization must file a petition with the CIR.[4]

[5] Under the Industrial Relations Act, "public employers are hereby authorized to recognize employee organizations for the purpose of negotiating collectively in the determination of and administration of grievances arising under the terms and conditions of employment of their public employees as provided in the . . . [a]ct."[5] However, "a supervisor shall not be included in a single bargaining unit with any other employee who is not a supervisor."[6] A supervisor is defined as

> any employee having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

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[1] Neb. Rev. Stat. § 48-825(4) (Reissue 2004).

[2] Neb. Rev. Stat. § 48-819.01 (Reissue 2004).

[3] Neb. Rev. Stat. § 48-801(7) (Cum. Supp. 2010).

[4] Neb. Rev. Stat. § 48-811 (Reissue 2004).

[5] Neb. Rev. Stat. § 48-816(2) (Reissue 2004).

[6] § 48-816(3)(a).

> authority is not a merely routine or clerical nature, but requires the use of independent judgment.[7]

[6,7] In addition, the CIR, as well as the National Labor Relations Board and the federal courts, has excluded from bargaining units so-called confidential employees. The U.S. Supreme Court set forth the definition of such employees in *NLRB v. Hendricks Cty. Rural Electric Corp.*[8] According to *Hendricks Cty. Rural Electric Corp.*,

> "management should not be required to handle labor relations matters through employees who are represented by the union with which the [c]ompany is required to deal and who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters."[9]

The Court approved the National Labor Relations Board's longstanding practice of employing a "labor-nexus" test in excluding "the narrow group of employees with access to confidential, labor-relations information of the employer."[10] The CIR has adopted this position, and although the CIR has been considering whether employees were "confidential" since 1982,[11] this court has not previously considered this issue.

The issues presented by this appeal are (1) whether the deputy employees in the offices of the county assessor, clerk, and treasurer and the office manager for the county extension office are statutory "supervisors" under § 48-816(3), and (2) whether the deputy employees in the offices of the county assessor, clerk, and treasurer; the clerk employees of those offices; and the secretary to the sheriff are "confidential" employees.

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[7] § 48-801(10).

[8] *NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 102 S. Ct. 216, 70 L. Ed. 2d 323 (1981).

[9] *Id.*, 454 U.S. at 179.

[10] *Id.*, 454 U.S. at 177-78.

[11] See *Civilian Management, Professional and Technical Employees Council of the City of Omaha, Inc. v. City of Omaha,* 6 C.I.R. 187 (1982).

2. Deputy Employees Are Statutory Supervisors

On appeal, the County contends that because deputies have the authority to perform the duties of the elected officeholder[12] and the elected officeholder is a supervisor, a deputy should also be considered a supervisor.

[8,9] The definition of "supervisor" in Nebraska's Industrial Relations Act is substantially identical to that of "supervisor" under the National Labor Relations Act.[13] And we have indicated that federal case law regarding the National Labor Relations Act is relevant in deciding issues under Nebraska's Industrial Relations Act.[14] The federal courts utilize a three-part test for determining supervisory status:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."[15]

(a) Deputy Employees Granted Supervisory Authority by Statute

The record indicates that none of the deputy employees at issue actually exercise supervisory authority. However, the Eighth Circuit has noted that "the actual exercise of the enumerated power is irrelevant so long as the authority to do so is present."[16] And we conclude that the authority is present with respect to these deputies.

Nebraska statutes authorize the appointment of deputies by elected officials and further provide those deputies with

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[12] Neb. Rev. Stat. §§ 23-1301.01 (county clerk) and 23-1601.02 (county treasurer) (Reissue 2007). See, also, Neb. Rev. Stat. §§ 23-1115 (Reissue 2007) and 25-2219 (Reissue 2008).

[13] Compare § 48-801(10) with 29 U.S.C. § 152(11) (2006).

[14] *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[15] *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001).

[16] *Beverly Enterprises v. N.L.R.B.*, 148 F.3d 1042, 1045 (8th Cir. 1998).

the authority to act in the absence of the elected official.[17] In particular, § 25-2219 provides that "[a]ny duty enjoined by this code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." And under Neb. Rev. Stat. § 23-1111 (Reissue 2007), which provides that "county officers in all counties shall have the necessary clerks and assistants," an elected official has the power to set the terms and conditions of employment in his or her office.[18]

Providing more support for the County's position is the fact that at least with respect to the deputy employees in the offices of the county clerk and treasurer, those deputies are required under state law to take the same oath as the elected official.[19] Moreover, any person holding the title of deputy can be removed from his or her deputy position without cause,[20] something that can be inconsistent with the grievance procedures often accompanying membership in a union.

For these reasons, we conclude that the deputies are authorized under Nebraska law to exercise supervisory authority.

(b) Deputy Employees Exercise Independent Judgment

We further conclude that when exercising these powers in the absence of the elected official, a deputy is exercising independent judgment, just as the elected official would. We caution, however, that the elected official is still in ultimate control of his or her office, and nothing in this opinion should be read to limit the power of the elected official with respect to his or her office.

(c) Deputy Employees Act in Interest of Their Employers

Finally, we note that there is no dispute that the deputy employees act in the interest of the County and of their particular elected officials.

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[17] See §§ 23-1301.01, 23-1601.02, 23-1115, and 25-2219.

[18] See *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

[19] See §§ 23-1301.01 and 23-1601.02.

[20] Neb. Rev. Stat. § 23-2514 (Reissue 2007).

Because we conclude that the deputy assessor, deputy clerk, and deputy treasurer are authorized as statutory supervisors, those positions cannot be included in the same bargaining unit as nonsupervisory positions. We therefore find merit to the County's assignment of error as to the deputies and reverse the CIR's decision certifying the bargaining unit as contrary to law.

3. County Extension Office Manager Is Not Statutory Supervisor

Though the deputy positions are supervisory positions, we do not find the same to be true for the office manager for the county extension office. Unlike the employees in the deputy positions, there are no statutes authorizing any powers, supervisory or otherwise, to any employees of the county extension office. And the record is clear that the person holding this position does not exercise any supervisory powers. In fact, in this case, this position is currently a part-time position and its occupant is the sole county employee in the office. Any other extension employee is a University of Nebraska employee, over whom the office manager has no authority. We therefore conclude that this position is not a supervisory position and that the CIR's order including it in the bargaining unit should be affirmed. This portion of the County's first assignment of error is without merit.

4. Clerk Employees and Secretary to County Sheriff Are Not "Confidential" Employees

Finally, we turn to the question of whether particular employees are "confidential" employees. Because we have already concluded that the deputy positions should be excluded from the bargaining unit, we need not address whether those employees are "confidential." And the County does not argue that the office manager of the county extension office is a confidential employee. Thus, we must determine only whether the clerk employees of the assessor, clerk, and treasurer, as well as the secretary to the sheriff, are "confidential" employees. In examining the record, we conclude that none of these employees are "confidential."

In determining whether an employee is "confidential," we adopt and apply the "labor-nexus" test utilized by the U.S. Supreme Court in *Hendricks Cty. Rural Electric Corp.*[21] Under this test, those individuals in the "narrow group of employees with access to confidential labor relations information of the employer"[22] are considered "confidential" employees. Because of this knowledge, such "confidential" employees are properly excluded from a bargaining unit.

On appeal, the County contends that the sheriff's secretary and the clerk employees all work in a confidential capacity with respect to their particular elected official and have "potential access to confidential information that is labor-related and may not be known to [IBEW]."[23] As was noted above, the U.S. Supreme Court has indicated that "'management should not be required to handle labor relations matters through employees who are represented by the union . . . who in the normal performance of their duties may obtain advance information of the [c]ompany's position with regard to . . . labor relations matters.'"[24] An examination of the record does not support the County's assertion.

Rather, according to all of the evidence in the record, only the elected official has access to confidential labor-related information. All three clerk employees, as well as the sheriff's secretary and the deputies in each office, testified that only the elected official had such information and that such information was kept locked when not being utilized by the official. In addition, the county assessor and sheriff also testified that their respective employees did not have access to any labor-related materials. There was no testimony presented suggesting that the clerk employees or the secretary to the sheriff had access to such labor-related materials.

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[21] See *NLRB v. Hendricks Cty. Rural Electric Corp., supra* note 8.

[22] *Id.*, 454 U.S. at 178.

[23] Brief for appellant at 34.

[24] *NLRB v. Hendricks Cty. Rural Electric Corp., supra* note 8, 454 U.S. at 179.

We therefore affirm the decision of the CIR that none of these employees are "confidential." The County's second assignment of error is without merit.

5. Burden of Proof

Finally, the County argues that in its order certifying IBEW's proposed bargaining unit, the CIR impermissibly shifted the burden of proof when it noted, with respect to whether the employees were confidential, that the County had failed to meet its burden to show that the positions were confidential.

We agree that the CIR has traditionally placed the burden of proof on the *union* in cases where the employer seeks to exclude certain positions from a bargaining unit.[25] And we agree that in this case, the CIR noted in its order that the *County* had failed to meet its burden to show that the employees were "confidential."

To the extent that this was error, however, it was harmless. The CIR specifically noted that there was no evidence in the record to show that the positions were confidential. Thus, regardless of whether the burden was placed on IBEW to show that the positions were not confidential or on the County to show that the positions were confidential, the result would be the same.

The County's third assignment of error is without merit.

VI. CONCLUSION

We conclude that the deputy employees are considered statutory supervisors. We therefore reverse the CIR's decision with respect to the deputies and otherwise affirm the decision of the CIR.

Affirmed in part, and in part reversed.

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[25] *Metro. Technical Community College Educ. Assoc. v. Metropolitan Technical Community College*, 3 C.I.R. 141 (1976).

REBEKAH HUBER, APPELLANT, V. KENT E. ROHRIG, APPELLEE.

791 N.W.2d 590

Filed December 3, 2010. No. S-10-002.

1. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
2. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
3. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
6. ____. Events which may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.
7. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
8. ____: ____. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
9. **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.
10. ____: ____. "Opening the door" is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
11. **Appeal and Error.** Error that does not prejudice the party does not provide grounds for relief on appeal.
12. **Pleadings: Rules of the Supreme Court: Good Cause: Pretrial Procedure.** Generally, the requirements of "in controversy" and "good cause" contained in Neb. Ct. R. Disc. § 6-335(a) are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that good cause exists for ordering the examination.
13. **Rules of the Supreme Court: Pretrial Procedure: Affidavits.** To obtain discovery under Neb. Ct. R. Disc. § 6-335(a), the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing,

but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under § 6-335(a).

14. **Actions: Negligence: Rules of the Supreme Court: Pretrial Procedure.** An allegation of negligence in a personal injury action does not put a party's mental condition in controversy for purposes of Neb. Ct. R. Disc. § 6-335(a).
15. **Courts: Rules of the Supreme Court: Pretrial Procedure.** When requesting a physical or mental examination, a movant's ability or inability to obtain the desired information without the requested examination is relevant to a court's decision whether to order an examination under Neb. Ct. R. Disc. § 6-335(a).
16. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.
17. ____: ____: ____. A motion in limine's purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
18. **Trial: Courts.** A court cannot err with respect to a matter not submitted to it for disposition.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

David C. Mullin and Elizabeth A. Culhane, of Fraser Stryker, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF THE CASE

This case involves a car accident in which Rebekah Huber, appellant, was a passenger in a vehicle struck by a vehicle driven by Kent E. Rohrig, appellee. Huber filed a complaint against Rohrig in the district court for Douglas County alleging that his negligence caused the accident and seeking damages for injuries she alleged resulted from the accident. Rohrig admitted liability. During discovery, Rohrig moved to compel a clinical psychological examination of Huber. Huber opposed the motion for various reasons, including the assertion that

Huber's psychological well-being was not in controversy. The district court granted the motion.

A jury trial was conducted on the issue of damages. After 1 day of trial, the district court granted Rohrig's motion for mistrial and dismissed the jury. The trial judge declined to recuse himself before the second trial. Huber sought and was denied access to the juror questionnaires prior to the second trial. The second trial was conducted, and a judgment in favor of Huber was entered awarding damages in an amount less than she sought.

Huber appeals from this second trial and assigns numerous errors. For the reasons explained below, we affirm.

II. STATEMENT OF FACTS

On January 12, 2006, Huber was riding as a passenger in a vehicle struck by a vehicle driven by Rohrig. After the accident, Rohrig was cited for driving while intoxicated. On June 21, 2007, Huber filed this action against Rohrig in which she alleged that his negligence caused the accident and sought damages therefor. In the course of proceedings, Huber made clear that her damages were for injuries consisting of chronic neck pain and cognitive deficits consistent with postconcussion syndrome. On August 8, 2008, Rohrig filed an amended answer and admitted liability.

During discovery, on August 22, 2008, Rohrig filed a motion pursuant to Neb. Ct. R. Disc. § 6-335(a) (Rule 35) to compel Huber to submit to a psychological clinical examination (hereinafter psychological examination or clinical examination). Based on her attorney's advice, Huber had previously cooperated with Rohrig's request that she submit to neuropsychological testing related to the physical origin of her claimed damages, but had refused to complete the psychological portion of the examination. It was Huber's position that a psychological clinical examination was not proper under Rule 35, because Huber's mental health was not "in controversy" and Rohrig had not shown "good cause" for needing the clinical portion of the examination. Huber noted that Rohrig had been given access to Huber's medical and educational records, the transcript of her deposition, and the results of a neuropsychological examination

performed by an expert retained by Huber. The court granted Rohrig's motion to compel and ordered that Huber complete the clinical portion of the examination.

Also during discovery, Huber took the deposition of Rohrig's medical expert, Dr. Charles Taylon. The deposition was not completed, but Taylon agreed to testify at trial. Huber's motion to compel the completion of Taylon's deposition was denied.

Shortly before the first of two trials began, Rohrig filed a motion in limine seeking to bar any mention or evidence of the fact that he was intoxicated when his vehicle struck the vehicle in which Huber was riding, as well as evidence that he had previously been arrested for drunk driving. Rohrig contended that because he had admitted liability, this evidence and evidence of alcohol use generally were irrelevant. The court sustained the motion in limine.

The first trial commenced in July 2009. After a day of trial, the court sustained Rohrig's motion for mistrial based on Huber's counsel's references to alcohol use during both voir dire and opening statements, in violation of the order in limine. Before the second trial was held, Huber moved to recuse the trial judge and the motion was denied.

Before the start of the second trial, Huber filed a motion entitled "Plaintiff's Motion for Production of Juror Questionnaires to Counsel" in which she requested an opportunity to review the juror questionnaires. The court denied the motion.

The second trial began on November 16, 2009. During voir dire and opening statements, Rohrig's counsel made some complimentary remarks regarding his client. At trial, Rohrig's expert, who had been authorized by the court to conduct the psychological examination of Huber, testified. Huber did not object to the substance of the expert's opinion testimony. The expert testified that based on the personality assessments he had performed, Huber has a tendency to magnify physical symptomology and makes an effort to present herself as having memory problems and to convince people she has a closed-head injury when in fact she does not. He stated that Huber has had personality problems and poor coping mechanisms for quite some time. The written report of Rohrig's expert, which Huber's counsel entered into evidence on cross-examination,

contained the expert's opinions and concluded by diagnosing Huber with "Major Depression, by History" and "Personality Disorder, Not Otherwise Specified, with Narcissistic, Histrionic, and Obsessive-Compulsive Features."

At trial, Huber put into evidence exhibits which showed that she had incurred various medical expenses. The exhibits were provided to the jury for deliberations.

After deliberations, the jury returned a verdict form stating that "[w]e, the jury duly impaneled and sworn . . . do find for the Plaintiff and award damages in the amount of $24,400," an amount less than the total contained on the face of Huber's exhibits. Judgment was entered, and Huber appeals.

III. ASSIGNMENTS OF ERROR

Huber assigns as error, restated and summarized, that the district court erred when it (1) granted Rohrig's motion for mistrial at the first trial, (2) denied Huber's motion for recusal, (3) excluded evidence and did not allow impeachment of Rohrig's character after his counsel placed Rohrig's character in issue, (4) denied Huber's motion to compel the completion of Taylon's deposition, (5) denied Huber's motion for production of the juror questionnaires, and (6) granted Rohrig's motion to compel Huber to complete the clinical interview portion of the neuropsychological examination.

IV. STANDARDS OF REVIEW

[1] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[2] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion. *Mihm v. American Tool*, 11 Neb. App. 543, 664 N.W.2d 27 (2003).

[3,4] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant

of a substantial right and denying just results in matters submitted for disposition. *Id.*

V. ANALYSIS

1. The District Court Did Not Err When It Granted Rohrig's Motion for Mistrial

Because of comments made by Huber's attorney during voir dire and opening statements, the district court granted a mistrial. Huber claims that the district court erred when it granted Rohrig's motion for mistrial, because the effects of the challenged comments would not prevent a fair trial. Rohrig responds by arguing that the objectionable comments were prejudicial and that it was not an abuse of discretion to grant the motion and order a new trial. We agree with Rohrig.

[5,6] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Sturzenegger, supra*. A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005). Events which may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters. See *id*. An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition. See *Kocontes, supra*.

Before the trial proceedings began, Rohrig filed a motion in limine seeking to exclude any mention of alcohol use at the trial. The motion was granted. During voir dire, Huber's counsel questioned the potential jurors about whether they were involved with the Mothers Against Drunk Driving organization and whether any of them abstain from alcohol. Rohrig moved for a mistrial based on a violation of the order in limine. The motion was denied. During opening statements, Huber's counsel paraphrased one of the steps from the principles urged by Alcoholics Anonymous and introduced her remarks by stating "as one organization put it." Following this statement,

Rohrig renewed his motion for mistrial and the court granted the motion.

The court explained its rationale for granting the motion. The court stated that Huber's counsel's several references to alcohol created a narrative that this was a drunk driving case rather than a damage case and that the commentary violated the court's order in limine. It is clear the district court determined that the references to alcohol would have a significantly prejudicial impact on the jury. Given the context in which the ruling occurred, such determination was reasonable. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The ruling of the district court was not untenable. Accordingly, we conclude that the district court did not err when it granted Rohrig's motion for mistrial.

2. The District Court Did Not Err When It Denied Huber's Motion for Recusal

Huber claims that the district court erred when it denied her motion for the judge to recuse himself. Huber supported her motion for recusal with the affidavit of her counsel. The affidavit asserted that the basis for the motion was the grant of the mistrial and Huber's counsel's belief that the district court judge was biased in favor of Rohrig due to certain rulings.

[7] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. See *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[8] In discussing bias or prejudice as a matter of law, we have stated that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *Id*. Thus, we have concluded that a judge should have recused herself

in subsequent proceedings where she initially made a custody determination when no evidence had yet been presented on the issue. *Id.* It has also been concluded that a Workers' Compensation Court trial judge should have recused himself where he recited facts about the employer which were not yet in the record. *Mihm v. American Tool*, 11 Neb. App. 543, 664 N.W.2d 27 (2003).

With respect to recusal, the U.S. Supreme Court has stated that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). The Court has also observed that a judge's ordinary efforts at courtroom administration cannot be the basis for bias or partiality. *Id.*

In the instant case, the evidence submitted in support of Huber's motion for recusal was the affidavit authored by Huber's counsel. In the affidavit, Huber's counsel complained of several rulings against Huber, and asserted that these rulings and comments by the judge about the rulings showed the judge was biased in favor of Rohrig's effort to remove alcohol use from the case and that as a result, the judge should be recused from the second trial. The ruling on the mistrial was featured in the affidavit.

As we have explained, the record shows that the trial judge's ruling on the motion for mistrial was based on his conclusion that Huber's counsel violated the order in limine excluding any mention of drunk driving and was effectively bringing liability into the action after Rohrig had admitted liability. Allegations of unfavorable rulings alone almost never establish that a judge should be recused. *Id.* In this case, a reasonable person who knew of the circumstances would not question the trial judge's impartiality. See *Gibilisco, supra*. Accordingly, we conclude that the district court judge did not abuse his discretion when he denied the motion for recusal.

3. The District Court Did Not Err When It Excluded Evidence and Prohibited the Impeachment of Rohrig's Character

Huber claims Rohrig's counsel opened the door to Rohrig's character when counsel stated during voir dire that Rohrig

was a "wonderful" veterinarian and that "no one loves pets more than Dr. Rohrig," and stated in his opening statement that he was pleased to be able to represent Rohrig at trial. Huber claims that she should have been allowed to impeach Rohrig's character and that the district court erred when it excluded certain evidence and prohibited Huber from impeaching Rohrig's character.

[9,10] 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. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). 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. *Id.* "Opening the door" is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue. See *id.*

The admission or exclusion of evidence is generally reviewed for an abuse of discretion. See *id.* We determine that Rohrig did not "open the door" to his character and that, therefore, the court did not abuse its discretion when it denied Huber's request to admit character evidence. The statements outlined above were not sufficient to put character at issue in this trial. The issue at trial was the amount of damages owed to Huber. The statements that Rohrig liked pets and that his attorney was pleased to represent him did not make Rohrig's character relevant or require some response or rebuttal. Rohrig's character did not become relevant to the jury's decision to determine the damages Huber had incurred. Indeed, for completeness, we note that Rohrig did not testify. Accordingly, the district court did not err when it excluded evidence offered to impeach Rohrig's character.

4. The District Court Did Not Err When It Denied Huber's Motion to Compel the Deposition of Taylon

Huber claims that the district court erred when it denied her motion to compel the completion of Taylon's videotaped

deposition testimony. During discovery, Huber did not complete the deposition of Taylon, Rohrig's medical expert, evidently due to Taylon's schedule. When the deposition could not be rescheduled, Taylon agreed to appear at the trial and testify. Notwithstanding Taylon's scheduled appearance at trial, Huber moved to compel the completion of the deposition. The motion was overruled.

On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*. The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id*.

Although we understand Huber's interest in a completed pretrial deposition, Huber has failed to show that the court's denial of her motion to compel deprived her of a substantial right. Taylon testified at trial, and Huber was afforded the opportunity to—and did in fact—cross-examine him. Huber has not established that her inability to depose Taylon deprived her of a substantial right. Accordingly, the district court did not err when it denied Huber's motion to compel.

5. The District Court Erred When It Denied Huber's Request for the Juror Questionnaires

Huber claims that the district court erred when it denied her request for the juror questionnaires, in violation of Neb. Rev. Stat. § 25-1629 (Reissue 2008). At trial, Huber explained that she wanted access to the questionnaires as an aid to effective voir dire and jury selection. At oral argument, counsel for Huber clarified that the questionnaires she requested were the questionnaires completed by jurors pursuant to Neb. Ct. R. § 6-1003.

Section 25-1629 states:

> The jury commissioner shall immediately upon deriving the proposed juror list mail a juror qualification form to each proposed juror pursuant to section 25-1629.01 and investigate the persons whose names are found on

> the list. If he or she finds that any one of them is not possessed of the qualifications of petit jurors as set forth in section 25-1601 or is excluded by the terms of section 25-1601, he or she shall strike such name from the list and make a record of each name stricken, which record shall be kept in his or her office subject to inspection by the court and attorneys of record in cases triable to a jury pending before the court, under such rules as the court may prescribe. The list as thus revised shall constitute the list from which petit jurors shall be selected, until such list shall have been exhausted in the manner hereinafter set forth or until otherwise ordered by the judge or judges. Unless otherwise ordered by the judge or judges, the jury commissioner shall immediately upon completing the revision of the list, in the presence of a judge for such district, select at random the names of eighty persons possessing the qualifications for grand jurors as set out in section 25-1601. When no grand jury list is selected, the judge or judges may at any time order the selecting of a grand jury list. This list shall constitute the list from which grand jurors shall be chosen. Any judge of the district court shall upon the request of any person entitled to access to the list of names stricken, if satisfied that such request is made in good faith, direct the jury commissioner to appear before the judge at chambers and in the presence of the complaining person state his or her reasons for striking the name specified in the request.

Section 6-1003 provides:

> The CONFIDENTIAL JUROR INFORMATION section of the Nebraska Juror Qualification Form, Part VII, shall be detachable and shall be removed by the clerks of the district and county courts or jury commissioners and stored in a confidential manner by such clerk or commissioner until the end of the jury term. No one shall be permitted access to these detached sections except as set forth in this rule. The clerk or commissioner shall deliver the detached confidential information to an approved research agent of the Nebraska Supreme Court. The Nebraska Minority and Justice Implementation Committee (NMJIC)

> and the Nebraska Racial Justice Initiative (NRJI) have been approved by the Nebraska Supreme Court as such research agents. The confidential juror information may also be maintained, stored, and transmitted to the approved research agent by electronic means by any court which possesses such capabilities.

By its language, § 25-1629 does not explicitly require that Huber be given access to the juror questionnaires. However, based on the court rule quoted above regarding the juror questionnaires, we conclude that an opportunity to review the questionnaires such as Huber sought is contemplated. See Neb. Ct. R. §§ 6-1001 to 6-1004. In particular, we refer to § 6-1003, which provides that part VII of the questionnaire should be detachable and maintained in a confidential manner. Given the language explicitly making part VII confidential, it logically follows that the remainder of the questionnaire is not confidential. Accordingly, we conclude that the information other than part VII should be made available upon request to an attorney involved in the jury trial.

Our understanding of the Nebraska provisions referred to above is consistent with the reasoning of other courts. Other courts that have addressed when such questionnaires can be given to the media have concluded that voir dire begins with the juror questionnaires and that unless good cause is established, voir dire should be open to the public. See, e.g., *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (presumptive right of access under First Amendment extends to voir dire examination of prospective jurors); *State ex rel. Beacon Journal v. Bond*, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002) (explaining that because purpose behind juror questionnaires is merely to expedite examination of prospective jurors, it follows that such questionnaires are part of voir dire process); *Copley Press v. San Diego County*, 228 Cal. App. 3d 77, 89, 278 Cal. Rptr. 443, 451 (1991) ("[t]he fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import").

[11] Based on the foregoing, the district court erred when it denied Huber's request to review the juror questionnaires.

However, error that does not prejudice the party does not provide grounds for relief on appeal. See *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). We determine that Huber was not prejudiced and that the ruling constituted harmless error, because Huber was able to conduct in-person voir dire of the jurors and was able to obtain information comparable to that provided on the juror questionnaires. Therefore, although the district court erred when it denied Huber access to the juror questionnaires, this ruling was harmless error.

6. Huber Waived Her Challenge to Rohrig's Expert's Testimony Regarding the Results of the Psychological Examination When She Did Not Object to the Introduction of the Testimony at Trial

Huber claims that the district court erred when it granted Rohrig's Rule 35 motion to compel Huber to submit to the psychological clinical interview portion of the neuropsychological examination with Rohrig's expert. Rule 35 reads in part as follows:

> Order for Examination. When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by one or more physicians, or other persons licensed or certified under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Huber contends that her mental condition was not "in controversy" and that Rohrig did not show "good cause" for requesting the examination. Huber claims that the damages she sought were based on cognitive deficits, which included difficulties with memory and concentration, but that the damages were not based on emotional pain and suffering. Huber contends that the decision not to request damages based on emotional pain

and suffering was not an oversight but an intentional decision made in part to avoid an indepth psychological examination by Rohrig.

Huber directs our attention to a portion of the record quoted below made during her deposition in which counsel agreed to the parameters of Huber's damages claim.

> [Rohrig's counsel:] Were there any, I guess, psychological symptoms that you've had to deal with since the accident that you would relate to the accident?
>
> [Huber's counsel]: Hang on a second. Let me interpose an objection. You're aware that our Complaint does not include a claim for emotional distress, aren't you?
>
> [Rohrig's counsel]: Not off the top of my head, I wasn't.
>
> [Huber's counsel]: We have not included a claim for emotional distress.
>
> [Rohrig's counsel]: Well, let me ask you as long as I have — I mean, in terms of — I'm running into things like anxiety, things like that in the medical records. I mean, are those claims you guys are going to be making?
>
> . . . .
>
> [Huber's counsel]: The head injury symptoms that have to do with concentration, memory those things like that — I don't think you're seeing that much anxiety in the post-accident records. The — yes, we're going to be looking at the head injury symptoms that have to do with her memory, concentration, stuff that came up in [Huber's expert's] evaluation that we talked about.
>
> [Rohrig's counsel]: Okay.
>
> [Huber's counsel]: But as far as anxiety, depression, PTSD, no.
>
> [Rohrig's counsel]: Well if we're clear that there's not going to be claims made for those, I don't need to ask anything about them.
>
> [Huber's counsel]: Right, and I don't know a neater way to make a line on that other than to say that —
>
> . . . .
>
> [Huber's counsel]: . . . I don't know what is the appropriate term.

> [Rohrig's counsel]: I suppose we could say the only mental symptoms would be the cognitive —
>
> [Huber's counsel]: Thank you, as opposed to emotional.

In opposing Rohrig's Rule 35 motion, Huber directed the district court to this exchange and the fact that Rohrig had taken Huber's deposition and had the transcript thereof. Huber also advised the district court of the fact that Rohrig had access to Huber's medical and educational records.

Rohrig asserts that Huber's mental condition was "in controversy" and that he established "good cause" to perform the clinical examination. Rohrig's Rule 35 showing consisted of arguments and a letter by Huber's counsel. Rohrig argues that the district court did not err in compelling Huber to complete the clinical interview portion of the neuropsychological examination because her mental condition was "in controversy." In support of this contention, Rohrig points to the portion of Huber's complaint that alleged she experienced pain and suffering, including mental anguish. Rohrig also argues that Huber's claim that she suffered a closed-head injury brought her mental condition into controversy. Rohrig argues that he established "good cause" for requesting the evaluation based on the fact that Huber's own expert completed a neuropsychological evaluation, including a psychological clinical interview. Rohrig argues that to be on equal footing with Huber, it was necessary that he have his own expert perform a psychological examination.

[12] We recognize that it is possible that the determination that a physical or mental condition is "in controversy" and that "good cause" exists for an examination may be based on the pleadings alone. However, generally, the requirements of "in controversy" and "good cause" contained in Rule 35 are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that "good cause" exists for ordering the examination. See *County of Hall ex rel. Tejral v. Antonson*, 231 Neb. 764, 437 N.W.2d 813 (1989). See, also, *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234,

13 L. Ed. 2d 152 (1964); *Neuman v. Neuman*, 377 A.2d 393 (D.C. 1977).

[13] To obtain discovery under Rule 35, the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing, but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under Rule 35. See, *Schlagenhauf, supra*; *Anderson v. Anderson*, 470 So. 2d 52 (Fla. App. 1985). For the reasons recited below, we determine that the district court abused its discretion when it granted Rohrig's Rule 35 motion. However, we also conclude that because Huber did not object at trial to the testimony and written evidence surrounding the results of the examination, she did not preserve the pretrial ruling for appellate review.

(a) "In Controversy" Requirement

[14] In *Schlagenhauf*, the U.S. Supreme Court stated that a routine allegation of negligence in a personal injury action does not put a party's mental condition "in controversy" for purposes of the federal counterpart to our Rule 35. Various courts have addressed when a party's mental condition becomes "in controversy" for Rule 35 purposes. Courts commonly conclude that plaintiffs can be ordered to undergo mental condition examinations where one or more of the following claims are present:

> (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff's concession that his or her mental condition is in controversy within the meaning of [Fed. R. Civ. P.] 35.

Stuff v. Simmons, 838 N.E.2d 1096, 1102 (Ind. App. 2005). See, also, *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995); *Gepner v. Fujicolor Processing*, 637 N.W.2d 681 (N.D. 2001).

In the course of these proceedings, Huber has not put her mental condition at issue, and Rohrig's claim that Huber's

mental condition is "in controversy" is not supported by the record. Other than Huber's generalized claims for pain and suffering contained in the complaint, Huber has not made a specific request for damages based on emotional injuries, and we are mindful that such general claims in pleadings are ordinarily not sufficient grounds to put one's mental condition "in controversy" for purposes of Rule 35. See, e.g., *Schlagenhauf, supra*; *Stuff, supra*.

In the course of these proceedings, Huber indicated that her cognitive condition, such as her memory and ability to learn and concentrate, was "in controversy"; however, she specifically excluded from the action any damages based on her emotional well-being and psychological health. At Huber's deposition, the parties acknowledged a distinction between cognitive and emotional symptoms and it was made clear that Huber was not claiming damages for emotional distress or anxiety. By placing her cognitive abilities at issue, Huber did not place all aspects of her mental health "in controversy."

Huber claimed certain cognitive issues resulted from the physical trauma of the accident, and she sought damages for those injuries. Events that occurred many years ago in Huber's past, which were the subject of the psychological clinical examination ordered by the court, were not relevant to the damages occasioned by the accident sought in this case. Huber's mental condition as understood under Rule 35 was not "in controversy," and the district court erred to the extent it found to the contrary.

(b) "Good Cause" Requirement

[15] The U.S. Supreme Court has explained that in determining whether there is good cause for an evaluation,

> "'the court must decide . . . in every case, whether the motion requesting . . . the making of a physical or mental examination adequately demonstrates good cause. The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by [Fed. R. Civ. P.] 26(b). Thus, by adding the words ". . . good

> cause . . . ,' the Rules indicate that there must be greater showing of need under [Rule 35] than under the other discovery rules.' "

Schlagenhauf v. Holder, 379 U.S. 104, 117-18, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). The Court added that "what may be good cause for one type of examination may not be so for another." *Id.*, 379 U.S. at 118. A movant's ability or inability to obtain the desired information without the requested examination is also relevant to a court's decision whether to order an examination under Rule 35. See, e.g., *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990) (finding good cause was not shown where defendant already had information it sought to support its position); *Stanislawski v. Upper River Services, Inc.*, 134 F.R.D. 260 (D. Minn. 1991) (concluding good cause was not shown to justify vocational examination where defendant had been allowed access to all of plaintiff's medical records, had deposed plaintiff, and had been provided with results of tests performed by plaintiff's vocational expert).

Rohrig claims that "good cause" for requesting the psychological clinical examination of Huber was shown, based primarily on the fact that Huber's expert had completed a neuropsychological examination that included a psychological clinical interview. Rohrig posits that without Rule 35 relief, he would be denied a level playing field if his expert were denied an opportunity to perform a psychological examination and Huber's expert's psychological examination were to come into evidence. However, the solution for Rohrig's dilemma was not to gain permission for an unwarranted examination, but, rather, to object to the attempted admission of Huber's expert's psychological examination at trial and, if unavailing, to appeal or cross-appeal the ruling admitting such evidence.

It was Rohrig's burden to demonstrate before the district court that he had "good cause" for seeking the Rule 35 examination. However, as Huber noted at the hearing, Rohrig did not proffer evidence other than a letter from Huber's counsel stating that Huber did not intend to submit to the psychological interview. Rohrig did not provide evidence such as an affidavit from his expert that the clinical interview was critical to completion of the cognitive testing. Nor was there evidence

that relying on the medical and other reports supplied to Rohrig by Huber would be insufficient in completing an evaluation of her cognitive abilities.

At Huber's deposition, the parties agreed that Huber's emotional health was not at issue and that the damages sought by Huber related to her cognitive deficits, which were clarified as memory loss and problems with concentration. By limiting the damages claim, Huber sought to avoid a psychological examination. Courts have sometimes characterized a psychological examination as a "'drastic measure.'" *U.S. v. DeNoyer*, 811 F.2d 436, 439 (8th Cir. 1987).

Huber claimed in this case that her cognitive issues resulted from the physical impact she suffered in the accident. Huber supplied Rohrig with the medical records in support of her case, including the neuropsychological examination completed by her expert and her educational records. Given the damages sought by Huber, Rohrig was warranted in obtaining his own testing of Huber's cognitive abilities; however, he did not establish "good cause" for an extensive psychological examination of Huber in general and for an examination delving into Huber's childhood in particular. Accordingly, we conclude that the grant of the motion to compel the examination under Rule 35 was in error, because Rohrig did not establish that Huber's psychological health was "in controversy" and did not establish that he had "good cause" for the psychological examination.

(c) Waiver

Although we conclude that the district court erred when it granted Rohrig's pretrial Rule 35 motion to compel, because Huber did not object to the admission of the evidence containing the results of the clinical examination by Rohrig's expert at trial, she has waived consideration of this ruling on appeal.

In *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003), we considered the circumstance where a trial court overruled a discovery-related pretrial motion that sought to exclude evidence. We stated that to preserve the alleged error for appeal, the movant must object when the particular evidence which

was sought to be excluded by the motion is offered during trial. We stated that if the movant does not object when the evidence is offered at trial, the issue is not preserved for appellate review. *Id*.

[16,17] In *Olson*, we likened the pretrial motion seeking to exclude evidence to a motion in limine and explained that the motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. We explained that it is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. See *id.*, citing *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). Rather, its purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. See *Olson, supra*. We concluded in *Olson* that these motion in limine principles applied to a pretrial motion attempting to exclude evidence as a discovery sanction, and we find that these same principles apply to the instant case.

In this case, after the grant of the motion to compel, Huber did not seek a protective or other order to prevent the information obtained through the clinical psychological examination from being displayed to the jury. At trial, Huber did not object to Rohrig's expert's testimony regarding the results of his psychological examination of Huber. For completeness, we note that the record shows Huber rather than Rohrig offered into evidence the neuropsychological report of Rohrig's expert, including the psychological evaluation portion of the examination. Further, during cross-examination, Huber questioned Rohrig's expert in depth, thereby "displaying" certain of the most sensitive aspects of his report before the jury.

[18] We have stated:

> It is well established that 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, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.

Sturzenegger v. Father Flanagan's Boys' Home, 276 Neb. 327, 342, 754 N.W.2d 406, 423 (2008). A court cannot err with respect to a matter not submitted to it for disposition. See *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2007).

Because Huber did not object at trial to the testimony of Rohrig's expert pertaining to the clinical psychological examination, Huber waived her appellate challenge to the evidence discovered, based on the improper grant of the motion to compel. Because the issue was not preserved for appellate review, the substance of this assignment of error has been waived.

VI. CONCLUSION

We conclude that the district court did not err when it granted Rohrig's motion for mistrial, denied Huber's motion for recusal, denied Huber's request to put in evidence of Rohrig's character, and denied Huber's motion to compel Taylon's deposition. We conclude that it was error to deny Huber's request to review the juror questionnaires but that no prejudice resulted from this ruling. Finally, we conclude that the district court erred when it granted Rohrig's pretrial motion to compel Huber to submit to a pretrial clinical psychological examination; however, because Huber did not object at trial to the admission of the evidence obtained during the examination, Huber did not preserve the issue for appellate review and has waived her challenge to the pretrial order directing she submit to the psychological evaluation.

AFFIRMED.

International Brotherhood of Electrical Workers Local 763 and International Brotherhood of Electrical Workers Local 1483, appellants, v. Omaha Public Power District, appellee.

791 N.W.2d 310

Filed December 3, 2010. No. S-10-025.

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. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.
4. **Labor and Labor Relations: Public Officers and Employees.** The purpose of Neb. Rev. Stat. § 48-824 (Reissue 2004) is to provide public sector employees with the protection from unfair labor practices that private sector employees enjoy under the National Labor Relations Act, by making refusals to negotiate in good faith regarding mandatory bargaining topics a prohibited practice.
5. **Commission of Industrial Relations.** An employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission of Industrial Relations.

Appeal from the Commission of Industrial Relations. Affirmed.

Robert E. O'Connor, Jr., for appellants.

Robert F. Rossiter, Jr., and Cristin McGarry Berkhausen, of Fraser Stryker, P.C., L.L.O., for appellee.

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

McCormack, J.

NATURE OF CASE

International Brotherhood of Electrical Workers Locals 763 and 1483 (collectively IBEW) filed a prohibited practices complaint against Omaha Public Power District (OPPD) on July 7, 2009. The complaint alleged that OPPD's implementation of its "Tobacco-Free Worksite" policy (the Policy) to each existing IBEW collective bargaining agreement (CBA) was a "prohibited practice" under Neb. Rev. Stat. § 48-824(1) and (2)(a), (b), and (f) (Reissue 2004). The issue was tried before the Commission of Industrial Relations (CIR) upon stipulated facts. The parties also stipulated at trial that they were at impasse regarding the negotiation of this issue. The CIR found that OPPD did not commit a prohibited practice in implementing the Policy to the existing agreements. IBEW now appeals.

BACKGROUND

The organizations that make up IBEW are labor organizations as defined in Neb. Rev. Stat. § 48-801(6) (Cum. Supp. 2010). OPPD is a political subdivision of the State of Nebraska and an employer as defined in § 48-801(4). IBEW represents two different bargaining units of employees employed by OPPD; each has a separate CBA with OPPD.

The term of both CBA's is June 1, 2007, to May 31, 2010. One of the CBA's provides:

> Other rules and practices, pertaining to working conditions, etc., which obtained on the effective date of the Agreement and which are not in conflict with any of the other provisions of the Agreement, shall remain in effect until revised or discontinued by mutual consent of the Company and the Union or the employees concerned.

In February 2008, the Governor signed the Nebraska Clean Indoor Air Act (the Act), which was codified under Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009). The Act prohibits smoking in enclosed indoor workspaces.[1] Under § 71-5727, the Act defines smoking as the lighting of any cigarette, cigar, pipe, or other smoking material or the possession of any

[1] § 71-5717.

lighted cigarette, cigar, pipe, or other smoking material, regardless of its composition. As a result of the Act's implementation, on May 28, 2008, OPPD notified its three unions of its plan to implement a new 2009 policy concerning a tobacco-free worksite. The parties agreed the implementation of the Act was a mandatory subject of collective bargaining, and in February 2009, OPPD opened up negotiations regarding the new policy. The International Association of Machinists and Aerospace Workers Local Lodge 31, which is the other union that represents OPPD employees, was a party to the negotiations at issue, but declined to join in the proceeding below.

On February 26, 2009, the parties held the first of four negotiation meetings. OPPD began negotiations by presenting the unions with a draft memorandum of understanding. On March 12, the parties met a second time, and the unions presented a joint union proposal, which contained several changes, including an extended implementation date, designated smoking areas, an exception for smokeless tobacco, and a provision regarding the use of cessation medication and sick leave for the purposes of quitting smoking. The parties held a third meeting on March 19, where OPPD presented its counterproposal. The counterproposal reflected OPPD's concessions regarding the use of tobacco during "'unpaid time'" and smoking cessation medication and use of sick leave for the purpose of quitting smoking.

On April 13, 2009, the parties met for a fourth and final time and OPPD presented its final proposal. OPPD sent its last, best, and final offer as a memorandum of understanding to all of the unions on April 17. The letter instructed the unions to notify OPPD of their position by April 30. IBEW declined to accept the final offer. OPPD thereafter notified all three unions that it would unilaterally implement the Policy on June 1, and the Policy was implemented on that date.

The Policy effectively prohibits the use of tobacco products within all company-owned and/or company-occupied buildings and vehicles, including but not limited to all facilities, vehicles, parking lots, parking garages, and private and public land where OPPD is performing work, as well as all sidewalks which OPPD maintains. The Policy defines tobacco products as

"all products used in the form of cigarettes, pipes, cigars and/or any smokeless form." The Policy also prohibits leaving the worksite to use tobacco products and using tobacco products while walking to or from an employee's parked car on OPPD property. The Policy states that if OPPD has reasonable cause to believe an employee is in violation of these prohibitions, OPPD will take corrective action which could include disciplinary action.

IBEW filed a prohibited practices complaint against OPPD. The complaint alleged that OPPD's implementation of the Policy to the existing CBA was a prohibited practice under § 48-824(1) and (2)(a), (b), and (f). The issue was tried before the CIR upon stipulated facts. The parties also stipulated at trial that they were at impasse regarding the negotiation of this issue. The CIR determined that the implementation of the Policy following good faith bargaining to impasse did not constitute a violation of § 48-824, and dismissed IBEW's claim. IBEW now appeals.

ASSIGNMENTS OF ERROR

IBEW assigns that the CIR erred in (1) failing to consider the existence of a valid, binding CBA, (2) relying upon inapplicable case law regarding impasse at contract expiration, and (3) allowing a public employer to unilaterally modify a CBA during its term after bargaining to impasse on a mandatory subject of bargaining.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-825(4) (Reissue 2004), 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 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]

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[2] See *Central City Ed. Assn. v. Merrick Cty. Sch. Dist., ante* p. 27, 783 N.W.2d 600 (2010).

[2] In an appeal from an order by the CIR 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.[3]

ANALYSIS

[3] Both IBEW and OPPD elected to engage in the collective bargaining process on the present issue. While a unilateral change in a term or condition of employment contained in a CBA may be a breach of contract,[4] the CIR lacks jurisdiction to hear breach of contract claims.[5] IBEW chose to bring this action before the CIR and alleged only that OPPD committed a prohibited practice under Nebraska's Industrial Relations Act (IRA). An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings.[6] Therefore, we will address only whether the implementation of the Policy in this instance was a prohibited practice under § 48-824.

The parties stipulated to the fact that OPPD is lawfully entitled to enact, without negotiation, such provisions of the Policy as are consistent with the Act. The Policy, however, exceeds the statutory requirements of the Act. Specifically, the Policy applies to smokeless tobacco and prohibits the use of tobacco products anytime an employee is on company time, is using company property, or is in company facilities. The Act did not require these additional changes to the CBA.

At issue, then, is whether a public employer can modify conditions or terms of employment during the term of a valid CBA after negotiating to impasse in good faith on a mandatory subject of bargaining, and then unilaterally implementing a change.

IBEW's complaint alleged a violation of § 48-824(1) and (2)(a), (b), and (f) when OPPD unilaterally implemented the

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[3] *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572, 772 N.W.2d 564 (2009).

[4] *Id.*

[5] See *id.*

[6] *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

Policy after reaching impasse in negotiations with IBEW. On appeal, IBEW relies on general principles of contract law and argues that it is impermissible to "insist to impasse, and then implement, a change during the term of the [CBA]."[7] OPPD argues that it did not commit a prohibited practice, because it did not refuse to bargain in good faith and because the parties did in fact reach impasse prior to implementation of the Policy. We agree and affirm the decision of the CIR.

[4] Unilateral implementation of final offers has consistently been discussed in relation to the duty to negotiate in good faith.[8] This is an established tenet of labor law and limits the scope of our analysis to whether OPPD's unilateral implementation of the Policy violates its duty to bargain in good faith. Section 48-824(1) states that it is a prohibited practice for an employer to refuse to negotiate in good faith with respect to mandatory topics of bargaining. The purpose of § 48-824 is to provide public sector employees with the protection from unfair labor practices that private sector employees enjoy under the National Labor Relations Act (NLRA), by making refusals to negotiate in good faith regarding mandatory bargaining topics a prohibited practice.[9]

[5] Prior to deciding the present case, the CIR had not recognized an employer's right to unilaterally implement its final offer upon reaching impasse during the pendency of a CBA. However, the CIR had previously determined that when negotiating upon expiration of a CBA or at its inception, an employer may unilaterally implement a final offer if it does so after impasse and before any proceeding has been initiated before

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[7] Brief for appellants at 21.

[8] See *Labor Board v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). See, also, *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *review denied sub nom. American Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[9] See Introducer's Statement of Intent, Committee Statement, L.B. 382, Committee on Business and Labor, 94th Leg., 1st Sess. (Feb. 6, 1995).

the CIR.[10] In *FOP Lodge 41 v. County of Scotts Bluff*,[11] the CIR determined that an employer may lawfully implement changes in terms and conditions of employment which are mandatory topics of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the CIR. If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.[12] The CIR here appropriately extended this rule to include the implementations of final offers during the term of a CBA.

We have previously noted that decisions under the NLRA are helpful in interpreting the IRA, but are not binding.[13] Under the NLRA, the general rule is that an employer has the right upon impasse to implement its final offer with respect to a mandatory subject of bargaining.[14] This has been applied to negotiations taking place during the term of a CBA.[15]

Section 8(a)(5) of the NLRA, codified at 29 U.S.C. § 158(a)(5) (2006), requires that an employer bargain with the union before effecting changes in terms and conditions of employment.[16] But if the parties reach good faith impasse in negotiations, the employer generally does not violate § 8(a)(5)

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[10] See, *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984), *affirming* 5 C.I.R. 441 (1982); *General Drivers & Helpers Union, Local No. 554 v. Saunders County, Nebraska*, 6 C.I.R. 313 (1982).

[11] *FOP Lodge 41 v. County of Scotts Bluff*, 13 C.I.R. 270 (2000).

[12] *Id.*

[13] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[14] *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, 939 F.2d 1392 (10th Cir. 1991).

[15] See *id.*

[16] *Id.*, citing *Taft Broadcasting Co., supra* note 8. See 29 U.S.C. § 158(a)(5).

by thereafter implementing changes consistent with those proposed to the union.[17]

> "'That the employer is free to implement changes after reaching good-faith impasse is another way of expressing the axiom that the employer's duty to bargain over proposed changes does not imply a duty to agree to the union's counterproposals or to make a concession. . . . The employer's duty to bargain does not give the union a right to veto the proposed changes by withholding consent. If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations.'"[18]

Section 8(d) of the NLRA imposes a mutual obligation on the employer and the representative of employees to bargain in good faith.[19] Nebraska's IRA does not contain a provision similar to § 8(d) of the NLRA. However, as previously stated, under § 48-824(1), it is a prohibited practice for a party to refuse to negotiate in good faith. Therefore, the duty to negotiate in good faith is mandated under both statutory schemes.

The IRA's good faith bargaining requirements provide a statutory check which supports the findings of the CIR in this case. The duty to negotiate in good faith on mandatory topics of bargaining is to be enforced by the application of § 48-824(1). Good faith bargaining requirements ensure that an employer will not simply "go through the motions" of discussing mandatory topics of bargaining and then take unilateral action by implementing its own terms. This requirement, coupled with the requirement that the parties reach a genuine impasse on the issue, ensures that an employer will not achieve its terms in bad faith.

NLRA cases which have recognized an employer's right to unilaterally implement changes to conditions of employment at

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[17] *Id.*

[18] *Colorado-Ute Elec. Ass'n, Inc. v. N.L.R.B.*, *supra* note 14, 939 F.2d at 1404 (emphasis omitted).

[19] 29 U.S.C. § 158(d).

impasse have reasoned that this right is counterbalanced by a union's right to strike and the statutory duty to bargain in good faith under § 8(d). Employees of a Nebraska public power district are not permitted to strike under the IRA.[20] However, employees have been provided other protections in lieu of the right to strike. Namely, employees are entitled to initiate prohibited practices proceedings before the CIR. Further, the CIR has jurisdiction over certain "industrial disputes involving governmental service."[21] As used in the IRA, the term "industrial dispute" includes "any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or refusal to discuss terms or conditions of employment."[22] When a party brings an industrial dispute, the CIR has the power to establish or alter conditions of employment.[23] As stated above, an employer may not unilaterally implement its final offer after a petition has been filed with the CIR. The union, therefore, may bring an industrial dispute when the parties have reached impasse on a mandatory subject of bargaining. This gives the union the power to ask the CIR to establish appropriate working conditions under the circumstances and effectively bars the employer from unilaterally implementing its final offer. These protections adequately counterbalance the employer's right to implement its final offer when impasse is reached.

Both parties agree that the Policy at issue is a mandatory topic of bargaining. The parties have stipulated that OPPD bargained in good faith and that negotiations reached a genuine impasse. The changes implemented by OPPD were contained in preimpasse proposals, and the implementation occurred before any petition was filed with the CIR. The facts of this case support the findings of the CIR and are not contrary to

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[20] § 48-801 and Neb. Rev. Stat. § 48-802 (Reissue 2004).

[21] Neb. Rev. Stat. § 48-810 (Reissue 2004).

[22] § 48-801(7).

[23] Neb. Rev. Stat. § 48-818 (Reissue 2004).

law. Recognizing an employer's right to implement changes unilaterally under the circumstances described above does not adversely affect the policy behind the IRA. We therefore affirm.

CONCLUSION

For the reasons stated above, we affirm the order of the CIR.

AFFIRMED.

STEPHAN, J., not participating.

IN RE TRUST OF LEO A. HRNICEK, ALSO KNOWN AS L.A. HRNICEK, M.D., DECEASED. ADRIENNE H. BRIETZKE, APPELLANT, V. FIRST NATIONAL BANK NORTH PLATTE, APPELLEE.

792 N.W.2d 143

Filed December 3, 2010. No. S-10-192.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code 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.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Contracts: Equity.** The right of retainer lies in equity.
5. **Limitations of Actions: Judgments.** It is axiomatic that a court's order is not subject to a statute of limitations defense.

Appeal from the County Court for Morrill County: RANDIN ROLAND, Judge. Affirmed.

Paul E. Hofmeister and Joseph A. Kishiyama, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellant.

John K. Sorensen, of Sorensen, Mickey & Hahn, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

First National Bank North Platte (FNBNP), as successor trustee of the trust of Leo A. Hrnicek, brought an action seeking to retain proceeds of the trust due to Adrienne H. Brietzke. The county court found Brietzke in contempt and otherwise granted FNBNP's request. Brietzke appeals. The primary issue on appeal is whether FNBNP can recover amounts owed to the trust by a beneficiary by retaining trust proceeds owed to that beneficiary. We affirm.

FACTUAL BACKGROUND

Leo A. Hrnicek and his wife had six children. In 1995, Hrnicek loaned $85,000, at 7-percent interest, to his daughter, Brietzke, and her husband. The loan was to be repaid beginning on April 1, 1995, over 15 years, for a total of 180 payments of $764.01 each. According to the terms of the loan, the last payment was to be made on March 1, 2010.

Hrnicek died on November 2, 1997. Upon his death, Hrnicek bequeathed all his property to the trustees of the "L. A. Hrnicek, M.D. Living Trust," dated May 30, 1997. Included in this property was the promissory note reflecting the loan from Hrnicek to Brietzke.

It appears that family drama ensued after Hrnicek's death, and litigation followed. On April 23, 2003, the county court approved a settlement entered into by various members of the family. That settlement provided that Brietzke and her cotrustee would both resign as trustees, to be replaced by FNBNP. In addition, Brietzke, whose counsel was a signatory to this settlement, "acknowledge[d] that she is indebted to [the] Trust," and that she agreed to "pay such debt in full according to the terms of the note." According to the record, payment on the loan had last been received from Brietzke on April 18, 2002.

Despite her promise to repay, Brietzke made no further payments on the loan. Thereafter, on June 1, 2009, FNBNP filed a motion asking the court to approve "retainage of trust distribution" otherwise owed to Brietzke on the ground that she had

not repaid amounts due to the trust under the court's April 23, 2003, order. Brietzke objected. Then on July 13, 2009, FNBNP filed an application with the county court asking that Brietzke be found in contempt for failing to abide by the court's order to repay the loan. FNBNP asked that the court order Brietzke to purge the contempt by repaying the principal and interest owed or, alternatively, allowing FNBNP to purge the contempt by withholding distributions due Brietzke under the terms of the trust.

A hearing was held on August 26, 2009, on both FNBNP's motion and its contempt application. At that hearing, a representative for FNBNP indicated that Brietzke had made no payments since April 18, 2002, had received about $103,000 in distributions under the trust, and could expect about $350,000 more before the trust was closed. The representative indicated that letters requesting repayment of the loan had been sent to Brietzke's counsel.

On September 28, 2009, following the hearing and prior to the court's decision, Brietzke filed a motion for distribution of the proceeds of the trust. On February 3, 2010, the county court found Brietzke in contempt of court and allowed FNBNP to "retain sufficient funds from any future distributions . . . to fully satisfy the outstanding balance of the promissory note owed to the trust in the amount of $55,600.11, plus per diem interest accumulating at a rate of $10.67 from April 18, 2002." Brietzke appeals.

ASSIGNMENTS OF ERROR

Brietzke assigns that the county court erred in (1) allowing FNBNP to retain funds from her distribution to repay the loan owed the trust and (2) calculating the amount due, since recovery of all or a portion of the amount due is barred by the applicable statute of limitations.

STANDARD OF REVIEW

[1-2] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.[1] When reviewing

[1] See *In Re Estate of Failla*, 278 Neb. 770, 773 N.W.2d 793 (2009).

a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[3] In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

ANALYSIS

Retainer.

In her first assignment of error, Brietzke assigns that the county court erred in allowing FNBNP to retain, or offset, from her distribution from the trust the unpaid amount of her debt owed to the trust, plus interest. Brietzke argues that while the probate code allows for such retention, the trust code makes no specific reference to this type of remedy.

The probate code does allow for retention:

> Unless a different intention is indicated by the will, the amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.[4]

This rule was the common-law rule.[5] And, as is noted by Brietzke, there is not a similar statute in Nebraska's trust code.

[4] However, Neb. Rev. Stat. § 30-3806 (Reissue 2008), a part of Nebraska's trust code, provides that "[t]he common

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[2] *Id.*

[3] *In re Estate of Matteson*, 267 Neb. 497, 675 N.W.2d 366 (2004).

[4] Neb. Rev. Stat. § 30-24,101 (Reissue 2008).

[5] *In re Estate of Williams*, 148 Neb. 208, 26 N.W.2d 847 (1947); *Nelson v. Janssen*, 144 Neb. 811, 14 N.W.2d 662 (1944); *Fischer v. Wilhelm*, 139 Neb. 583, 298 N.W. 126 (1941); *Stanton v. Stanton*, 134 Neb. 660, 279 N.W. 336 (1938); *First Trust Co. v. Cornell*, 114 Neb. 126, 206 N.W. 749 (1925).

law of trusts and principles of equity supplement the Nebraska Uniform Trust Code, except to the extent modified by the code or another statute of this state." And as we noted in *Fischer v. Wilhelm*,[6] the right of retainer lies in equity.

Moreover, the Restatement (Second) of Trusts also supports the conclusion of the county court that FNBNP can retain a portion of Brietzke's distribution. Section 251A provides that

> [i]f a testator leaves property in trust and a beneficiary of the trust was indebted to the testator, the interest of the beneficiary in the trust estate is subject to a charge for the amount of his indebtedness, unless the testator manifested an intention to discharge the debt, or manifested an intention that the beneficiary should be entitled to enjoy his interest even though he should fail to pay his indebtedness.[7]

There is nothing in this record that would indicate any contrary intention.

This general rule has been relied upon again and again in trust cases in other jurisdictions—some citing to the Restatement and others to common law.[8] And in Minnesota, the Court of Appeals has twice implied, without discussion, that the Minnesota version of the probate code, which is codified in Nebraska at § 30-24,101, is applicable to trusts as well.[9]

We conclude that the retainer of a distribution is a valid, equitable remedy available to trustees in situations such as this. It was therefore not error for the county court to order such in this case. Brietzke's first assignment of error is without merit.

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[6] *Fischer, supra* note 5.

[7] Restatement (Second) of Trusts § 251A at 634 (1959).

[8] *Hurtig v. Gabrielson*, 525 N.W.2d 612 (Minn. App. 1995); *Matter of Will of Cargill*, 420 N.W.2d 268 (Minn. App. 1988); *In re Estate of Watters*, 245 Or. 477, 422 P.2d 676 (1967); *County Nat. Bank etc. Co. v. Sheppard*, 136 Cal. App. 2d 205, 288 P.2d 880 (1955); *In re Trust of Lunt*, 235 Iowa 62, 16 N.W.2d 25 (1944); *Sheridan v. Riley*, 32 Backes 288, 133 N.J. Eq. 288, 32 A.2d 93 (1943). See, also, *Brown et al. v. Sperry*, 182 Miss. 488, 181 So. 734 (1938) (utilizing rule in probate case).

[9] *Hurtig, supra* note 8; *Matter of Will of Cargill, supra* note 8.

Statute of Limitations.

Brietzke next assigns that the county court erred in ordering the particular amount retained from her distribution, because a portion of the principal and interest could no longer be recovered, as it was barred by the applicable statute of limitations.[10] Brietzke argues that any payment and accompanying interest due more than 5 years earlier is not recoverable.

[5] Brietzke overlooks the fact that the note signed by her and evidencing her obligation to pay was reduced to a judgment when she acknowledged that debt and agreed to pay it in the 2003 settlement, which settlement was approved by the county court. It is axiomatic that a court's order is not subject to any limitations defense.[11] Moreover, as was conceded by Brietzke's counsel at oral arguments, a court's exercise of its contempt powers also would not be subject to any statute of limitations.

Brietzke's second assignment of error is also without merit.

Calculation of Amount Due.

We finally note that at oral argument before this court, Brietzke took issue with the calculation of the amount due, and thus to be retained, from Brietzke's distribution from the trust. But Brietzke did not assign this as error, nor argue this in her brief. We therefore decline to address it further.

CONCLUSION

Retainer is a valid, equitable remedy available to the trustee in this case. And the trust's right of retainer is not barred by any statute of limitations. The decision of the county court is therefore affirmed.

AFFIRMED.

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[10] See Neb. Rev. Stat. § 25-205 (Reissue 2008).

[11] See *id.*

KNIGHTS OF COLUMBUS COUNCIL 3152 ET AL., APPELLANTS, V. KFS BD, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

791 N.W.2d 317

Filed December 10, 2010. No. S-09-225.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.
3. ____: ____. When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Securities Regulation: Federal Acts: Courts: Jurisdiction.** Federal courts have exclusive jurisdiction over private suits brought for violations under the Securities Exchange Act of 1934. And they also have exclusive jurisdiction over suits in equity or in law to enforce any liability or duty created by the act or the rules and regulations thereunder. But except for specified actions, the rights and remedies provided under the act are in addition to any and all other rights and remedies that may exist at law or in equity.
5. **Actions: Securities Regulation: Federal Acts: Pleadings.** Investors cannot plead around the lack of a private cause of action for violations of federal securities law by captioning their claim as a common-law claim.
6. **Securities Regulation: Federal Acts: Damages.** The broker-dealer record-keeping requirements under the Securities Exchange Act of 1934 do not provide a private damage remedy for violations.
7. **Negligence: Fraud: Proof.** For both negligent and fraudulent misrepresentation, the plaintiff must be a recipient of the misrepresentation to show reliance.
8. **Contracts: Fraud.** A person has a duty to disclose information to another in a transaction when necessary to prevent his or her partial or ambiguous statement from being misleading. But a plaintiff must have received the representation before the plaintiff can show that a defendant had a duty to disclose additional facts.
9. **Fraud.** Mere silence cannot constitute a misrepresentation absent a duty to disclose information.
10. ____. When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent.
11. ____. Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.

12. ____. To reveal some information on a subject triggers the duty to reveal all known material facts.
13. **Fraud: Intent.** An ambiguous statement is fraudulent if made with the intent that it be understood in its false sense or with reckless disregard as to how it will be understood.
14. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.

Appeal from the District Court for Otoe County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

J.L. Spray and Randall V. Petersen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

James M. Bausch and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee KFS BD, Inc.

Joseph E. Jones and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee Mutual of Omaha Insurance Company.

Daniel E. Klaus, of Rembolt Ludtke, L.L.P., for appellees Reid D. Houser and Jeffrey N. Sime.

Gail S. Perry and Derek C. Zimmerman, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees Richard A. Witt and Kenneth R. Cook.

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

CONNOLLY, J.

The appellants are former customers of Rebecca Engle, a stockbroker formerly employed by Kirkpatrick Pettis, the predecessor of KFS BD, Inc. The appellants sued KFS BD, a

Nebraska corporation and Mutual of Omaha company; Mutual of Omaha Insurance Company; and officers of these two firms (collectively the defendants). The appellants alleged claims of vicarious liability, breach of contract, fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment. Their theories of recovery hinged on the following allegations: (1) Kirkpatrick Pettis misrepresented to them and to federal regulators why Kirkpatrick Pettis terminated Engle's employment; and (2) the defendants concealed that Engle was discharged because she violated state and federal securities laws.

The district court sustained the defendants' motions to dismiss all of the claims for failure to state a claim upon which relief could be granted. We affirm in part, and in part reverse.

I. BACKGROUND

1. Complaint's Allegations

(a) General Allegations

Because Kirkpatrick Pettis filed a securities industry form on December 22, 2000, we assume that all of the appellants' allegations are directed at actions taken by Kirkpatrick Pettis. To avoid confusion, we will refer to Kirkpatrick Pettis' conduct. And in analyzing the court's order sustaining the motion to dismiss, we must accept as true the factual statements and reasonable inferences from the appellants' complaint and attached exhibits.[1]

We glean the following from the appellants' complaint. From January 1998 to November 29, 2000, Engle was employed by Kirkpatrick Pettis, a Mutual of Omaha company and KFS BD's predecessor. KFS BD is a wholly owned subsidiary of Mutual of Omaha.

Engle worked in Kirkpatrick Pettis' Nebraska City and Syracuse, Nebraska, offices with Brian Schuster. Kirkpatrick Pettis received numerous customer complaints against her. In the spring of 2000, Kirkpatrick Pettis experienced a "catastrophic

[1] See, *Doe v. Board of Regents, ante* p. 492, 788 N.W.2d 264 (2010); Neb. Ct. R. Pldg. § 6-1110(c).

failure" of its compliance and supervisory obligations. It led to the eventual collapse of the business. Mutual of Omaha's chairman, chief executive officer, and board of directors took "heightened" control of Kirkpatrick Pettis and the supervision of Engle.

Because Engle was difficult to manage and they no longer wished to support the type of business she was doing, Kirkpatrick Pettis discharged her. Engle then affiliated with First Union Securities, and Schuster elected to follow her. Kirkpatrick Pettis decided to close the Nebraska City and Syracuse offices because of Engle's discharge and Schuster's decision to follow her. November 29, 2000, was Engle's last day of employment and the day that Kirkpatrick Pettis closed its offices in Nebraska City and Syracuse.

Engle—while still employed with Kirkpatrick Pettis and with its knowledge—falsely represented to customers that the offices were being closed because of a reduction in the sales force. On November 28, 2000, the day before Engle's discharge, Kirkpatrick Pettis sent a letter to its customers. It stated that it would be closing its Nebraska City and Syracuse offices on November 29. It informed its customers that they would soon be receiving information from Engle and Schuster announcing their affiliation with First Union Securities. The letter did not state a reason for its closing the offices or the reason for Engle's new affiliation. It included a number to call if the customers wished to maintain their business with Kirkpatrick Pettis.

On November 29, 2000, Engle and Schuster sent a letter to customers announcing their affiliation with First Union Securities. The letter stated that although Kirkpatrick Pettis had chosen to close the Nebraska City and Syracuse offices, Engle and Schuster would be keeping them open as their own business: Engle & Schuster Financial Advisory Group of First Union Securities. The letter had the new business name in the letterhead and stated that Kirkpatrick Pettis had been very helpful in making Engle and Schuster's transfer as smooth as possible.

On December 22, 2000, Kirkpatrick Pettis filed a "Form U-5" with the National Association of Securities Dealers (NASD),

now known as the Financial Industry Regulatory Authority, Inc. (FINRA).[2] The Form U-5 is the "Uniform Termination Notice for Securities Industry Registration." The Form U-5 stated that Kirkpatrick Pettis had discharged Engle and stated the reason as a "reduction in sales force." When Kirkpatrick Pettis filed the Form U-5, the defendants knew that Engle had violated securities law and had pending customer complaints. They also knew that these violations were reportable events that Kirkpatrick Pettis should have disclosed on the form.

(b) Allegations Supporting Separate Claims

(i) Fraudulent Misrepresentation

The appellants alleged that in November 2000 and thereafter, Kirkpatrick Pettis knowingly made false statements in its filing with NASD and in letters it sent to the appellants. The false statements were that Engle had left its employment because of a reduction in its workforce and that Engle left its employment because Kirkpatrick Pettis was closing the Nebraska City office. The real reasons were that she was discharged because of customer complaints and her failure to adhere to company, industry, and state standards of conduct. The appellants alleged the defendants intended that the appellants rely on letters sent to them that falsely stated they were closing the Nebraska City office because of a reduction in its sales force. The defendants also intended that the securities regulators rely on these misrepresentations and not commence an investigation. Finally, the defendants intended that the appellants rely on the representations and information made public by regulators.

(ii) Negligent Misrepresentation

This claim rested solely upon the appellants' allegations that Kirkpatrick Pettis supplied false information to NASD on the Form U-5. They alleged that the defendants provided this false information with knowledge that it was intended for the guidance of others and that the following groups would rely on it: current and future investors, securities regulators, and future

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[2] See *Siegel v. S.E.C.*, 592 F.3d 147 (D.C. Cir. 2010).

broker-dealers. The defendants had a public duty to give accurate information and failed to exercise due care or competence to do so. And the appellants were within the class of persons intended to benefit from their duty and had reasonably relied on the information.

(iii) Breach of Contract

The appellants alleged that the defendants breached the new account agreements that each appellant signed when starting an account. Each new account agreement required the defendants to comply with all federal and state securities laws and all NASD bylaws and rules. The defendants breached the agreements when they failed to follow rules requiring them to file a truthful Form U-5 and to supplement information regarding Engle's discharge. Furthermore, the defendants breached their covenant of good faith and fair dealing with the appellants.

(iv) Fraudulent Concealment

The appellants alleged that the defendants owed a duty to their customers to report the true reason for Engle's discharge—her misconduct. Instead, KFS BD "fraudulently concealed the true reason Engle was discharged." Specifically, the appellants alleged that members of Kirkpatrick Pettis' executive committee sent "false and misleading letters" to its customers regarding Engle's discharge and filed the false Form U-5. And they allowed their agents to conceal and misrepresent the true facts. The defendants made these representations with knowledge of the true facts. Because of their concealment, the appellants continued to do business with her.

The appellants alleged that the defendants knew or should have known that because of their conduct, the appellants would be deceived to their detriment through two means. First, as a consequence of their sending letters with false statements to their customers and permitting their agents to conceal and misrepresent facts, the appellants would be unable to ascertain the truth about Engle's conduct. Second, as a consequence of their filing the false Form U-5, NASD and Nebraska's Department of Banking and Finance would not investigate Engle and the appellants would not ascertain the truth about her conduct.

2. District Court's Order Sustaining Defendants' Motions to Dismiss

Each defendant moved to dismiss all the appellants' claims for failure to state a cause of action or because the claim was barred by the applicable statute of limitations. The district court sustained the motions against each claim for failure to state a cause of action.

Regarding the fraudulent misrepresentation claim, the court found that neither the letter Kirkpatrick Pettis sent to customers nor the letter Engle and Schuster sent to customers included a false assertion. The court stated that neither letter gave a reason for Kirkpatrick Pettis' closing of the offices. The court also dismissed the appellants' fraudulent concealment claims. It found that the appellants could not show that the defendants concealed a material fact with the intent that the appellants act in response to the concealment. It reasoned that Kirkpatrick Pettis' letter invited the appellants to maintain their relationship with it, instead of pushing them to follow Engle. The court also concluded that the appellants' fraudulent concealment claim failed because they had not alleged having access to or seeing the Form U-5.

Regarding the negligent misrepresentation claim, the court concluded that the appellants failed to identify any justifiable reliance. It concluded that the appellants had to show that they acted or refrained from acting because of a false representation. And it determined that the claim failed because they failed to allege that they took any action based on the information in the Form U-5.

Finally, the court concluded that the appellants' breach of contract claim failed for two reasons. First, federal courts have held NASD rules and securities exchange rules do not confer a private cause of action for violations. And the appellants had attempted to circumvent these holdings by couching the violation of NASD rules as a breach of contract claim. Second, the appellants had failed to recite or attach the relevant portion of the agreements. Thus, it was impossible to determine whether the new account agreements had merely incorporated securities rules or conferred additional rights and obligations.

II. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in dismissing, with prejudice, their claims of breach of contract, negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment.

III. STANDARD OF REVIEW

[1-3] An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.[3] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[4] When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[5]

IV. ANALYSIS

1. Breach of Contract

The district court dismissed the appellants' breach of contract claim. It relied on cases that held NASD rules and securities exchange rules do not confer a private cause of action for violations. It concluded that the appellants had attempted to circumvent these holdings by couching a violation of NASD rules as a breach of contract claim. The court also concluded that it was impossible for it to determine whether the new account agreements had merely incorporated securities rules or expressly conferred rights and obligations. It stated that the appellants had failed to recite or attach the relevant portion of the agreements.

The appellants contend that it was sufficient to allege that the defendants (1) agreed in the new customer agreements to

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[3] See *Doe, supra* note 1.

[4] See *id.*

[5] See *id.*

comply with all federal and state laws and NASD bylaws and rules and (2) breached these contracts when they failed to comply with these laws.

"NASD is a non-profit, self-regulatory organization registered with the Securities and Exchange Commission as a national securities association."[6] NASD, now FINRA, "is the primary regulatory body for the broker-dealer industry,"[7] subject to control of the Securities and Exchange Commission (SEC).[8] Congress has delegated to it authority "to promulgate and enforce rules governing the conduct of its members," also subject to SEC's approval and changes.[9]

[4] Federal courts have exclusive jurisdiction over private suits brought for violations under the Securities Exchange Act of 1934 (Securities Exchange Act).[10] And they also have exclusive jurisdiction over suits in equity or in law to enforce any liability or duty created by the act or "the rules and regulations thereunder."[11] But except for specified actions not involved here,[12] the rights and remedies provided under the Securities Exchange Act are in addition to "any and all other rights and remedies that may exist at law or in equity."[13]

In its order, the court cited federal cases in which the court held that plaintiffs cannot seek redress for a defendant's violation of NASD rules or securities exchange rules.[14] In those

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[6] *MM&S Financial v. National Ass'n of Securities*, 364 F.3d 908, 909 (8th Cir. 2004).

[7] *Sparta Surgical v. Nat. Ass'n of Sec. Dealers*, 159 F.3d 1209, 1210 (9th Cir. 1998).

[8] See, *id.*; *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996).

[9] *Barbara, supra* note 8, 99 F.3d at 51. See, also, *Sparta Surgical, supra* note 7.

[10] 15 U.S.C. § 78a et seq. (2006).

[11] See 15 U.S.C. § 78aa.

[12] See 15 U.S.C. § 78bb(f).

[13] 15 U.S.C. § 78bb(a).

[14] See, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); *Baden v. Craig-Hallum, Inc.*, 646 F. Supp. 483 (D. Minn. 1986).

cases, however, the investors sought recovery for the broker-dealers' violations of such rules. Common-law securities suits can be independent of duties or liabilities created by federal statutes or rules.[15]

For example, in *Zannini v. Ameritrade Holding Corp.*,[16] we held that a subscriber's class action negligence claim against an online brokerage service was not preempted by a federal statute. That statute authorized the SEC to establish the standards for a broker-dealer's operational capacity. Relying on federal cases, we concluded that absent preemptive federal regulations, courts generally permitted investors' state law claims if they involved the relationship between investors and their brokers; the bargains struck between investors and their brokers; and efficacy of the broker's trading system, especially as compared to its representations about the system.[17]

[5] But investors cannot plead around the lack of a private cause of action for violations of federal securities law by captioning their claim as a common-law claim. For example, federal courts do not permit a common-law breach of contract claim against NASD or a securities exchange for violating or failing to enforce its own rules. These courts have precluded these claims because the statute requiring compliance with securities statutes and rules does not grant a private right of action.[18] Similarly, the Seventh Circuit rejected a common-law claim for breach of fiduciary duty based on the violation of an exchange rule when the governing statute did not provide a private cause of action.[19]

[6] The U.S. Supreme Court has held that the broker-dealer recordkeeping requirements under the Securities Exchange Act

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[15] See *Barbara, supra* note 8.

[16] *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

[17] *Id.*

[18] See, e.g., *MM&S Financial, supra* note 6; *Sparta Surgical, supra* note 7.

[19] See *Indemnified Capital Inv. v. R.J. O'Brien & Assoc.*, 12 F.3d 1406 (7th Cir. 1993). See, also, *In re Series 7 Broker Qualification Exam Scoring*, 548 F.3d 110 (D.C. Cir. 2008).

do not provide a private damage remedy for violations.[20] And many federal courts have accordingly held no private right of action exists for violations of rules promulgated by a securities exchange or self-regulatory organization.[21] On point here, the Second Circuit has specifically held that a contract's implied incorporation of rules and regulations that govern a broker-dealer's dealings with an investor will not support a private cause of action when the rules and regulations themselves provide no private cause of action.[22]

We agree with these authorities. Permitting the appellants to proceed with a breach of contract claim for the defendants' alleged violation of federal recordkeeping duties would be inconsistent with Congress' intent to (1) give federal courts exclusive jurisdiction over such violations and (2) preclude private remedies for violations of recordkeeping requirements. We conclude that the district court did not err in dismissing the appellants' breach of contract claim.

2. The Appellants Must Show That They Received a Representation Under Any of Their Deceit Claims

The appellants argue that for their misrepresentation and concealment claims, we should recognize their theory of reliance on the integrity of the financial industry's regulatory system. They argue that the defendants had a public duty to provide this information and that they wrongfully manipulated the system by supplying inaccurate or false information or by concealing the truth about Engle's discharge in the Form U-5. They do not claim that they received or learned of the statements in the Form U-5. But they contend that the court erred in requiring them to show direct reliance on the Form U-5 statements, because they relied on the consequences of the

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[20] See *Touche Ross v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979).

[21] See 5 Thomas Lee Hazen, The Law of Securities Regulation § 14.26[2] (6th ed. 2009).

[22] *Gurfein v. Ameritrade, Inc.*, 312 Fed. Appx. 410 (2d Cir. 2009). See, also, *Appert v. Morgan Stanley Dean Witter, Inc.*, No. 08-CV-7130, 2009 WL 3764120 (N.D. Ill. Nov. 6, 2009).

false filing: the lack of regulatory action against Engle and her employment by a reputable firm after she left Kirkpatrick Pettis. Thus, it was reasonable for them to conclude that she was a reputable broker in whom they could trust.

The appellants argue that *Bank of Valley v. Mattson*[23] supports their theory of reliance because it illustrates that a plaintiff can rely on an indirect misrepresentation even if the defendant did not intend this result. Instead, they argue that the defendants had reason to expect that the appellants would rely on their misrepresentation. We disagree with the appellants that *Bank of Valley* applies here.

In *Bank of Valley*, we recognized an exception to the requirement that a plaintiff show the maker of a misrepresentation intended the plaintiff to rely on his or her misrepresentation. We held that a claim of fraudulent misrepresentation did not fail because the person relying on the misrepresentation learned of it through a third party. In that case, the appellant was told the false facts by a third party who repeated what the maker of the misrepresentation had stated to the third party. The appellant then made a loan to the maker in reliance on the false facts. In concluding that the appellant could rely on the information relayed to him by the third party, we quoted applicable provisions of the Restatement (Second) of Torts. First, we stated that § 531 provides:

> "One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced."[24]

We agree that this section extends liability to plaintiffs that the defendant had "reason to expect" would rely on the false representation. We note, however, that this class of plaintiffs does not include every plaintiff that a reasonable person should

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[23] *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983).

[24] *Id.* at 601, 339 N.W.2d at 927, quoting Restatement (Second) of Torts § 531 (1977).

have recognized as being a possible recipient of a false representation.[25] In *Bank of Valley*, we also relied on § 533 of the Restatement, which imposes liability for indirect misrepresentations through a third party. The comments to § 533 clarify that the maker of a misrepresentation must intend that it be repeated to others to influence them or must have information that gives the maker "special reason to expect that [the misrepresentation] will be communicated to others, and will influence their conduct."[26]

In sum, a plaintiff can rely on the third-party communication of a defendant's fraudulent misrepresentation if the plaintiff shows that the defendant intended the plaintiff to learn of and rely on it in the transaction or type of transaction involved, or had a particular reason to believe that the plaintiff would do so.[27] But in *Bank of Valley*, we specifically analyzed whether the hearer had justifiably relied on the misrepresentation. So while the third-party communication exception provides a limited exception to the intent element, *Bank of Valley* did not hold that a plaintiff need not show actual reliance on a misrepresentation.

Moreover, we have required plaintiffs to show that they received a misrepresentation. In *Brummels v. Tomasek*,[28] we held that the plaintiff's fraudulent misrepresentation claim failed because the plaintiff did not allege that the misrepresentation was made to him or her. But the plaintiff never received the misrepresentation. So in the context of the facts in that case, we clearly meant that the plaintiff failed to allege that he received the representation.

The principle that a plaintiff must have received the information before the plaintiff can show reliance is reflected in the Restatement's § 533. That section limits liability for misrepresentations made through a third party to those that "the maker

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[25] See Restatement, *supra* note 24, comment *d*.

[26] See *id.*, § 533, comment *d*. at 73.

[27] See, *Bank of Valley, supra* note 23; Restatement, *supra* note 24, § 531.

[28] *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007), citing *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

intends or has reason to expect its terms will be repeated or its substance *communicated* to the other, and that it will influence his conduct in the transaction or type of transaction involved."[29] Similarly, the Restatement permits the "recipient" of a fraudulent misrepresentation to recover against its maker if the recipient justifiably relied on it.[30] These provisions illustrate that plaintiffs cannot show reliance on a misrepresentation that never reached them and of which they had no knowledge.[31]

[7] Similarly, for negligent misrepresentation claims, we have stated that "[b]y its terms, § 552 contemplates liability to third parties only if the supplier intends for the misinformation to ultimately reach the third party or if the supplier knows that the recipient will pass the misinformation on to the third party."[32] We specifically declined to extend the defendant's liability to third parties who were not recipients of the defendant's negligent misrepresentation. So for both negligent and fraudulent misrepresentation, the plaintiff must be a recipient of the misrepresentation to show reliance.

[8] Also, whether the appellants received the alleged misrepresentations is relevant to their concealment claim. A person has a duty to disclose information to another in a transaction when necessary to prevent his or her partial or ambiguous statement from being misleading.[33] But a plaintiff must have received the representation before the plaintiff can show that a defendant had a duty to disclose additional facts.[34] So this type of concealment claim also depends upon whether the appellants received the defendants' partial or ambiguous representations.

But the appellants counter that reliance can be shown by their reliance on the integrity of the financial industry's regulatory

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[29] Restatement, *supra* note 24, § 533 at 73 (emphasis supplied).

[30] See *id.*, § 537 at 80.

[31] *Slakey Brothers Sacramento, Inc. v. Parker*, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (1968).

[32] *Brummels, supra* note 28, 273 Neb. at 580, 731 N.W.2d at 592.

[33] See *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), citing Restatement, *supra* note 24, § 551(2).

[34] Restatement, *supra* note 24, § 551(2)(b), comment *g*.

system. They analogize to the fraud-on-the-market doctrine, which the U.S. Supreme Court recognized in a decision under rule 10b-5[35] of the SEC's regulations.[36]

When involving the purchase or sale of a security, rule 10b-5 prohibits making any untrue statement of a material fact or omitting any material fact necessary to prevent a statement from being misleading.[37] The rule is authorized by a provision of the Securities Exchange Act. That statute prohibits manipulative or deceptive practices in buying or selling securities registered on a national securities exchange.[38] The U.S. Supreme Court has held there is a narrow exception to the reliance requirement for actions brought under rule 10b-5. For these claims, the Court recognized a rebuttable presumption of reliance on a material misrepresentation reflected in the market price of a traded security that has been fraudulently distorted.[39] But the presumption is limited to situations in which investors trade securities relying on the integrity of a well-established securities market. The appellants ask us to apply this presumption here. We decline to do so.

Here, the rationale does not exist for applying the fraud-on-the-market doctrine. The reliance presumption is based on efficient market theory. That is, in an open securities market, "'the price of a company's stock is determined by the available material information,'"[40] and affected by misrepresentations or the withholding of material information.[41] Moreover, the presumption depends upon the existence of a public statement that reflects the alleged misrepresentations.[42] Here, the appellants

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[35] See 17 C.F.R. § 240.10b-5 (2010).

[36] See *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988).

[37] See 17 C.F.R. § 240.10b-5(b).

[38] See 15 U.S.C. § 78j(b).

[39] See *Basic Inc., supra* note 36.

[40] *Id.*, 485 U.S. at 241.

[41] See *Basic Inc., supra* note 36.

[42] See *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008).

did not allege, or show through exhibits, that any information in the Form U-5 was publicly disclosed by NASD. Even if we assumed that the report were publicly available, it would not be a public statement of collective information that was influenced by market forces. Instead, the appellants are relying on the absence of regulatory action taken because of the filing; failure to regulate is not an appropriate application for the reliance presumption.

The fraud-on-the-market doctrine has generally been limited to securities fraud claims brought under rule 10b-5. Rule 10b-5 limits claims to those involving the buying and selling of securities, for which an efficient market theory makes sense. Further, Congress designed the Securities Exchange Act to protect investors against the manipulation of stock prices, where investors must rely on market integrity in securities markets because millions of shares are traded daily.[43]

As noted, in contrast to transactions involving the buying or selling of securities, the U.S. Supreme Court has held that the broker-dealer recordkeeping requirements under the Securities Exchange Act do not provide a private damage remedy for violations.[44] Neither the Form U-5 filing nor the letters to customers were transactions involving the trading of securities. We conclude that the reliance presumption is not appropriate in this context. Thus, we reject the appellants' argument that they can premise their misrepresentation or concealment claims through their alleged reliance on the absence of regulatory action against Engle or her subsequent employment by another broker-dealer.

3. Negligent Misrepresentation

As noted, the appellants' negligent misrepresentation claim rested solely upon their allegations that Kirkpatrick Pettis supplied false information to NASD on the Form U-5. The appellants contend that the court erred in dismissing this claim because they could not show that they had relied on statements in the Form U-5.

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[43] See *Basic Inc., supra* note 36.

[44] See, *Touche Ross, supra note* 20; 5 Hazen, *supra* note 21.

As explained, the appellants must show they were recipients of the defendant's negligent misrepresentation.[45] But the appellants counter that under the Restatement (Second) of Torts § 552(3), the defendants had a public duty to provide information to NASD disclosing the circumstances of Engle's discharge. They contend that as investors, they were within the class of persons for whom this duty existed. We do not reach the public duty issue, because we have already determined that they cannot show reliance on the Form U-5 when they did not receive statements made in the filing.

We have adopted the Restatement's § 552 for claims of negligent misrepresentation.[46] That section provides:

> (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.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
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> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.[47]

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[45] See *Brummels, supra* note 28.

[46] See *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

[47] Restatement, *supra* note 24, § 552 at 126-27.

As the North Carolina Court of Appeals explained, the elements of a negligent misrepresentation claim are set out under subsection (1) of the Restatement's § 552.[48] Subsections (2) and (3) only define the class of plaintiffs who can recover.[49] Subsection (3) extends liability to a larger class of persons than the class defined under subsection (2). But more important to our analysis, it does not eliminate the requirement that the extended class of beneficiaries must have received and relied upon the misinformation.

Further, comment *a.* of § 552 applies to the entire section and states that liability extends to the "users" of commercial information "in which the maker was manifestly aware of the use to which the information was to be put and intended to supply it for that purpose."[50] And the illustrations in the comments to subsection (3) also show that a plaintiff must have relied on the representation.[51] So the appellants' reliance on subsection (3) of the Restatement's § 552 does not change our holding that in negligent misrepresentation claims: The plaintiff must receive and rely on the commercial misinformation supplied by the defendant.[52]

The appellants did not allege that they received or were aware of the statements in the Form U-5. We conclude that the court did not err in dismissing their negligent misrepresentation claim for failure to allege reliance.

4. Fraudulent Misrepresentation Claim

The appellants contend that by filing the Form U-5 and sending letters to the appellants, the defendants "attempted to 'assuage' and 'alleviate' any concerns [the appellants] may have had regarding Engle's competency."[53] We have already

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[48] See *Brinkman v. Barrett Kays & Associates, P.A.*, 155 N.C. App. 738, 575 S.E.2d 40 (2003).

[49] See *id.*

[50] Restatement, *supra* note 24, § 552, comment *a.* at 128.

[51] See *id.*, comment *k*.

[52] See, *Hollywood Trucking, Inc. v. Watters*, 385 Ill. App. 3d 237, 895 N.E.2d 3, 324 Ill. Dec. 3 (2008); *Brinkman, supra* note 48; *Taylor v. Stevens County*, 47 Wash. App. 134, 732 P.2d 517 (1987).

[53] Brief for appellants at 24.

rejected their argument that they could show reliance on the Form U-5 through the absence of regulatory activity against Engle and her employment with a different broker-dealer. Because they did not allege that they received or were aware of statements in the Form U-5, the court also did not err in dismissing their fraudulent misrepresentation claim to the extent that it was based on the Form U-5 statements. We next address their argument that the court erred in dismissing their claim to the extent it was based on letters to customers from Kirkpatrick Pettis and from Engle and Schuster.

The court determined that the letters to customers from Kirkpatrick Pettis and Engle and Schuster did not contain a fraudulent misrepresentation, because neither letter specified a reason for closing the Nebraska City and Syracuse offices. But the court failed to consider whether the letters were intended to create a false impression, even if literally true.

To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.[54]

[9-13] It is true that mere silence cannot constitute a misrepresentation absent a duty to disclose information.[55] But we need not consider whether Kirkpatrick Pettis owed fiduciary duties to the appellants. When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent.[56] "Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally

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[54] *Brummels, supra* note 28.

[55] See *Moyer v. Richardson Drug Co.*, 70 Neb. 190, 97 N.W. 244 (1903).

[56] See, *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952); Restatement, *supra* note 24, § 529. See, also, *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984).

true is fraudulent if used to create an impression substantially false."[57] "'To reveal some information on a subject triggers the duty to reveal all known material facts.'"[58] Consistent with imposing liability for half-truths, the Restatement (Second) of Torts § 527 provides that an ambiguous statement is fraudulent if made with the intent that it be understood in its false sense or with reckless disregard as to how it will be understood.

It is true that Kirkpatrick Pettis' letter did not give an explanation for its closing of the Nebraska City and Syracuse offices. But in the next sentence, it stated that its customers would shortly be receiving information from Engle and Schuster announcing their new affiliation with First Union Securities. The letter did not disclose to customers, as the appellants' allegations and exhibits suggest, that Kirkpatrick Pettis was closing the offices because (1) it had discharged Engle for misconduct and (2) Schuster had elected to follow her.

We conclude that the court erred in dismissing the appellants' fraudulent misrepresentation claim without considering whether statements in the letters from Kirkpatrick Pettis and Engle and Schuster, while literally true, were sufficient to create a false impression. But in our de novo review, we conclude that the appellants plausibly claimed that Kirkpatrick Pettis sent or authorized letters fraudulently implying that Engle and Schuster were leaving Kirkpatrick Pettis' employment because Kirkpatrick Pettis was closing its Nebraska City and Syracuse offices for reasons unrelated to Engle's conduct. Whether the appellants can ultimately prove that the impression was false is not the issue in considering a motion to dismiss. Accepting all the factual allegations in the complaint as true and drawing all reasonable inferences in favor of the appellants, the complaint is sufficient to survive a motion to dismiss.

5. Fraudulent Concealment

The appellants alleged that Kirkpatrick Pettis fraudulently concealed the true reason for Engle's discharge in its Form U-5

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[57] See *Johnson, supra* note 56, 155 Neb. at 563, 52 N.W.2d at 744.

[58] *State ex rel. NSBA, supra* note 56, 227 Neb. at 26, 416 N.W.2d at 531.

filing and in the letters that they sent to customers. Their claim regarding the Form U-5 is twofold. First, they alleged that Kirkpatrick Pettis' failure to report the true reason for Engle's discharge was "a material fact to the NASD, SEC, [the appellants,] and the State of Nebraska, in their decision to allow her to do business with the [appellants]." Second, they alleged that the concealment was material to the appellants' decision to continue to do business with her.

To the extent that the appellants' concealment claim relied on the Form U-5 and securities regulators' response, permitting the claim would be inconsistent with federal securities law. As discussed, Congress excluded a private remedy for a violation of filing requirements under the Securities Exchange Act.[59] We do not consider whether the appellants could base their concealment claim upon an omission within the Form U-5 under other circumstances. As explained above, this part of the claim fails because they did not allege that they received any statements in the filing. But their allegation that the letters to them from Kirkpatrick Pettis and Engle constituted a fraudulent concealment was unrelated to any duty to file reports with securities regulators. Because it does not rely upon the violation of duties for which a remedy does not exist, it is not precluded.

We note that an overlap exists between fraudulent concealment claims and misrepresentation claims based on half-truths or ambiguities. That is, if a defendant's partial or ambiguous representation is materially misleading, then the defendant has a duty to disclose known facts that are necessary to prevent the representation from being misleading.[60]

As noted, on November 28, 2000, Kirkpatrick Pettis sent a letter to its customers stating that it would be closing its Nebraska City and Syracuse offices on November 29. It did not give any reason for the closings or for Engle's new affiliation. But it informed its customers that they would soon be receiving information from Engle and Schuster announcing

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[59] See, *Touche Ross, supra* note 20; 5 Hazen, *supra* note 21.

[60] See, *Streeks, supra* note 33; Restatement, *supra* note 24, § 551(2)(b).

their affiliation with First Union Securities. It included a number to call if the customers wished to maintain their business with Kirkpatrick Pettis or had any questions regarding their account.

The district court found that Kirkpatrick Pettis' letter invited the appellants to maintain their business with it, instead of pushing them to follow Engle. So the court determined that the claim failed because the defendants did not conceal any material fact with the intent that the appellants act in response to the concealment. But the court failed to consider whether the defendants concealed the information with the intent that the appellants refrain from acting.

In *Streeks v. Diamond Hill Farms*,[61] we quoted and relied on the Restatement's § 551[62] to address the appellant's argument that he had no duty to disclose information in a fraudulent concealment case. Subsection (1), which sets out the elements of the claim, provides:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act *or refrain from acting* in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.[63]

The Restatement rule obviously includes a defendant's intent to induce another person to refrain from acting. But in *Streeks*, we also quoted an earlier case as properly setting out the elements of fraudulent concealment. Unfortunately, those elements did not include a defendant's intent to induce another person to refrain from taking action:

> "to prove fraudulent concealment, a plaintiff must show that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not

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[61] *Streeks, supra* note 33.

[62] See Restatement, *supra* note 24, § 551.

[63] *Id.* at 119 (emphasis supplied).

> within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff *act in response to the concealment or suppression*; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment."[64]

We have been imprecise in setting out the intent element for fraudulent concealment cases. And the intent element cannot be read consistently with the reliance and damage elements. Those elements require a plaintiff to show that he or she acted *or refrained from acting* in response to a concealment and sustained damages as a result. In contrast, a defendant's intent to induce the plaintiff to act in response to a concealment cannot include the plaintiff's *choosing* not to act. Instead, when a plaintiff's inaction in response to a concealment causes damages, it is because the concealment of material information induced the plaintiff's *false belief* that action was not needed.[65] The concealment deprives the plaintiff of making an intelligent choice to act or refrain from acting.

By comparison, in fraudulent misrepresentation cases, we have stated that a plaintiff must show that the defendant intended the plaintiff *to rely* on a false representation.[66] That requirement is broad enough to include a plaintiff's action or inaction in reliance upon a defendant's misrepresentation, which is consistent with Restatement principles.[67] And many courts either apply the same elements for all fraud and deceit claims, i.e., fraudulent misrepresentations or concealments, or have specifically stated in fraudulent concealment cases that

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[64] *Streeks, supra* note 33, 258 Neb. at 589, 605 N.W.2d at 118 (emphasis supplied).

[65] See, e.g., *Security Inv. Co. v. State*, 231 Neb. 536, 437 N.W.2d 439 (1989). Compare *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

[66] See *Brummels, supra* note 28.

[67] Compare Restatement, *supra* note 24, § 531.

the defendant must have intended to induce the plaintiff to either act or refrain from action.[68]

[14] Because of our inconsistency, the district court failed to consider whether the defendants intended the appellants to refrain from acting. To avoid further mistakes, we hold that to prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act *or refrain from acting* in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.

Unsurprisingly, the intent element that we first set out in *In re Estate of Stephenson*[69] has been repeated in other published opinions besides *Streeks*. To ensure that the incorrect intent element does not resurface, we overrule the following opinions only to the extent that they can be read as precluding a plaintiff from showing that a defendant fraudulently concealed a material fact with the intent that the plaintiff refrain from acting in response: *Brummels v. Tomasek*[70]; *Streeks v. Diamond Hill Farms*[71]; *In re Estate of Stephenson*[72]; *Ord v. AmFirst*

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[68] See, e.g., *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069 (Del. 1983); *ASC Const. Equip. v. City Commercial Estate*, 303 Ga. App. 309, 693 S.E.2d 559 (2010); *Gouge v. McNamara*, 586 N.W.2d 710 (Iowa App. 1998); *Francis v. Stinson*, 760 A.2d 209 (Me. 2000); *7979 Airport Garage v. Dollar Rent A Car*, 245 S.W.3d 488 (Tex. App. 2007).

[69] *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993).

[70] *Brummels, supra* note 28.

[71] *Streeks, supra* note 33.

[72] *In re Estate of Stephenson, supra* note 69.

Invest. Servs.[73]; *Kramer v. Eagle Eye Home Inspections*[74]; and *Precision Enters. v. Duffack Enters*.[75]

Having clarified the elements of a fraudulent concealment claim, we turn to the sufficiency of the appellants' complaint on the intent element. As the trial court realized, Kirkpatrick Pettis' letter failed to explain to its customers the reason for Engle's discharge. Additionally, the letter also failed to disclose to customers that it had discharged Engle and was closing the offices because of that action, as suggested by the complaint. Because the letter failed to state any reason, the appellants could have reasonably believed that the offices were being closed for an innocuous reason that did not concern them and that Engle and Schuster were leaving Kirkpatrick Pettis because of the closings.

Further, Kirkpatrick Pettis stated in its letter that customers would shortly be receiving information from Engle and Schuster about their new affiliation. And a letter from Kirkpatrick Pettis' general counsel to Engle's attorney suggests that Kirkpatrick Pettis knew Engle would likely represent her discharge as a voluntary termination. In fact, Engle and Schuster—on Engle's last day of employment with Kirkpatrick Pettis—sent a letter to their customers the day after Kirkpatrick Pettis sent its letter. In that letter, Engle and Schuster stated that customers would be receiving paperwork in a couple of days to transfer their accounts to First Union Securities. They also stated that Kirkpatrick Pettis was "being very helpful in making this transfer as smooth as possible."

The letters in the attached exhibits, coupled with the complaint's allegations that Kirkpatrick Pettis approved them, are sufficient to support a claim that Kirkpatrick Pettis knew some of its customers were about to transfer their accounts to

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[73] *Ord v. AmFirst Invest. Servs.*, 14 Neb. App. 97, 704 N.W.2d 796 (2005).

[74] *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006), *abrogated on other grounds, Tracy Broadcasting Corp. v. Telemetrix, Inc.*, 17 Neb. App. 112, 756 N.W.2d 742 (2008).

[75] *Precision Enters. v. Duffack Enters.*, 14 Neb. App. 512, 710 N.W.2d 348 (2006).

Engle and Schuster's new firm absent any disclosure regarding Engle's discharge.

Although the court concluded that Kirkpatrick Pettis' letters were intended to persuade customers to keep their accounts with Kirkpatrick Pettis after it closed its Nebraska City and Syracuse offices, that intent did not preclude any other purpose. The appellants specifically alleged that because of the defendants' approval of these letters and their agents' concealments, they were unable to ascertain the truth about Engle's conduct. So another plausible purpose for concealing information about Engle's discharge was to ensure that the appellants did not question investment activity in their accounts or Kirkpatrick Pettis' ability to supervise its agents.

Accepting all the factual allegations in the complaint as true and drawing all reasonable inferences in favor of the appellants, we conclude that the appellants' complaint was sufficient to survive a motion to dismiss. The appellants' complaint and exhibits allege that (1) by failing to disclose Engle's discharge or the reason for her discharge and (2) by allegedly permitting Engle and Schuster to solicit customers with Kirkpatrick Pettis' apparent cooperation, the defendants intended that the appellants not question Engle's misconduct. We therefore reverse the district court's order dismissing this claim only as it relates to Engle's and Kirkpatrick Pettis' letters to customers.

The district court dismissed the appellants' complaint solely upon their failure to allege sufficient facts regarding the defendants' intent in these letters. The remaining elements raise factual issues which are not properly before us. Also, because the court concluded that the appellants had failed to state a claim, it did not reach their other theories of liability, and we similarly do not reach those issues.

V. SUMMARY

In conclusion, we hold the following:

• We affirm the court's dismissal of the breach of contract claim, because the rules the defendants allegedly violated do not provide a private remedy and federal courts have exclusive jurisdiction over private suits brought for the alleged violations.

• We affirm the court's dismissal of the appellants' negligent misrepresentation claim. This claim, which was based solely on statements in a securities regulations filing, fails because the appellants did not allege that they received the statements.

• We reverse the court's dismissal of the appellants' fraudulent misrepresentation claim to the extent that it is based on statements made in letters Kirkpatrick Pettis sent or authorized Engle to send to its customers. The appellants plausibly claimed that the letters created a false impression about Engle's leaving her employment with Kirkpatrick Pettis.

• We reverse the court's dismissal of the appellants' fraudulent concealment claim that was also based on these letters. The appellants plausibly claimed that they would not have transferred their business to Engle's new broker-dealer if material facts regarding her discharge had been disclosed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

ALLEN ROOS AND DEAN ROOS, COTRUSTEES OF THE LESLIE D. ROOS AND RUBY S. ROOS TRUST, ET AL., APPELLANTS, V. KFS BD, INC., A NEBRASKA CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEES.

799 N.W.2d 43

Filed December 10, 2010. No. S-09-477.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. It accepts all the factual allegations in the complaint as true and draws all reasonable inferences for the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.
3. ____: ____. When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

4. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
6. **Securities Regulation: Federal Acts: Liability: Words and Phrases.** Control person liability is a federal statutory remedy imposing joint and several liability on persons who have the power to control the conduct of a person violating securities laws.
7. **Securities Regulation: Federal Acts: Liability.** Liability for controlling persons is secondary and depends upon showing liability for a primary violation of the Securities Exchange Act of 1934.
8. **Securities Regulation: Federal Acts: Courts: Jurisdiction.** Federal courts have exclusive jurisdiction over violations of the Securities Exchange Act of 1934.
9. ____: ____: ____: ____. Because a claim of control person liability under 15 U.S.C. § 78t (2006) depends upon showing an underlying violation of the Securities Exchange Act of 1934, federal courts also have exclusive jurisdiction over such claims.
10. **Corporations.** As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly of the other.
11. **Corporations: Liability.** A parent corporation is not liable for the acts of its subsidiary merely because of stock ownership.
12. ____: ____. Separate from claims of derivative liability, a parent corporation can be liable for its own participation in its subsidiary's unlawful conduct if it used its ownership interest to intervene and direct the subsidiary's actions.
13. **Corporations: Liability: Proof.** Under the theory of direct participant liability, it is not sufficient to show that the parent and subsidiary corporations shared common directors.
14. ____: ____: ____. For a plaintiff to prevail in a direct participant claim, it must distinguish the intervening conduct from a parent corporation's normal control of a subsidiary—such as supervising the subsidiary's finance and budget decisions or general policies. The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.

Appeal from the District Court for Otoe County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

J.L. Spray and Randall V. Petersen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellants.

James M. Bausch and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee KFS BD, Inc.

Joseph E. Jones and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee Mutual of Omaha Insurance Company.

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

CONNOLLY, J.

I. SUMMARY

The appellants are former customers of Rebecca Engle, a stockbroker formerly employed by Kirkpatrick Pettis, the predecessor of KFS BD, Inc. The appellants sued KFS BD, a Nebraska corporation and Mutual of Omaha company, and Mutual of Omaha Insurance Company (collectively the defendants). The appellants' theories of recovery hinged on the following allegations: (1) Kirkpatrick Pettis misrepresented to them and to federal regulators why Kirkpatrick Pettis terminated Engle's employment; and (2) the defendants concealed the true reason for Engle's discharge.

The district court sustained the defendants' motions to dismiss all of the appellants' claims except their negligent misrepresentation claim. Later, it overruled the appellants' motion to file a third amended complaint and granted summary judgment to KFS BD on the appellants' negligent misrepresentation claim.

We affirm in part, and in part reverse as follows:

- We reverse that part of the court's order dismissing the appellants' fraudulent misrepresentation and fraudulent concealment claims.
- We affirm that part of the court's order dismissing the appellants' "control person" liability claim against Mutual of Omaha Insurance Company (Mutual).
- We reverse that part of the court's order dismissing the appellants' agency claim against Mutual.
- We affirm the court's order of summary judgment for the defendants on the appellants' negligent misrepresentation claim.

• We affirm the court's order denying the appellants leave to amend their complaint.

II. BACKGROUND

1. Complaint's Allegations

The background facts in the appellants' operative complaint are substantially the same as those set out in *Knights of Columbus Council 3152 v. KFS BD, Inc*.[1] Although the parties presented additional evidence in this case at the summary judgment hearing, that evidence was only relevant to the appellants' negligent misrepresentation claim. As we explain below, the appellants' negligent misrepresentation claim fails as a matter of law. But we do not consider the evidence presented at the summary judgment hearing to analyze the court's order sustaining the defendants' motions to dismiss. For reviewing that order, we accept as true the following factual statements and reasonable inferences from the appellants' complaint and attached exhibits.[2]

Kirkpatrick Pettis employed Engle from January 1998 to November 2000. Kirkpatrick Pettis was a Mutual company and KFS BD's predecessor. KFS BD is a wholly owned subsidiary of Mutual.

Kirkpatrick Pettis received numerous customer complaints about Engle. In the spring of 2000, Kirkpatrick Pettis experienced a "catastrophic failure" of its compliance and supervisory obligations, leading to the eventual collapse of the business. Mutual's chairman and chief executive officer, president, and board of directors took "heightened" control of Kirkpatrick Pettis and the supervision of Engle.

In December 2000, the defendants knowingly filed or caused to be filed a false and intentionally misleading "Form U-5" with the National Association of Securities Dealers (NASD), now known as the Financial Industry Regulatory Authority, Inc., regarding Engle's separation from KFS BD. In the Form

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[1] See *Knights of Columbus Council 3152 v. KFS BD, Inc., ante* p. 904, 791 N.W.2d 317 (2010).

[2] See *id.*

U-5, the defendants represented that Engle's separation from KFS BD's employment was the result of KFS BD's closing its office located in Nebraska City, Nebraska. The defendants also allowed Engle and "Schuster" (a coworker) to falsely represent to customers that Kirkpatrick Pettis was closing the Nebraska City office because of a reduction in its sales force. In reality, Kirkpatrick Pettis had asked Schuster to stay and operate the office and had discharged Engle for cause.

The fraud was intended to conceal Engle's improper, wrongful, and negligent acts from the public, existing clients, and new clients. It allowed Engle to be hired by another broker-dealer and to continue offering investment advice to her customers. And it prevented the NASD from investigating Engle's separation from KFS BD, disciplining her, making a public record of her misdeeds, and preventing her from working in the industry. The appellants alleged claims of fraudulent misrepresentation, fraudulent concealment, and negligent misrepresentation. Additionally, they alleged separate claims of "control person" liability and agency liability solely against Mutual.

2. District Court's Orders

Upon the defendants' motions to dismiss, the court dismissed the appellants' fraudulent misrepresentation and fraudulent concealment claims. Also, it dismissed the appellants' control person liability and agency claims against Mutual. The only remaining claim was the appellants' negligent misrepresentation claim. Later, the court overruled the appellants' motion to file a third amended complaint and sustained KFS BD's second motion for summary judgment on the appellants' negligent misrepresentation claim.

III. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred as follows:

(1) in dismissing their claims of fraudulent misrepresentation and fraudulent concealment;

(2) in dismissing their claims against Mutual;

(3) in sustaining KFS BD's motion for summary judgment on their negligent misrepresentation claim;

(4) in sustaining KFS BD's objection to exhibit 30, a witness' affidavit; and

(5) in denying their motion for leave to file a third amended complaint.

IV. STANDARD OF REVIEW

[1-3] We review a district court's order granting a motion to dismiss de novo. We accept all the factual allegations in the complaint as true and draw all reasonable inferences for the nonmoving party.[3] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[4] When a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[5]

[4] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

[5] Permission to amend a pleading is addressed to the discretion of the trial court, and we will not disturb the trial court's decision absent an abuse of discretion.[7]

V. ANALYSIS

1. Order Dismissing Claims

We first address the appellants' assignment that the court erred in dismissing their fraudulent misrepresentation and fraudulent concealment claims and their claims against Mutual.

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *State ex rel. Wagner v. Gilbane Bldg. Co., ante* p. 223, 786 N.W.2d 330 (2010).

[7] See *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 770 N.W.2d 608 (2009).

(a) The Fraudulent Misrepresentation Claim Survives

The court dismissed the appellants' fraudulent misrepresentation claim because the appellants had failed to plead that they received, or were aware of, a misrepresentation about Engle's discharge upon which they could rely. We agree that the appellants must show that they relied upon some statement other than the Form U-5, or show that they received the information contained in the filing. As we held in *Knights of Columbus Council 3152*, to the extent that the appellants premised their misrepresentation and concealment claims on statements in the Form U-5, they must show that they were recipients of these statements. They cannot state a claim by alleging that they relied on the lack of regulatory action because of this filing.[8] We also agree that they did not allege they were recipients of statements in the Form U-5.

But in their general allegations, the appellants alleged that the defendants allowed Engle and Schuster to falsely represent to customers that Kirkpatrick Pettis was closing the Nebraska City office. They alleged that Kirkpatrick Pettis had discharged Engle for misconduct. This allegation is sufficient to survive a motion to dismiss. We cannot say that the complaint fails to show a reasonable expectation that the appellants could prove their claim, i.e., show they received a misrepresentation authorized by Kirkpatrick Pettis that Engle was leaving its employment because it was closing the Nebraska City office. Nor can we say no reasonable expectation exists that they can prove Kirkpatrick Pettis knew its agents were making misleading representations to its customers. Thus, the court erred in dismissing the defendants' fraudulent misrepresentation claim.

(b) The Fraudulent Concealment Claim Survives

Similarly, the court dismissed the appellants' fraudulent concealment claim. It found that the appellants failed to allege that they had access to or relied on the Form U-5. But again, the appellants alleged that the defendants concealed the reason for

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[8] *Knights of Columbus Council 3152, supra* note 1.

Engle's discharge by filing the false Form U-5 *and* by permitting its agents to conceal and misrepresent the facts. If, apart from the filing, the appellants could show that they were recipients of misleading representations that contained omissions amounting to a fraudulent concealment, their claim would be viable. The district court erred in dismissing their fraudulent concealment claim.

(c) Control Person Liability

[6] The appellants alleged that Mutual was jointly and severally liable as a controlling person under 15 U.S.C. § 78t (2006). Control person liability is a federal statutory remedy imposing joint and several liability on persons who have the power to control the conduct of a person violating securities laws. Section 78t(a) sets out the elements required for control person liability under the Securities Exchange Act of 1934 (Securities Exchange Act):

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

[7-9] Controlling persons under this section can include parent corporations.[9] But liability for controlling persons is secondary and depends upon showing liability for a primary violation of the Securities Exchange Act.[10] Federal courts have exclusive jurisdiction over violations of the Securities Exchange Act.[11] Because a claim of control person liability under 15 U.S.C. § 78t depends upon showing an underlying violation of the Securities Exchange Act, federal courts also have exclusive jurisdiction over such claims. The court dismissed this claim

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[9] See Annot., 182 A.L.R. Fed. 387 (2002).

[10] See, e.g., *In re Cutera Securities Litigation*, 610 F.3d 1103 (9th Cir. 2010); *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124 (2d Cir. 1994).

[11] See 15 U.S.C. § 78aa (2006).

because control person liability applies only to a federal securities fraud claim. The appellants do not specifically argue this ruling in their brief, and we conclude that the court did not err in dismissing the appellants' claim to the extent it relied on control person liability.

(d) Direct Participant Liability

Although we have determined that the appellants' claim of control person liability fails, most federal courts of appeals have held that control person liability does not exclude common-law agency claims.[12] The appellants contend that their allegations of Mutual's control over Kirkpatrick Pettis are relevant to their agency theory of recovery. The court rejected the appellants' claim of agency liability. It determined that the appellants failed to allege that Kirkpatrick Pettis had acted on Mutual's behalf in firing Engle or filing the Form U-5.

[10,11] "As a general rule, two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly of the other."[13] So a parent corporation is not liable for the acts of its subsidiary merely because of stock ownership.[14] But circumstances exist when a parent corporation can be directly or derivatively liable for the acts of its subsidiary.

Regarding their motion to dismiss, the appellants informed the court that they based their agency theory of liability against Mutual on apparent authority. The appellants stated that they did not intend to plead derivative theories of liability such as alter ego or piercing the corporate veil. We conclude that despite the appellants' label of apparent authority, the issue raised by their allegations is direct participant liability. Under the theory of direct participant liability, Mutual could only be liable for actions taken by Kirkpatrick Pettis if it had directed

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[12] 2 Thomas Lee Hazen, The Law of Securities Regulation § 7.12[2] (6th ed. 2009).

[13] 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 43 at 285 (perm. ed., rev. vol. 2006).

[14] See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

its subsidiary to conceal material facts or make false representations about Engle's discharge or to permit Kirkpatrick Pettis' agents to do so.

[12-14] Separate from claims of derivative liability, a parent corporation can be liable for its own participation in its subsidiary's unlawful conduct if it used its ownership interest to intervene and direct the subsidiary's actions.[15] But under the theory of direct participant liability, it is not sufficient to show that the parent and subsidiary corporations shared common directors.[16] For a plaintiff to prevail in a direct participant claim, it must distinguish the intervening conduct from a parent corporation's normal control of a subsidiary—such as supervising the subsidiary's finance and budget decisions or general policies.[17] "The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility."[18]

The appellants concede that their allegations that Kirkpatrick Pettis acted as Mutual's agent in discharging Engle could have been clearer. But they argue that their complaint was sufficient to survive a motion to dismiss. Also, they argue that discovery has revealed evidence that Mutual commanded Kirkpatrick Pettis' actions.

In scrutinizing the complaint, we find the following: (1) Paragraph 13 alleged that Mutual took heightened control of Kirkpatrick Pettis, including supervision of Engle; and (2) paragraph 14 alleged that the defendants allowed Engle and Schuster to falsely represent to customers and Kirkpatrick Pettis that the Nebraska City office was being closed because of a reduction in the sales force. These paragraphs are sufficient to survive a motion to dismiss.

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[15] See, *Bestfoods, supra* note 14; *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989); *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 864 N.E.2d 227, 309 Ill. Dec. 361 (2007); 10 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 4878 (perm. ed., rev. vol. 2010).

[16] See *Bestfoods, supra* note 14.

[17] See *id.*

[18] *Id.*, 524 U.S. at 72.

The allegation in paragraph 13, that Mutual took heightened control of supervising Engle, implicitly included its involvement in a decision to discharge her for cause. And paragraph 14 alleged Mutual's direct involvement or authorization of false or misleading misrepresentations regarding Engle's discharge. These allegations were sufficient to suggest a claim for direct participant liability, and we cannot say that there was no reasonable expectation of proving this claim through discovery. Thus, the court erred in dismissing the appellants' claim against Mutual for failing to state a claim regarding its own conduct.

We emphasize, however, that the appellants' claim is not that Mutual controlled Kirkpatrick Pettis to the extent that we should not recognize their separate corporate identities.[19] Instead, their claim is that in this specific instance, Mutual used its ownership control to achieve the intended result of misleading the appellants about Engle's discharge. The appellants cannot premise direct participant liability on the mere fact that Kirkpatrick Pettis shared directors with Mutual. The evidence must show that a Mutual officer intervened in the management of Kirkpatrick Pettis to direct its conduct.

2. The Appellants' Negligent Misrepresentation Claim Fails

The appellants' negligent misrepresentation claim rested solely upon their allegations that Kirkpatrick Pettis supplied false information to the NASD on the Form U-5. As stated above, this claim is insufficient as a matter of law because they failed to allege that they were recipients of the alleged misrepresentation.[20] The appellants' third amended complaint similarly failed to allege that they were recipients of statements in the Form U-5. So the court's ruling that they could not file the third amended complaint does not change our analysis. Similarly, exhibit 30, a witness' affidavit, was relevant only to their claim that they could rely on the lack of regulatory

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[19] See *Hayes v. Sanitary & Improvement Dist. No. 194*, 196 Neb. 653, 244 N.W.2d 505 (1976).

[20] *Knights of Columbus Council 3152, supra* note 1.

action taken because of the Form U-5 filing. We rejected that argument in *Knights of Columbus Council 3152*.[21] Because the appellants failed to allege that they received statements made in the Form U-5, the court did not err in (1) granting KFS BD summary judgment, (2) excluding exhibit 30, and (3) denying leave to file a third amended complaint.

VI. CONCLUSION

We conclude that the appellants' negligent misrepresentation claim fails as a matter of law. We reverse, however, the court's order dismissing the appellants' fraudulent misrepresentation and fraudulent concealment claims. And we reverse the court's dismissal of their claim against Mutual to the extent that the appellants premised their claim upon Mutual's direct participation in Kirkpatrick Pettis' alleged misrepresentations or fraudulent concealment. We remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and STEPHAN, JJ., not participating.

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[21] See *id.*

FELICIA WRIGHT, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CHASITY WRIGHT, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRICT, APPELLEE.

PORTIA DENAY LOYD, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, DEIDRA LOYD, APPELLANT, V. OMAHA PUBLIC SCHOOL DISTRCT, APPELLEE.

791 N.W.2d 760

Filed December 10, 2010. Nos. S-10-048, S-10-067.

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. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.

3. ____: ____. An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.
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. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeals from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Appeals dismissed.

Melany S. O'Brien and Terry Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., and Mandy L. Strigenz, of Sibbernsen & Strigenz, P.C., for appellants.

Patrick B. Donahue and Ronald F. Krause, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

STEPHAN, J.

In these consolidated actions, appellants alleged that the Omaha Public School District (OPS) negligently failed to protect two of its students from harm. They appeal from orders of the district court entering summary judgment in favor of OPS in each case. We conclude that because the notices of appeal were untimely filed, we lack jurisdiction to reach the substantive issues presented.

BACKGROUND

Separate complaints were filed in the district court for Douglas County by Felicia Wright (Wright), individually and as special administrator of the estate of Chasity Wright (Chasity), deceased, and by Portia Denay Loyd (Portia), a minor, by and through her mother and next friend, Deidra Loyd (Loyd). The defendants in each action were OPS and Simmonds Restaurant Management, Inc., doing business as Burger King (Simmonds). The cases arose from an incident which occurred on June 25, 2004. On that day, Chasity and Portia were attending summer school at Omaha South High School. During their lunch break,

they left the school building and went to a nearby restaurant operated by Simmonds. In the parking lot of the restaurant, Chasity and Portia were assaulted by four or five females, at least two of whom had also attended classes at Omaha South High School that day. Chasity died from an asthma attack precipitated by the assault, and Portia sustained injuries.

In their complaints, appellants alleged that OPS was negligent in failing to protect Chasity and Portia from harm and that Simmonds was negligent in failing to take measures to prevent the assaults on its premises. OPS and Simmonds filed answers denying that they were negligent. Simmonds also filed a third-party complaint against one of the alleged perpetrators of the assault.

On March 31, 2009, the district court entered summary judgment in favor of OPS in each case, reasoning that "OPS did not owe a duty to supervise and protect Chasity and Portia from the off-campus assault . . . as the assault was unforeseeable as a matter of law." On June 30, the district court overruled motions to reconsider filed in each case, specifically stating, "This order shall not be considered a final judgment for purposes of appeal as defined in § 25-1315 (R.R.S. 2008)." On January 4, 2010, the district court entered orders pursuant to stipulations dismissing each case with prejudice as to Simmonds only. Wright filed a notice of appeal on January 13, and Portia filed a notice of appeal on January 20. Both notices indicated that the appeals were taken from the orders sustaining the motions for summary judgment filed by OPS. Neither party challenged the dismissal of Simmonds.

On March 12, 2010, the Court of Appeals summarily dismissed both appeals for lack of jurisdiction because there had been no adjudication of the third-party complaint and there had been no express determination pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008). In both appeals, appellants filed motions for rehearing which included, as attached exhibits, orders entered by the district court on March 19 dismissing the third-party complaints. Those orders were subsequently included in supplemental transcripts filed in each appeal.

On April 27, 2010, the Court of Appeals entered in each appeal a minute order which stated:

> Motion of appellant for rehearing sustained in part; appeal reinstated and jurisdictional issue reserved pending final submission of appeal. Parties directed to address jurisdictional issue in their briefing on appeal. See Neb. Rev. Stat. § 25-1912(2) (Reissue 2008); Ferer v. Aaron Ferer & Sons Co., 16 Neb. App. 866, 755 N.W.2d 415 (2008).

On the same date, the Court of Appeals consolidated the two appeals for purposes of briefing, oral argument, and disposition. We subsequently moved the consolidated appeals to our docket on our own motion, based on our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred in (1) sustaining a motion in limine filed by OPS, (2) finding that OPS had no duty as a matter of law to supervise and protect Chasity and Portia, (3) finding that the assault was not foreseeable as a matter of law, and (4) granting OPS' motion for summary judgment.

STANDARD OF REVIEW

[1,2] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

ANALYSIS

[3,4] An appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[4] Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *In re Estate of Hockemeier, ante* p. 420, 786 N.W.2d 680 (2010); *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[3] *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

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

court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[5] The question of when final orders were entered in these cases is governed by § 25-1315(1), which provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In cases involving multiple claims or parties, we have interpreted this statute to require

> an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.[6]

In these cases, the district court did not make a determination pursuant to § 25-1315 when it entered summary judgment for OPS in each case, and it specifically stated that its orders overruling the motions to reconsider entry of summary judgment were not final orders as defined by § 25-1315. Nor did the district court make determinations pursuant to § 25-1315

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[5] *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

[6] *Malolepszy v. State, supra* note 3, 270 Neb. at 108, 699 N.W.2d at 392.

when it ordered the dismissal of Simmonds on January 4, 2010. Thus, when the notices of appeal were filed on January 13 and January 20, the cases stood in the same procedural posture as in *Malolepszy v. State*,[7] where we held that the pendency of an unresolved third-party complaint in the absence of a determination and direction pursuant to § 25-1315(1) precluded our jurisdiction over an appeal from the entry of summary judgment in favor of the defendant.

Finality was achieved in these cases on March 19, 2010, when the district court entered orders dismissing the third party complaints. Neb. Rev. Stat. § 25-1912(1) (Reissue 2008) provides that in order to obtain appellate reversal of a judgment or final order entered by a district court, a party must file a notice of appeal "within thirty days after the entry of such judgment, decree, or final order." In these cases, there were no notices of appeal filed *after* the entry of the final orders on March 19. Appellants rely upon the notices of appeal which they filed *before* entry of that order to establish appellate jurisdiction.

The Nebraska Court of Appeals addressed a similar sequence of events in *Ferer v. Aaron Ferer & Sons Co.*[8] In that case, a notice of appeal was filed from a summary judgment order which disposed of some but not all of the appellant's claims and the district court did not make a determination pursuant to § 25-1315. In response to a show cause order entered by the Court of Appeals, the appellant produced an order from the district court dismissing all claims against all defendants and indicating that its prior order was intended to have this effect. The appellant did not file a new notice of appeal after this order, but argued that his previously filed notice of appeal related forward under § 25-1912(2), which provides:

> A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be

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[7] See *id.*

[8] *Ferer v. Aaron Ferer & Sons Co.*, 16 Neb. App. 866, 755 N.W.2d 415 (2008).

> treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

In rejecting this argument, the Court of Appeals held that § 25-1912(2) applied only to the specific circumstance of a notice of appeal filed after the announcement of a decision or final order, but before entry of judgment, and was "not intended to validate anticipatory notices of appeal filed prior to the announcement of a final judgment."[9]

Appellants attempt to distinguish their cases from *Ferer* by arguing that the Court of Appeals reinstated these appeals in response to their motions for rehearing. They rely upon *State v. Craig*,[10] in which the Court of Appeals dismissed for lack of jurisdiction, but then reinstated the appeal in response to the appellant's motion for rehearing. But in its opinion, the Court of Appeals specifically analyzed the order from which the appeal was taken and concluded that it constituted a final and appealable order. The notice of appeal was filed on the day after the order was entered. The reinstatement of the appeal in *Craig* was irrelevant to the court's ultimate determination that there was a final, appealable order from which a timely appeal was taken. Thus, *Craig* provides no support for appellants' argument that this case is distinguishable from *Ferer*.

Nor are we persuaded by appellants' argument that any jurisdictional defect was in some way resolved by the Court of Appeals' reinstatement of these appeals in response to the motions for rehearing. We note that the reinstatement orders were entered on April 27, 2010, more than 30 days following the final orders entered by the district court on March 19, so there is no basis for any argument that appellants were somehow led to believe that they were not required to file timely notices of appeal *after* the final orders of the district court. To the contrary, the orders reinstating these appeals specifically reserved the jurisdictional issue "pending final submission of appeal" and directed the parties to address the jurisdictional issue in their briefs.

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[9] *Id.* at 870, 755 N.W.2d at 418.

[10] *State v. Craig*, 15 Neb. App. 836, 739 N.W.2d 206 (2007).

Finally, appellants cite cases from other jurisdictions in support of their argument that reinstatement of an appeal following dismissal necessarily cures a jurisdictional defect. We need not discuss those cases, because the question of appellate jurisdiction in the cases before us is necessarily dependent upon the provisions of Nebraska statutes as interpreted and applied by the appellate courts of this state. We conclude that the reasoning of the Nebraska Court of Appeals in *Ferer* is correct and directly applicable to the jurisdictional issue presented in these appeals. Notices of appeal were not filed within 30 days after entry of the final orders on March 19, 2010, as required by § 25-1912(1), and therefore we do not have appellate jurisdiction.

CONCLUSION

[5] When an appellate court is without jurisdiction to act, the appeal must be dismissed.[11] Accordingly, we dismiss these appeals.

APPEALS DISMISSED.

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[11] *Malolepszy v. State, supra* note 3; *In re Guardianship & Conservatorship of Woltemath, supra* note 3.

STATE OF NEBRASKA, APPELLEE, V.
WILMAR A. MENA-RIVERA, APPELLANT.
791 N.W.2d 613

Filed December 17, 2010. No. S-10-112.

1. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
2. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
3. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
4. **Statutes: Legislature: Intent.** When construing a statute, a court's objective is to determine and give effect to the legislative intent of the enactment.

5. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
6. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. ____: ____. An appellate court will not read into a statute a meaning that is not there.
8. **Words and Phrases.** The word "prior" is generally understood to mean preceding in time or in order.
9. **Pleas: Legislature: Intent: Words and Phrases.** Interpreting "prior" to mean "immediately before" the entering of a plea of guilty or nolo contendere better reflects the legislative intent of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).
10. **Criminal Law: Pleas: Proof.** To withdraw a plea under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), all a defendant must show is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.
11. **Criminal Law: Pleas.** Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) does not require that the immigration consequences of a conviction be an absolute certainty before a defendant may withdraw his plea.
12. **Words and Phrases.** "May" is used to connote a contingency or a possibility. "Will," on the other hand, conveys futurity and carries with it certainty that the event will happen.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Reversed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., 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.

Under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), the trial court—before accepting a guilty plea or a nolo contendere plea—must advise a defendant that the plea could result in removal from the United States or a denial of naturalization. The court gave the advisement to Wilmar A. Mena-Rivera before accepting a not guilty plea at his arraignment. But later, when under a plea bargain he pleaded guilty to a lesser

offense, the court failed to repeat the advisement. May Mena-Rivera withdraw his guilty plea because the court did not repeat the advisement? We conclude that he may. We reverse the district court's order denying his motion to withdraw his guilty plea.

BACKGROUND

At his arraignment on December 17, 2008, Mena-Rivera, a lawful resident originally from El Salvador, pleaded not guilty to child abuse, at the time a Class III felony,[1] after first receiving an advisement required by § 29-1819.02. Section 29-1819.02 requires a court to advise a defendant, before accepting a plea of guilty or nolo contendere, that a conviction for the crime charged may have adverse immigration consequences. After receiving the advisement, Mena-Rivera stated that he understood it.

Later, under a plea agreement, Mena-Rivera appeared before the court and pleaded guilty to one count of attempted child abuse, a Class IIIA felony.[2] During this appearance, the court did not repeat the immigration advisement. Mena-Rivera, however, acknowledged that the court had arraigned him previously and that he understood his rights.

On June 3, 2009, Mena-Rivera moved to withdraw his plea. He claimed that because the court failed to reread the advisement, his plea was involuntary. The court noted that it had not given him the advisement before he entered his guilty plea. But then it ruled that to have his plea withdrawn, he must demonstrate two things. First, he must show that he was prejudiced by the nonadvisement. According to the district court, to demonstrate prejudice, the defendant must show that it is "'reasonably probable he would not have pleaded guilty or nolo contendere if properly advised.'" Second, the court required that Mena-Rivera show that there is more than a remote possibility that the conviction would have adverse immigration consequences. To allow the defendant to show this, the trial court ordered an evidentiary hearing.

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[1] Neb. Rev. Stat. § 28-707(5) (Reissue 2008).

[2] See Neb. Rev. Stat. § 28-201(4)(c) (Reissue 2008).

At the evidentiary hearing, Mena-Rivera introduced an immigration detainer from the U.S. Department of Homeland Security (DHS). The detainer stated that DHS had commenced an investigation to determine whether Mena-Rivera is subject to removal from the United States. He introduced this to show that his conviction would have the adverse immigration consequences required by the statute. Mena-Rivera, however, declined to adduce any evidence concerning prejudice. He argued that doing so would violate his attorney-client privilege. Because he failed to show prejudice, the court overruled his motion to withdraw his plea. Later, the court sentenced Mena-Rivera to a term of 20 to 48 months in prison, with credit for 352 days served.

ASSIGNMENTS OF ERROR

Mena-Rivera claims as error the following:

1. The court erred in refusing to allow Mena-Rivera to withdraw his plea.

2. The court erred in not warning him of the immigration consequences of his plea as required by § 29-1819.02.

3. The court erred in requiring Mena-Rivera to show prejudice from the court's failure to advise under § 29-1819.02.

4. The court erred in accepting his plea without establishing the voluntary and intelligent nature of the guilty plea before accepting it.

5. Mena-Rivera was denied his right to effective assistance of counsel under the Sixth Amendment.

STANDARD OF REVIEW

[1,2] The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.[3] The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[4]

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[3] *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

[4] See *id.*

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.[5]

ANALYSIS

The Court Was Required to Give Mena-Rivera the Warning at the Time of the Guilty Plea

Mena-Rivera argues that the lower court was required to reread him the warning before it accepted his plea on attempted child abuse. It is not enough, Mena-Rivera argues, that the trial court warned him when it arraigned him on the initial charge of child abuse. The State, of course, views it differently. It argues that this earlier warning was sufficient. And if it was not, Mena-Rivera must show that he was prejudiced by the court's failure to repeat the warning.

Section 29-1819.02 states in part:

> (1) 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.

[4-7] In construing § 29-1819.02, our objective is to determine and give effect to the legislative intent of the enactment.[6] When construing a statute, we must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which

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[5] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[6] See, *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010); *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007); *Peterson v. Minden Beef Co.*, 231 Neb. 18, 434 N.W.2d 681 (1989).

would defeat it.[7] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[8] And we will not read into a statute a meaning that is not there.[9]

[8] Here, the result hinges on the meaning of the word "prior." The word "prior" is generally understood to mean "preceding in time or in order."[10] It is true that giving the advisement at a defendant's initial arraignment would be prior to the defendant's entering a plea. But when we consider the legislative intent behind § 29-1819.02, we conclude that "prior" should be read to entail more immediacy.

In enacting § 29-1819.02, the Legislature was clearly concerned with the unfairness of pleas that defendants enter without full knowledge of their consequences.[11] We believe that reading "prior" to mean that the court should give the advisement immediately before the defendant enters a guilty plea or nolo contendere plea better promotes the Legislature's intent. In contrast, to read "prior" to mean that the court can give the advisement at any time before a defendant enters a plea could undermine the Legislature's intent.

First, weeks or months may often pass between when a court initially arraigns a defendant and when the defendant enters his plea of guilty or nolo contendere. During this time, the defendant may forget what the court advised him of at his initial arraignment. In such a case, the Legislature's intent of ensuring that the defendant knew the immigration consequences of his plea could be frustrated.

Second, the Legislature's intent could be frustrated because defendants often plead to a lesser charge than what they were initially arraigned on. Mena-Rivera is one such defendant.

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[7] *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010); *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[8] See, *In re Estate of Fries, supra* note 7; *Herrington v. P.R. Ventures, supra* note 7.

[9] *In re Estate of Fries, supra* note 7; *In re Adoption of Kailynn D., supra* note 6.

[10] Webster's Encyclopedic Unabridged Dictionary of the English Language 1145 (1994).

[11] See Neb. Rev. Stat. § 29-1819.03 (Reissue 2008).

A layperson could reasonably expect less severe penalties to flow from a less severe charge. If a defendant who pleads guilty to a lesser charge than what he was arraigned on is not read the immigration advisement when he enters his plea of guilty or nolo contendere, he may believe that the prior advisement does not apply. This uncertainty, however, is the mischief that the Legislature wished to combat when it enacted § 29-1819.02.

[9] We conclude that interpreting "prior" to mean "immediately before" the entering of a plea of guilty or nolo contendere better reflects the legislative intent of § 29-1819.02.

The State argues that even if the lower court erred in not rereading the advisement to Mena-Rivera, the court should not allow him to withdraw his plea unless he can show prejudice. Our case law involving § 29-1819.02, however, has made clear that only two elements must be met before a defendant can withdraw his or her plea; and prejudice is not one of them.

[10] Recently, in *State v. Yos-Chiguil*,[12] we stated that all a defendant must show to withdraw a plea under § 29-1819.02 is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.

The court had advised the defendant in *Yos-Chiguil* that a "conviction could adversely affect his ability to remain or work in the United States."[13] The court did not, however, warn the defendant that he could lose the opportunity to one day acquire citizenship. We decided that the defendant in *Yos-Chiguil* could not withdraw his plea because he had made no allegations that "he faces the prospect of denial of an application for naturalization based solely upon the conviction which he seeks to vacate."[14] We did not require the defendant in *Yos-Chiguil* to show prejudice apart from the two elements that appear in the text of the statute. This was so even though the defendant

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[12] *State v. Yos-Chiguil, supra* note 5.

[13] *Id.* at 597, 772 N.W.2d at 579.

[14] *Id.* at 599, 772 N.W.2d at 580.

already knew that some immigration consequences would flow from his plea.

Having established that § 29-1819.02 required the court to reread the immigration advisement to Mena-Rivera when he entered his guilty plea—which it failed to do—we now examine the second element: whether Mena-Rivera faces an immigration consequence of which the court did not warn him. We stated in *Yos-Chiguil* that a "defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given."[15]

Here, Mena-Rivera introduced into evidence a detainer from DHS. It stated that DHS had initiated an investigation to determine whether he is subject to removal from the United States.

[11,12] We do not read *Yos-Chiguil*'s language that a defendant "actually face[]" immigration consequences as saying that the consequences must be an absolute certainty before the defendant may withdraw his plea under § 29-1819.02. The statute uses the word "may" as opposed to "will." "May" is used to connote a contingency or a possibility.[16] "Will," on the other hand, conveys futurity[17] and carries with it certainty that the event will happen. Also, immigration law can be complex and the exact consequences for any individual defendant can be difficult to forecast. We do not believe it is wise to require our trial court judges to wade into this complex area of law, in which most judges have little expertise. Nor should we require judges to wait so long to see the results of deportation that it may be too late for defendants to effectively avail themselves of § 29-1819.02. We conclude that when DHS places an immigration detainer on an individual, that person "actually faces" immigration consequences so that he may claim the protections of § 29-1819.02. Mena-Rivera has thus satisfied the second element of the statute.

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[15] *Id.* at 598, 772 N.W.2d at 580.

[16] See Webster's Encyclopedic Unabridged Dictionary of the English Language, *supra* note 10 at 886.

[17] *Id.* at 1634.

Because the court did not read the immigration advisement to Mena-Rivera when it took his plea and he has shown that he faces immigration consequences, we conclude that it was error for the court not to allow Mena-Rivera to withdraw his plea.

Mena-Rivera's Other Claims

Because we have determined that Mena-Rivera is entitled to withdraw his plea based on § 29-1819.02, we need not consider his other assignments of error.[18]

CONCLUSION

Mena-Rivera was entitled to withdraw his plea under § 29-1819.02. The court erred in concluding that the advisement at the arraignment satisfied the statute and in requiring Mena-Rivera to establish prejudice to withdraw his plea. We reverse, and remand with directions to the district court to allow Mena-Rivera to withdraw his plea.

Reversed.

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[18] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

Heavican, C.J., dissenting.

I concur with the majority's holding that Mena-Rivera has demonstrated that he faces an adverse immigration consequence. I respectfully disagree with the decision that the district court did not meet the requirements of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), however, because the district court did read the advisement "prior to" accepting Mena-Rivera's plea of guilty.

During the arraignment on December 17, 2008, the district court advised Mena-Rivera of the charges against him, his possible pleas, and his rights in relation to those pleas. During that advisement, the district court stated:

> I am required by state statute to advise you that if you are not a citizen of the United States and you are convicted of this charge, a conviction could result in either your deportation from the United States or the denial of any application which you may have pending to become a citizen of the United States.

Mena-Rivera stated he understood that consequence and entered a plea of not guilty. The advisement complied with the requirements of § 29-1819.02.

On February 11, 2009, less than 2 months later, Mena-Rivera changed his plea to guilty. The following colloquy took place:

> THE COURT: My record shows to me that you appeared before the Court on December 17th of last year. At that time, I told you about your rights, the pleas that were pending against you, the penalties in the event you were convicted, and the rights — the rights, the pleas, the charges, and penalties. You told me you understood all of those things; is that correct?
>
> [Mena-Rivera]: Yes Your Honor.
>
> THE COURT: When you were here on December 17th, you told me that you understood the rights that you had. You also told me that you understood the pleas that you could enter; is that correct?
>
> [Mena-Rivera]: Yes, Your Honor.
>
> THE COURT: Is there anything that I told you about with respect to either your rights or the pleas that you would like for me to tell you about again?
>
> [Mena-Rivera]: No, Your Honor.
>
> THE COURT: And you feel comfortable as you sit here today that you understand those things; is that correct?
>
> [Mena-Rivera]: Yes, Your Honor.

Section 29-1819.02 requires that the district court read the advisement "[p]rior to acceptance of a plea of guilty or nolo contendere." The district court gave the advisement to Mena-Rivera at his arraignment, and during the plea hearing asked if Mena-Rivera remembered his rights or had any questions regarding those rights. We have previously held that adverse immigration consequences are collateral to a guilty plea and that trial courts are only obligated to advise defendants of "direct" consequences.[1] Therefore, while the district court was statutorily obligated to read the advisement "prior

[1] *State v. Zarate*, 264 Neb. 690, 695, 651 N.W.2d 215, 222 (2002).

to acceptance" of a plea of guilty or no contest, Mena-Rivera's constitutional rights were not implicated. Given the facts of this case, I believe the district court met the requirements of the statute, and Mena-Rivera should not be entitled to withdraw his plea of guilty. I would therefore affirm the decision of the district court denying Mena-Rivera's motion to withdraw his guilty plea.

TIMOTHY MEYERS, APPELLANT, V. NEBRASKA STATE PENITENTIARY OF THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, AND COMMISSIONER OF LABOR OF THE STATE OF NEBRASKA, APPELLEES.

791 N.W.2d 607

Filed December 17, 2010. No. S-10-267.

1. **Employment Security: Judgments: Appeal and Error.** In an appeal from the Nebraska Appeal Tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors 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 law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Employment Security.** Under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008), an individual shall be disqualified for unemployment benefits for misconduct related to his work.
4. **Employment Security: Words and Phrases.** Misconduct related to work is defined as behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
5. **Employment Security.** An employee's actions do not rise to the level of misconduct if the individual is merely unable to perform the duties of the job.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded with directions.

Kevin Ruser and Patricia A. Knapp, of University of Nebraska Civil Clinical Law Program, and Clint Cadwallader, Kurt

Arganbright, Matthew Meyerle, and Joshua Wunderlich, Senior Certified Law Students, for appellant.

John H. Albin, Special Assistant Attorney General, and Katie Baltensperger, Senior Certified Law Student, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Timothy Meyers filed a claim for unemployment insurance benefits after termination from his employment as a corrections officer at the Nebraska State Penitentiary of the Nebraska Department of Correctional Services (State Penitentiary). The issue in this case is whether Meyers' repeated failures to follow security procedures constituted misconduct in connection with his work so as to disqualify him from receiving unemployment benefits. Because the record does not support the determination that Meyers' actions amount to misconduct, we reverse the decision of the district court.

BACKGROUND

Meyers worked as a correctional officer at the State Penitentiary from January 5, 2009, until his discharge on May 8, 2009. Meyers was hired on a 6-month probationary period and was required to complete 6 weeks of training, including on-the-job training where he was assigned to certain posts for 8 hours per week. At the conclusion of his training on each post, Meyers signed a form indicating he understood the requirements of that post. Meyers also received a training manual, which included administrative regulations and the code of ethics, and an employee handbook. Meyers successfully completed his training. The appellees maintain that Meyers was discharged for failing to follow procedures that govern State Penitentiary security practices.

Throughout Meyers' employment, supervisors raised concerns regarding his ability to perform the functions of his job. In a February 21, 2009, incident report, a supervisor noted that Meyers had difficulty performing radio protocols, even

after the skills had been demonstrated and explained. Another supervisor noted that Meyers "might not be suitable in the field of corrections." This observation was based on Meyers' apparent difficulty applying restraints and retaining information. In addition, the incident reports contained in the record note that although Meyers was able to complete his training, he had difficulty grasping information and needed extensive instruction. The final report which recommended termination of Meyers' employment stated that Meyers' job performance had been unsatisfactory, that he struggled to adapt to the correctional environment, and that "Meyers' attitude is more of a person working in a library versus one working in a prison."

The report recommending termination of Meyers' employment identifies specific incidents where Meyers failed to properly carry out his duties. On February 26, 2009, Meyers was assigned to a tower to supervise movement in the prisonyard. During the hours of dark or inclement weather, an officer assigned to this post is required to challenge any individual observed walking across the yard to ensure that an inmate is not attempting to escape or access unauthorized areas. The prescribed protocol requires the officer to challenge the movement by turning on a red light. If the person moving about the yard is prison staff, that person must flash back with his or her flashlight. The report states that Meyers admitted he saw a person in the yard whom he did not challenge and that Meyers explained that his failure to challenge that movement was a result of poor lighting, shadows in the yard, and the fact that he had been watching dog handlers and dogs and scanning the area between other towers.

On April 2, 2009, Meyers was assigned to the visiting room to supervise inmates and their visitors. His supervisor reported that Meyers paid little attention to the operation of the visiting room and instead devoted his time toward getting a supervisor "to do [Field Training Officer] modules." A supervisor did complete one module with Meyers, and Meyers was thereafter informed that he was ill prepared for work and more concerned about his personal needs than those of his coworkers. After the April 2 shift, Meyers' supervisor reported

that Meyers made the statement: "'I see the predominant number of mixed couples in here are black.'" His supervisor reported that there were three mixed couples in the visiting room at the time and that he found the statement both "alarming and dangerous."

On April 27, 2009, Meyers was assigned to a housing unit. Meyers was to work in the control center, from which the cell and entrance doors of the housing unit are locked and unlocked to control the movement of the inmates. Each hour, inmates are allowed to move freely between their cells and the housing unit for a 10-minute period. For the remainder of the hour, inmates are not allowed to enter the housing unit or their cells unless they have a specific reason to do so. The appellees testified that this protocol is in place for security reasons; if other inmates gain access to those areas without staff observation, they might be able to hide contraband, steal items, or assault fellow inmates. Outside of the 10-minute open period, protocol requires an inmate to request access to the housing area or an individual cell via an intercom system. In order to allow the requested access, an officer must verify the inmate's identity and cell assignment before allowing the inmate to enter. Each control center contains a picture of each inmate and the inmate's cell assignment.

During Meyers' shift on April 27, 2009, on three separate occasions, he violated the protocol described above. Meyers opened the doors of cells that were unoccupied when the inmates who were assigned to those cells were not in the housing unit. These violations were reported to a lieutenant, who testified before the Nebraska Appeal Tribunal that Meyers explained that the inmates would "yell and push him to open room doors even if he was not certain if that inmate even lived in that housing unit or was assigned to that room."

Meyers received a termination letter which explained the reasons for termination as follows:

> You have failed to comprehend several essential job duties such as application of restraints and radio operation.
>
> . . . You failed to challenge movement on the External Yard while you were assigned to Tower 4.

> . . . You failed to control inmate movement in a housing unit by allowing unoccupied room doors to be unsecured.

After his employment was terminated, Meyers applied to reopen an established benefits claim. An adjudicator determined that Meyers' employment was not terminated for misconduct, and the State Penitentiary appealed that determination on June 19, 2009.

A notice of appeal filed was mailed to Meyers on June 19, 2009, stating that he would be advised of the date and time of his hearing within approximately 15 to 25 business days. Meyers was a member of the U.S. Naval Reserve and, from July 17 to August 1, was deployed overseas for reserve training duty. On July 27, Meyers was mailed the notice of hearing setting forth the date, time, and manner of the hearing. The hearing was scheduled for August 10. Notice was received when Meyers returned home; however, he did not read the notice until after the hearing had occurred. Meyers therefore did not participate in the hearing.

The appeal tribunal found that Meyers was discharged for misconduct in connection with his work. On appeal, the district court affirmed this finding and, quoting *Bristol v. Hanlon*,[1] concluded that Meyers' actions constituted misconduct "in that they evinced a 'deliberate, willful or wanton disregard of an employer's interest . . . or carelessness or negligence of such a degree or recurrence as to manifest culpability . . . .'" The court also found that Meyers was not entitled to relief under the Servicemembers Civil Relief Act[2] because the decision of the appeal tribunal was not a default judgment and Meyers did not have a meritorious defense to the action as required under the act.[3] Meyers appeals.

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[1] *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981), *overruled on other grounds, Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982).

[2] 50 U.S.C. app. § 501 et seq. (2006 & Supp. II 2008).

[3] See *id.*, § 521(g).

ASSIGNMENTS OF ERROR

Meyers assigns that the district court erred in (1) affirming the appeal tribunal's decision that Meyers had been fired from his job due to misconduct and (2) determining that Meyers was not entitled to relief under the Servicemembers Civil Relief Act.

STANDARD OF REVIEW

[1,2] In an appeal from the appeal tribunal to the district court regarding unemployment benefits, the district court conducts the review de novo on the record, but on review by the Court of Appeals or the Supreme Court, the judgment of the district court may be reversed, vacated, or modified for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

ANALYSIS

[3,4] Under Neb. Rev. Stat. § 48-628(2) (Cum. Supp. 2008), an individual shall be disqualified for unemployment benefits for misconduct related to his work. We have previously defined misconduct as behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.[5]

[5] Meyers argues that he was discharged not for misconduct, but, rather, for his inability to perform job duties. An employee's actions do not rise to the level of misconduct if the individual is merely unable to perform the duties of the job.[6]

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[4] *NEBCO, Inc. v. Murphy, ante* p. 145, 784 N.W.2d 447 (2010).

[5] *Id*. See, also, *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998); *Smith v. Sorensen*, 222 Neb. 599, 386 N.W.2d 5 (1986).

[6] See *Perkins v. Equal Opportunity Comm.*, 234 Neb. 359, 451 N.W.2d 91 (1990).

However, deliberate indifference to the standards of behavior that an employer has a right to expect is misconduct.[7] In reliance on *Bristol v. Hanlon*,[8] the appellees assert, and the district court concluded, that Meyers' failure to (1) follow security procedures when admitting inmates to the housing unit without proper authorization, (2) observe the inmates and their visitors in the visiting area, and (3) follow security procedures and challenge unknown persons walking in the prison yard after dark evidenced a deliberate, willful, or wanton disregard of an employer's interest or carelessness or negligence of such a degree or recurrence as to manifest culpability.

In support of this argument, the appellees assert that Meyers' actions show a complete disregard of his employer's interest because Meyers deliberately failed to observe important safety rules. Meyers was thoroughly trained on the expected protocol, his violations were multiple instances over a period of time, and Meyers was often reminded of the correct procedure following these violations. Specifically, during the final incident that led to the termination of Meyers' employment, Meyers violated the same rule three times even after being reminded of the proper protocol after each preceding instance. The appellees argue that this shows deliberate disregard of the employer's interest in maintaining a safe prison facility or, in the alternative, that Meyers' actions amount to negligence which manifests culpability.

We find the district court's reliance on *Bristol* to be misplaced. In that case, the claimant worked for a slaughterhouse and was trained to remove the hides of beef carcasses. The claimant damaged hides by making improper cuts; he conceded that the cuts were improper. But, when warned by another employee to stop making such cuts, he responded by shouting obscenities and continuing to make the cuts in the same fashion as he had prior to the warnings. The claimant was fired for this conduct and was denied unemployment benefits on the basis of misconduct. We affirmed the determination and found

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[7] See *Bristol v. Hanlon, supra* note 1.

[8] *Id.*

that the claimant damaged the hides intentionally; that he had been fully trained, having worked for the company for 3 years; and that his actions were due to his unhappiness about doing a particular job.[9] *Bristol* is distinguishable from the present case. The record indicates that Meyers struggled to adapt to the correctional environment and that supervisors expressed concerns that he was not suited for the field of corrections. It was also noted that Meyers had difficulty grasping basic concepts and retaining information, even for short periods of time. Aside from the appellees' assertions, there is no evidence that Meyers' failures were the result of *deliberate* indifference or were so careless or negligent as to manifest culpability.

The present case is similar to *Borbas v. Virginia Employment Com'n*,[10] in which the Virginia Court of Appeals reversed a determination that a prison security guard had been discharged for misconduct after breaching security policies on three occasions. Though all three of the breaches concerned the security of the prison facilities, the court noted that behavior that is involuntary or unintentional or results from simple negligence warrants dismissal, but not disqualification from benefits. The court also found no evidence that the guard, despite her extensive training, ever performed well, so the breaches were not a result of a decline in her performance. The court concluded that her actions were negligent at most and did not rise to misconduct.

Under the definition of "misconduct" developed in our case law, misconduct generally involves intentional actions as indicated by the phrases "'wanton and willful disregard of the employer's interests,'" "'deliberate violation of rules,'" and "'disregard of standards of behavior.'"[11] Misconduct may also involve negligence on the part of the employee, but only when it "manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or

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[9] *Id.*

[10] *Borbas v. Virginia Employment Com'n*, 17 Va. App. 720, 440 S.E.2d 630 (1994).

[11] *NEBCO, Inc. v. Murphy, supra* note 4, *ante* at 154, 784 N.W.2d at 455 (quoting *Douglas Cty. Sch. Dist. 001 v. Dutcher, supra* note 5).

of the employee's duties and obligations."[12] Poor judgment, inability to cope with situations, and occasional incidents of nondeliberate failure to precisely follow established rules and procedures do not constitute the kind of willful and deliberate misconduct that will disqualify an employee from receiving unemployment benefits as provided by law.

Meyers' apparent inability to perform the functions of his job most likely warrants dismissal. This is especially the case under the circumstances of Meyers' employment, as he was still a probationary employee at the time his employment was terminated. Meyers was employed as a corrections officer for only 4 months. Similar acts committed by a seasoned employee might prove misconduct by amounting to evidence of a deliberate violation of the rules or disregard of the employer's interest. In the present case, however, we conclude that the record does not contain competent evidence to support a finding that Meyers' violations of protocol rise to the level of misconduct as we have defined it. Because this conclusion is dispositive, we need not address Meyers' other assignment of error.

CONCLUSION

The record supports a finding that Meyers' actions constituted, at most, negligence. They did not constitute the misconduct necessary to justify a denial of benefits. Accordingly, we reverse the judgment of the district court and direct it to remand the matter to the appeal tribunal with directions to enter an award consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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[12] *Douglas Cty. Sch. Dist. 001 v. Dutcher, supra* note 5, 254 Neb. at 321, 576 N.W.2d at 472.

STATE OF NEBRASKA, APPELLEE, V. KENNETH C. FLEMING, APPELLANT.

792 N.W.2d 147

Filed December 23, 2010. No. S-10-120.

1. **Trial: Witnesses: Testimony: Appeal and Error.** An appellate court reviews a trial court's allowance of leading questions for an abuse of discretion. It is usual and proper for the trial court to permit leading questions in conducting the examination of a witness who is immature; unaccustomed to court proceedings; inexperienced, agitated, terrified, or embarrassed while on the stand; and lacking in comprehension of the questions asked.
2. **Judges: Recusal.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
3. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias bears the heavy burden of overcoming the presumption of judicial impartiality.
4. **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.
5. **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.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Effectiveness of Counsel: Records: 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. If the matter has not been raised or ruled on at the trial court level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
8. **Criminal Law: Indictments and Informations: Time.** A criminal information is not insufficient with respect to a time allegation so long as it alleges a distinct beginning and an equally clear end within which the crimes are alleged to have been committed.
9. **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.
10. ____. 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 Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., and, on brief, D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Defendant, Kenneth C. Fleming, was convicted of two counts of first degree sexual assault of a child. He was sentenced to 20 to 40 years' imprisonment on each count, with the sentences to run consecutively. Fleming appeals. We affirm.

FACTUAL BACKGROUND

The convictions in this case arise from sexual assault allegations made against Fleming by his stepdaughter, F.K., and his stepniece, A.S. Fleming was married to T.F. in 2006. At the time of the marriage, T.F. had three children from previous relationships, including F.K. A fourth child was born to Fleming and T.F. during the marriage. In March 2006, the family moved from Holdrege, Nebraska, to Kearney, Nebraska, due to a job opportunity for Fleming. In Kearney, the family lived in several residences, including two trailer homes and a single-family home. For nearly all the time at issue, the family lived at this latter location.

At the time of the move to Kearney, T.F. did not work outside of the home. However, in 2008, T.F. did obtain employment outside of the home. Fleming worked during the day, and T.F. worked at night. While T.F. was at work, Fleming stayed home with the children.

The single-family home in Kearney was usually filled with people. Besides the Flemings and their children, two family friends spent some time living in the home, followed by the family of Fleming's cousin, which included two children. Beyond those persons living in the home, the children of T.F.'s brother would occasionally visit the family in Kearney, and T.F. had a second job babysitting her nieces and nephews from that family. Moreover, when the family had lived in a prior residence in Kearney, Fleming's sister had lived with them for a time.

In November 2008, T.F. and the children moved to North Platte, Nebraska. Fleming remained in Kearney. In January 2009, F.K. reported to T.F. that Fleming had sexually assaulted her on various occasions while the family lived in Kearney. F.K. also stated that Fleming had sexually assaulted A.S. T.F. then contacted A.S. and A.S.' mother and father and eventually confirmed that Fleming had also assaulted A.S.

T.F. contacted North Platte law enforcement. Eventually, it was determined that the alleged assaults took place when F.K. lived in Kearney. Kearney law enforcement then initiated an investigation, which ended with the charges filed in this case.

At trial, both F.K. and A.S. testified that Fleming penetrated their vaginal areas with his finger, his tongue, and his penis and that he forced them to perform oral sex on him. Fleming testified and denied the allegations. The theory of his defense was that F.K. and A.S. made up their stories at the instigation of T.F.

ASSIGNMENTS OF ERROR

On appeal, Fleming assigns that (1) trial counsel was ineffective in several particulars; (2) the State's information was insufficient, in violation of his due process rights; (3) the trial court erred in allowing the State's expert witness to testify regarding the credibility of the alleged victims and in overruling Fleming's motion for mistrial on this basis; (4) the trial court erred in allowing the State to use leading questions and photographs to elicit testimony regarding the alleged assaults; (5) the trial court erred in conducting competency examinations

of the two alleged victims in the presence of the jury; (6) the trial court erred in overruling Fleming's motion to recuse; (7) the trial court erred in failing to grant Fleming's motions for directed verdict; (8) there was insufficient evidence to support his conviction; and (9) his sentences were excessive.

STANDARD OF REVIEW

[1] We review a trial court's allowance of leading questions for an abuse of discretion.[1] It is usual and proper for the trial court to permit leading questions in conducting the examination of a witness who is immature; unaccustomed to court proceedings; inexperienced, agitated, terrified, or embarrassed while on the stand; and lacking in comprehension of the questions asked.[2]

[2,3] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[3] A defendant seeking to disqualify a judge on the basis of bias bears the heavy burden of overcoming the presumption of judicial impartiality.[4]

[4] 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.[5]

[5,6] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial

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[1] See *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985).

[2] *Id.*

[3] *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

[4] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[5] *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

court.[6] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[7]

ANALYSIS

Ineffective Assistance of Counsel.

In his first assignment of error, Fleming assigns that his trial counsel was ineffective in that he (1) did not make himself available to Fleming, nor did he sufficiently communicate with Fleming; (2) refused to "gather and/or use" evidence and witnesses as directed by Fleming; (3) was not adequately prepared to use witnesses' inconsistent statements to impeach their live testimony; (4) refused to adequately address the motive of F.K., A.S., T.F., and others; (5) failed to adequately cross-examine F.K. and A.S.; (6) failed to file a motion to quash information; and (7) failed to file a motion to withdraw as counsel after Fleming filed complaint against him with the Counsel for Discipline.

[7] 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. If the matter has not been raised or ruled on at the trial court level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.[8]

In this case, both Fleming and the State agree that Fleming's claims are not cognizable on direct appeal. And we agree, with one exception, that we lack a record to determine whether trial counsel's representation was ineffective. We do, however, conclude that we can and will review Fleming's assertions with regard to the sufficiency of the information filed against him. We otherwise decline to reach on direct appeal Fleming's arguments regarding the ineffectiveness of his trial counsel.

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[6] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[7] *Id.*

[8] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

Sufficiency of Information.

In his second assignment of error, Fleming argues that the information against him was insufficient as it alleged the acts occurred between June 1 and November 25, 2008. Fleming argues that this time period is so broad as to violate his due process rights.

Fleming concedes that this court has held in *State v. Martinez*[9] that "where an information provides a timeframe which has a distinct beginning and an equally clear end within which the crimes are alleged to have been committed, it is [constitutionally] sufficient." However, he argues that the "'blanket bar'" on subsequent prosecutions during that same time period does not meet the goal stated in *Martinez* of "balancing the profound tension between the constitutional rights of one accused of child molestation against the State's interest in protecting those victims who need the most protection."[10] Rather, Fleming argues that "[i]t must be little comfort to defendants accused of first degree sexual assault of a child to know the 'blanket bar' will shield them from future prosecutions, when the current law makes it easier for the State to win a conviction on the charge they currently face."[11] Fleming urges us to reject the rule set forth in *Martinez* and instead adopt a rule that requires a case-by-case examination of "whether an indictment is reasonably particular with respect to the time of the offense."[12]

As an initial matter, the State argues that Fleming failed to file a motion to quash or otherwise object to the information and thus has waived any objection that he might have. A review of the record supports this. However, Fleming also alleges that his trial counsel was ineffective in this particular. Thus, as was noted above, we will address this issue on direct appeal.

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[9] See *State v. Martinez*, 250 Neb. 597, 599, 550 N.W.2d 655, 657 (1996).

[10] See *id.* at 601, 550 N.W.2d at 658.

[11] Brief for appellant at 26-27.

[12] See *State v. Baldonado*, 124 N.M. 745, 751, 955 P.2d 214, 220 (N.M. App. 1998).

[8] This court, as recently as January of this year, reiterated the rule it set out in *Martinez*,[13] namely, that an information is not insufficient with respect to a time allegation so long as it alleges a "distinct beginning and an equally clear end within which the crimes are alleged to have been committed."[14] We noted that to hold otherwise "would impose an impossible burden on a child sexual assault victim where there are allegations of multiple assaults over a lengthy timeframe."[15]

Our reasoning in *Martinez* was sound, and we decline to revisit it. Fleming's second assignment of error is therefore without merit.

Testimony of Barbara Sturgis, Ph.D.

In his third assignment of error, Fleming argues that the district court erred in admitting the testimony of Barbara Sturgis, Ph.D., and in not granting his motion for mistrial as a result of Sturgis' testimony.

The purpose of Sturgis' testimony was to provide for the jury background concerning child victims and how they differ from adult victims. Fleming argues Sturgis' testimony that "kids can disclose with detail when they're disclosing what's happened to them" improperly bolstered the credibility of F.K. and A.S.

This court has previously approved of the use of the type of testimony given by Sturgis.[16] At that time, we noted that this type of evidence was helpful because "'[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,' and 'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.'"[17]

A reading of the entirety of Sturgis' testimony calls Fleming's argument into question. Sturgis was asked whether children could disclose with detail; she indicated they could, but that

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[13] *State v. Martinez, supra* note 9.

[14] *State v. Gibilisco*, 279 Neb. 308, 317, 778 N.W.2d 106, 113 (2010) (citing *State v. Martinez, supra* note 9).

[15] *Id.* at 318, 778 N.W.2d at 113-14.

[16] *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

[17] *Id.* at 39, 486 N.W.2d at 204.

it "depends on what's happened to them." When asked to give an example, Sturgis stated that "kids can disclose with detail when they're disclosing what's happened to them." She then went on to testify that while children can disclose with detail, a child is less likely to tell all of the details to one person and instead will "talk about some of the things at some time and other of the things at others." In addition, Sturgis testified that children are capable of lying and that all of her observations were dependent on the child and his or her capabilities.

This case is distinguishable from *State v. Doan*,[18] a Nebraska Court of Appeals case relied upon by Fleming. In that case, when asked whether it was unusual for a child to not report an incident immediately or to not be visibly upset by reporting sexual abuse, the witness testified to the history she had obtained from the victim, then indicated that she evaluated whether she believed the victim. The witness concluded that she had received "'validation'" of the child's account of abuse.[19]

Unlike *Doan*, in which the witness had interviewed the alleged victim and made a determination of whether she believed the victim, Sturgis acknowledged that she had never interviewed F.K. or A.S. and that she had not even viewed their interviews with law enforcement. Nothing in Sturgis' testimony was directed at these particular witnesses, but, rather, was a discussion of child witnesses in general. At no point did Sturgis opine on whether F.K. or A.S. had been sexually assaulted, nor did she opine on whether she believed the allegations made by F.K. and A.S.

The district court did not err in admitting Sturgis' testimony and denying Fleming's motion for mistrial. Fleming's third assignment of error is without merit.

Use of Leading Questions and Photographs.

In his fourth assignment of error, Fleming contends that the district court erred in allowing the use of leading questions and photographs during F.K.'s testimony.

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[18] *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

[19] *Id.* at 488, 498 N.W.2d at 807.

While acknowledging the discretion afforded to the district court in this matter, Fleming argues that such discretion was abused in this case. In particular, Fleming argues that "[t]he trial court's decision to allow [F.K.] to describe and identify the rooms where the alleged assault may have occurred preemptively struck down one of [Fleming's] means for attacking her credibility."[20]

A review of the record, however, demonstrates that the district court did not abuse its discretion. F.K. was just 7 years old at the time of trial. Over the past few years, F.K. had lived in at least five residences. And over those years there was, as the State puts it, "a veritable legion of other relatives and/or friends living with them"[21] at various times. The leading questions asked, and the photographs shown, were designed to help F.K. focus on the homes where the alleged abuse took place. None of the leading questions related to the offenses themselves.

The district court did not abuse its discretion in allowing the use of leading questions and photographs during F.K.'s testimony. Fleming's fourth assignment of error is without merit.

Competence Hearing.

In his fifth assignment of error, Fleming asserts, without authority, that the district court erred in conducting F.K.'s and A.S.' competence examinations before the jury. The State argues that there was no error, as child witnesses are presumed competent,[22] and there is no requirement that such hearings be held out of the presence of the jury.[23]

This issue has been considered in several jurisdictions. For example, the Pennsylvania Supreme Court has adopted a per se rule that child witnesses are to be examined for competence outside the presence of the jury.[24] The court noted that

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[20] Brief for appellant at 34.

[21] Brief for appellee at 9.

[22] See Neb. Rev. Stat. § 27-601 (Reissue 2008).

[23] See Neb. Rev. Stat. § 27-104 (Reissue 2008).

[24] *Com. v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998).

> [e]ven with a cautionary instruction . . . permitting the competency proceedings to take place in the presence of the jury inevitably permeates into the veracity determination assigned exclusively to the jury. Particularly in cases such as this where credibility is the central issue, the likely impact of conducting the competency proceedings in the presence of the jury cannot be diminished.[25]

The Colorado Supreme Court specifically rejected this per se rule in *People v. Wittrein*.[26] Instead, that court concluded that while it was

> the better approach [to examine outside the presence of the jury], any prejudice . . . does not rise to the level of reversible error. The prosecutor asked [the child victim] simple questions that directly related to her ability to be truthful and to relate facts to the jury. The jury was not told the purpose of the testimony and was excused before the judge ruled on . . . competency.[27]

Similarly, the New Mexico Court of Appeals noted in *State v. Manlove*[28] that it was not error for the trial court judge to inquire into the competence of a child witness in the presence of the jury. The *Manlove* court noted that such decisions were in the sound discretion of the trial court, though the court did "feel that generally the better practice would be to conduct this examination outside the presence of the jury."[29]

Still other jurisdictions have concluded that it was not error, or in some instances was even preferable, to have the competency proceedings take place in the presence of the jury. These jurisdictions argue that this type of questioning "assists the

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[25] *Id.* at 566, 722 A.2d at 647. But see *Com. v. Delbridge*, 771 A.2d 1 (Pa. Super. 2001) (concluding that per se rule was inapplicable where credibility and truthfulness not at issue).

[26] *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

[27] *Id.* at 1081.

[28] *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (N.M. App. 1968) (superseded by state evidence rule on other grounds as stated in *State v. Heuglin*, 130 N.M. 54, 16 P.3d 1113 (N.M. App. 2000)).

[29] *Id.* at 193, 441 P.2d at 233. See, also, *State v. Tandy*, 401 S.W.2d 409 (Mo. 1966).

jurors in evaluating independently the child's qualifications as a witness."[30] The Wisconsin Supreme Court has also noted that where there was no objection and the jury was instructed that it was the sole judge of the credibility of the witnesses, as well as the weight and effect of the witnesses, it was not error to hold proceedings in the presence of the jury.[31]

We believe that the best practice is for any hearings on the competency of child witnesses to take place outside the presence of the jury. However, the failure of the trial court to do so is not necessarily reversible error. Instead, an appellate court must consider whether the defendant was prejudiced by the trial court's actions. And we decline to find reversible error in this case.

We note that Fleming objected to F.K.'s examination taking place in the presence of the jury, but did not make the same objection when A.S. was later examined in the same manner. In performing the examination, the district court judge asked a number of general questions of the witnesses. During F.K.'s examination, she was questioned in part as follows:

> [Court] How are you today?
>
> [F.K.] Good. How are you?
>
> Q Just fine. Can you tell me your name for the record?
>
> A [Witness provided first name for record.]
>
> Q What is your last name?
>
> A [Witness provided last name for record.]
>
> . . . .
>
> Q How old are you?
>
> A I'm seven.
>
> Q And what grade are you in in [sic] school?
>
> A Second.
>
> . . . .

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[30] *Brown v. United States*, 388 A.2d 451, 458 (D.C. 1978). See, also, *The State v. Orlando*, 115 Conn. 672, 163 A. 256 (1932); *Schamroth v. State*, 84 Ga. App. 580, 66 S.E.2d 413 (1951); *Ramer v. State*, 40 Wis. 2d 79, 161 N.W.2d 209 (1968). Cf. *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958) (applying same reasoning for potentially insane witness).

[31] *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1966).

Q You understand that you're here today to provide some testimony or tell us some things that happened; is that right?

A Uh-huh.

Q Do you know what a lie is?

A Yeah.

Q Can you tell me?

A When you say something happened but it really didn't.

Q And if people tell lies, do anybody — does anything happen to them?

A People don't believe them for a long time.

Q For a long time?

A Uh-huh.

. . . .

Q Now today you're here and we're going to — or the attorneys are going to ask you some questions, and can you promise to me that you will tell the truth?

A Uh-huh.

Q And do you understand that if you don't, that you can get into trouble?

A Uh-huh.

Similar questions were asked and answered during the court's examination of A.S. At the conclusion of each witness' examination, the district court made no affirmative, explicit finding of competence, but simply allowed counsel to begin direct examination. We note also that neither F.K. nor A.S. were otherwise placed under oath when testifying; thus, the examination by the court essentially substituted as their oaths.

In addition, the jury was instructed by the district court judge as follows: "I am not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely." The jury was also instructed that it was "the sole judge[] of the credibility of the witnesses and the weight to be given to their testimony."

For the reasons noted above, we conclude that the district court did not err in allowing the witnesses to be examined for

competency in the presence of the jury. As such, Fleming's fifth assignment of error is without merit.

Recusal of Trial Court Judge.

In his sixth assignment of error, Fleming contends that the district court judge should have recused himself. The basis for the recusal request is that the judge "conducted himself in a biased and prejudice[d] manner against [Fleming]."

From a review of the briefs and argument, it appears that Fleming requested recusal because certain rulings went against him at trial. After a complete reading of the record in this case, however, it is clear that while the district court judge ruled against Fleming, he also made several rulings in Fleming's favor. Other than essentially complaining that the district court judge did not like him, Fleming points to nothing that would require the district court judge to recuse himself. The district court judge therefore did not abuse its discretion by declining to do so. Fleming's sixth assignment of error is without merit.

Directed Verdicts and Sufficiency of Evidence.

In his seventh assignment of error, Fleming contends that the district court erred in denying his motion for directed verdict and his renewed motion for directed verdict. And in his eighth assignment of error, Fleming contends there was insufficient evidence to support his conviction. These two assignments of error will be considered together.

Fleming was charged with two counts of first degree sexual assault of a child.[32] "A person commits sexual assault of a child in the first degree if he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older."[33] And Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines

> [s]exual penetration [as] sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into

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[32] See Neb. Rev. Stat. § 28-319.01 (Reissue 2008).

[33] § 28-319.01(1).

> the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

As an initial matter, the record shows that both F.K. and A.S. were under 12 years of age at the time of the alleged sexual assault and that Fleming was over the age of 19. As to the alleged sexual assaults, F.K. testified that Fleming's "weiner and his hand and his mouth" touched her body and that "[m]y private and my hand and my mouth" touched Fleming's body. F.K. stated that Fleming "put his private in my private." F.K. indicated that "[h]e would have me on the floor, and he would put his private in my private and then start rubbing." F.K. also stated that she had to put her hand on his "private" and that "[i]f the white stuff didn't come out, he would want us to put our mouth on it." F.K. testified that she would do so. F.K. additionally testified that she witnessed Fleming "put his private . . . in [A.S.'] private."

In addition, A.S. testified that her "private touched [Fleming's] private" and also that her mouth touched Fleming's "private." A.S. also stated that Fleming "told [her] to sit on his face and he licked my private [with his tongue]" and that she did not have any clothes on over her "private" when that event occurred. In response to this testimony, A.S. stated that Fleming's tongue did not go "inside of [her] private." A.S. additionally testified that she witnessed F.K. "suck on it," referring to Fleming's "private."

The above evidence, when viewed in a light most favorable to the State, clearly supports the denial of Fleming's motions for directed verdict and also supports the guilty verdicts entered against Fleming for first degree sexual assault of a child. Fleming's seventh and eighth assignments of error are without merit.

Sentences.

In his ninth, and final, assignment of error, Fleming asserts that the sentences imposed upon him were excessive.

[9,10] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's

observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[34] 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.[35]

Fleming's primary argument seems to be centered on the following statement of the district court: "Although . . . Fleming — and I understand your disagreement with whether you did anything wrong, the system, the jury disagrees with you. And you need to be and will be sentenced pursuant to what the jury determined occurred as opposed to what you think occurred." Fleming argues that this statement shows the district court sentenced him because of Fleming's "audacity in maintaining his innocence."[36]

We do not read the district court's statement in that manner. Rather, we read the district court's statement as its recognition that while Fleming continued to assert his innocence, the jury disagreed and concluded that Fleming was guilty and that he would be sentenced accordingly.

Fleming was convicted of two counts of first degree sexual assault of a child, a Class IB felony,[37] punishable by a minimum of 20 years' and a maximum of life imprisonment.[38] Section 28-319.01(2) further provides a mandatory minimum sentence of 15 years' imprisonment. Fleming was sentenced to 20 to 40 years' imprisonment on each count, with sentences to be served consecutively. These sentences were within statutory limits.

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[34] *State v. Epp, supra* note 6.

[35] *Id.*

[36] Brief for appellant at 47.

[37] See § 28-319.01(2).

[38] See Neb. Rev. Stat. § 28-105 (Reissue 2008).

Moreover, as is noted by the State, Fleming's minimum sentence is just 5 years more than the mandatory minimum for the crimes for which he was convicted. Both F.K. and A.S. have nightmares because of the abuse perpetrated by Fleming, as well as continuing emotional problems. The sentences imposed on Fleming were not excessive; the district court did not abuse its discretion in so sentencing Fleming. Fleming's final assignment of error is without merit.

CONCLUSION

The judgment and sentences of the district court are affirmed.

AFFIRMED.

WRIGHT, J., not participating.

FREEDOM FINANCIAL GROUP, INC., ET AL., APPELLANTS, V. JANICE M. WOOLLEY, INDIVIDUALLY, ET AL., APPELLEES.

794 N.W.2d 142

Filed December 30, 2010. No. S-09-1302.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael L. Schleich and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellees.

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

PER CURIAM.

Case No. S-09-1302 is before this court on the motion for rehearing filed by appellants regarding our opinion reported at *Freedom Fin. Group v. Woolley, ante* p. 825, 792 N.W.2d 134

(2010). We overrule the motion but, for purposes of clarification, modify the opinion as follows:

In the section of the opinion designated "FACTS":

We withdraw the first three paragraphs, *id.* at 827-28, 792 N.W.2d at 137, and substitute the following:

> Presidents Trust was an independent, nondepository limited liability company (LLC) chartered in South Dakota. FFG was the sole member of Presidents Trust. Bethel Enterprises is the parent company to FFG, Freedom Group, Freedom Financial, Freedom Asset Management, Mid-America Employment Services, and U.S. Securities Management. Simply stated, Bethel Enterprises owned FFG, which was in turn the sole owner of Presidents Trust.
>
> On or about July 10, 2003, Presidents Trust, through various marketing agents, began soliciting individuals to invest in its "Fixed Income Trust" concept (FIT Program). David Klasna, president of both FFG and Presidents Trust, stated in his deposition that Presidents Trust was the only entity allowed to market the FIT Program, an investment concept.
>
> On July 18, 2003, Presidents Trust sought legal counsel from Woolley, of Marks Clare, regarding the legalities of the FIT Program. Woolley and Marks Clare provided an opinion letter addressed to Klasna. In that letter, Woolley stated that the FIT Program was exempt from registration under South Dakota statutes. In the opinion letter, Woolley indicated that she and Marks Clare had "confined our review to the South Dakota statutes, administrative rules and Federal statutes." Subsequent to the issuing of the opinion letter, Presidents Trust began marketing the FIT Program in earnest. The Securities Exchange Commission (SEC) began an investigation shortly thereafter.

Further, we withdraw the 10th and 11th paragraphs of that section, *id.* at 829-30, 792 N.W.2d at 138, and substitute the following:

> In Klasna's deposition, he also stated that he had asked Woolley to look at federal securities law as well as South Dakota state banking law. Klasna stated that he was aware

that "things of this nature were regulated as securities" and that they were hoping to find an exemption. He also claimed to have said as much to Woolley. Klasna admitted that he did not remember whether he had specifically asked Woolley to look into securities law, but he said that it was implied, if not stated outright.

Klasna stated that FFG had collected funds for the sale of the FIT Program before Woolley rendered her opinion, but that those funds were put in safekeeping until they were certain the FIT Program could be released. Klasna could not recall a specific conversation with Woolley about whether the FIT Program was a security until after investors raised the issue. Klasna alleged that even after investors questioned whether the FIT Program required registration, Woolley continued to assure him that the FIT Program met the definition of a trust and was exempt. Klasna also stated he did not believe that Woolley understood the FIT Program or the potential securities problems.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

BRYAN S. BEHRENS, AN INDIVIDUAL, ET AL., APPELLANTS AND CROSS-APPELLEES, V. CHRISTIAN R. BLUNK, AN INDIVIDUAL, ET AL., APPELLEES AND CROSS-APPELLANTS.

792 N.W.2d 159

Filed December 30, 2010. No. S-10-342.

1. **Pretrial Procedure: Appeal and Error.** An appellate court reviews a trial court's sanction for failure to comply with a proper discovery order for abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Judgments: Appeal and Error.** As to questions of law, an appellate court decides such questions independently of the lower court's conclusions.

4. **Rules of the Supreme Court: Pretrial Procedure.** The Nebraska Rules of Discovery are substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure. And Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.
5. **Constitutional Law: Self-Incrimination: Pretrial Procedure.** The constitutional privilege against self-incrimination applies to discovery in a civil action.
6. **Constitutional Law: Self-Incrimination.** The Fifth Amendment privilege against compulsory self-incrimination is personal; it attaches to the person, not to potentially incriminating information or materials in the hands of third parties.
7. **Corporations: Self-Incrimination.** A corporation has no right to invoke the privilege against self-incrimination.
8. **Rules of the Supreme Court: Pretrial Procedure: Parties.** Under Neb. Ct. R. Disc. § 6-326(b)(1), whether a party seeking discovery is the plaintiff or defendant, that party is only entitled to discovery of nonprivileged information or material.
9. **Actions: Constitutional Law: Pretrial Procedure: Self-Incrimination.** Before a trial court dismisses an action because the plaintiff has invoked the Fifth Amendment in response to discovery requests, it must first (1) balance the parties' interests and (2) consider whether a less drastic remedy could accommodate the plaintiff's privilege against self-incrimination and maintain fairness to the defendant.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

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

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees Christian R. Blunk and Berkshire & Blunk.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees Christian R. Blunk and Abrahams, Kaslow & Cassman, L.L.P.

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

CONNOLLY, J.

SUMMARY

Bryan S. Behrens and three other plaintiffs appeal from the district court's order that dismissed with prejudice their attorney

malpractice action against Christian R. Blunk and the law firms for which Blunk worked. After Behrens invoked his Fifth Amendment privilege against compulsory self-incrimination, the court dismissed the action as a sanction for Behrens' failure to comply with its order compelling discovery. We conclude that the court erred when it failed to balance the parties' interests and consider less drastic remedies before dismissing the plaintiffs' action. We reverse, and remand for further proceedings.

BACKGROUND

In December 2008, the plaintiffs filed their complaint. The plaintiffs include the following parties: Behrens; the Bryan Behrens Co., Inc. (BBC), a Nebraska corporation that Behrens owns; National Investments, Inc. (NII), a Nevada corporation that Behrens owns; and Thomas Stalnaker, a court-appointed receiver requested by the Securities and Exchange Commission to collect and make available for claims all assets owned by Behrens, BBC, and NII. The plaintiffs sued Blunk for legal malpractice. In addition, the plaintiffs sued Berkshire and Blunk, Blunk's former partnership. They also sued Abrahams Kaslow & Cassman LLP, the firm that later employed Blunk. The plaintiffs alleged that Blunk's negligent acts occurred when he was employed at both firms. In April 2009, the federal government indicted Behrens on charges of securities fraud, mail fraud, wire fraud, and money laundering.

Criminal Allegations

The criminal allegations give context to the civil action. The indictment alleged a Ponzi scheme. Behrens owned a company that provided financial planning advice and offered insurance products to clients. He was registered to sell securities. In 2002, he purchased NII, which was a Nevada real estate investment company. Behrens defrauded 25 NII investors out of $8.2 million. He induced some of his insurance and securities clients to cash out their annuities or investment accounts and invest in NII. He told investors that (1) they were investing in NII; (2) their investments would produce a 7- to 9-percent rate of return, with little to no risk; and (3) they would receive

back their principal in 5 to 10 years. Behrens would normally issue a promissory note to investors with these promises. Instead of investing their money in real estate, he used it to support an extravagant personal lifestyle and other businesses that he acquired. He deposited the investors' money into bank accounts that he controlled and then transferred the money to other bank accounts to conceal its source. He used the investment money from later investors to make monthly payments to earlier investors.

Plaintiffs' Civil Action

In the plaintiffs' civil complaint, they generally alleged that Blunk negligently advised Behrens to purchase NII to "borrow" funds from Behrens' insurance and investment clients and rechannel the funds through BBC. Specifically, Blunk allegedly advised Behrens to (1) issue high-interest promissory notes from NII, which Blunk drafted; (2) use investors' money to create an investment pool; (3) have NII loan the money to Behrens; (4) create BBC to borrow funds from Behrens to acquire and operate retail businesses. Behrens allegedly followed Blunk's advice in using BBC to acquire retail businesses, including a floral business, convenience store, and grocery store. The complaint also alleged that Blunk personally borrowed $55,000 from the investment fund and failed to repay the loan. The complaint included a second cause of action to recover the loan principal plus interest.

Blunk alleged several affirmative defenses, including that the plaintiffs' claims were barred under the doctrines of contributory negligence, equitable estoppel, unclean hands, and mitigation of damages.

Procedural History

As stated, the federal government filed its indictment in April 2009. In May, the defendants in the civil case issued requests for documents and interrogatories. On June 8, the plaintiffs moved for an order to stay the civil action pending the criminal proceeding. The plaintiffs attached the federal indictment. In July, the defendants moved to compel discovery. On July 28, the plaintiffs' attorney wrote the defendants'

attorney that Behrens would invoke his Fifth Amendment right if he requested a deposition. Behrens' federal public defender had advised Behrens not to respond to the civil discovery requests and to invoke his Fifth Amendment privilege until the criminal trial was completed.

In August 2009, Blunk filed a suggestion of bankruptcy with the court. The district court clerk told the plaintiffs' attorney that the court had stayed further proceedings because of the bankruptcy filing. In October, the court dismissed the action without prejudice for lack of prosecution, but the district court reinstated the action in November.

In November 2009, the defendants again moved to compel discovery. The court's docket sheet shows that the court sustained the motion in part, and in part overruled it, but the court apparently did not issue a written order. This order, however, effectively overruled the motion to stay, and the defendants agree that the court did overrule that motion. In December, the defendants moved for summary judgment. They asked for a dismissal, arguing that the plaintiffs could not maintain the action and that Behrens could not assert his Fifth Amendment privilege against self-incrimination.

In January 2010, the plaintiffs responded to the defendant law firms' requests for documents and interrogatories. Behrens repeated that his attorney had advised him not to incriminate himself and that he was invoking his Fifth Amendment privilege. He stated that his criminal trial was scheduled for April 12, 2010 (10 weeks later) and that after the trial, he would respond. For most individual requests, he stated that a more complete set of responsive documents were in Blunk's or the defendant law firms' possession. Behrens also stated that to the extent documents were produced by the defendants or in the receiver's possession, they would be made available to the defendants for review and copying at a mutually convenient time. Behrens invoked his Fifth Amendment privilege in response to requests for promissory notes, bank statements, financial statements, tax returns, articles of incorporation, and documents from other attorneys who had represented him. Behrens gave the same basic response to interrogatories. After receiving these responses, the defendants moved for dismissal

as a sanction for the plaintiffs' failure to comply with the discovery order.

In March 2010, the court overruled the defendants' motion for summary judgment. It concluded that the plaintiffs' failure to comply with discovery requests did not affect the genuine issues of material fact raised by the complaint. But the court granted the motion to dismiss the action as a discovery sanction. The court recognized that Behrens' criminal trial was still pending. It relied, however, on cases holding that a party can invoke his or her Fifth Amendment rights as a shield in a party's defense, but not as a sword to limit discovery in a civil case that the party brings against others. The court concluded that the delay had prejudiced the defendants and dismissed the action.

ASSIGNMENTS OF ERROR

The plaintiffs assign, restated, that the court erred as follows:

(1) concluding that Behrens could not assert his privilege against self-incrimination in a civil case;

(2) finding that the plaintiffs had failed to respond to discovery requests when they had identified the receiver as the party having the requested information and documents and agreed to make the documents available;

(3) finding that the defendants were prejudiced by a 6-week delay when they failed to adduce any facts showing prejudice; and

(4) dismissing the action.

On cross-appeal, Blunk and the defendant law firms assign that the court erred in overruling their motion for summary judgment.

STANDARD OF REVIEW

[1-3] We review a trial court's sanction for failure to comply with a proper discovery order for abuse of discretion.[1] A judicial abuse of discretion exists when reasons or rulings of

[1] See, *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2] As to questions of law, however, we decide such questions independently of the lower court's conclusions.[3]

[4] We note that the plaintiffs urge us to adopt the Eighth Circuit's rule of closely scrutinizing an order of dismissal as a discovery sanction.[4] It is true that the Nebraska Rules of Discovery are substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure. And Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.[5] But other federal courts, including the U.S. Supreme Court, have reviewed orders of dismissal as a discovery sanction for abuse of discretion.[6]

All federal courts recognize that an order of dismissal is among the harshest sanctions a court can impose for discovery violations.[7] Instead of applying a higher level of scrutiny to review orders of dismissal, most federal courts have set out

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

[3] See *D & S Realty v. Markel Ins. Co., ante* p. 567, 789 N.W.2d 1 (2010).

[4] *Sentis Group, Inc., Coral Group, Inc. v. Shell Oil*, 559 F.3d 888 (8th Cir. 2009).

[5] See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

[6] See, *National Hockey League v. Met. Hockey Club*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976); *Vallejo v. Santini-Padilla*, 607 F.3d 1 (1st Cir. 2010); *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298 (2d Cir. 2009); *Collins v. Illinois*, 554 F.3d 693 (7th Cir. 2009); *Ashby v. McKenna*, 331 F.3d 1148 (10th Cir. 2003); *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3d Cir. 2003); *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998); *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894 (5th Cir. 1997); *Freeland v. Amigo*, 103 F.3d 1271 (6th Cir. 1997); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993); *Shortz v. City of Tuskegee, Ala.*, 352 Fed. Appx. 355 (11th Cir. 2009).

[7] See, e.g., *National Hockey League, supra* note 6; *Smith v. Gold Dust Casino*, 526 F.3d 402 (8th Cir. 2008); *Benitez-Garcia v. Gonzalez-Vega*, 468 F.3d 1 (1st Cir. 2006); *Zocaras v. Castro*, 465 F.3d 479 (11th Cir. 2006).

standards or factors that they consider in determining whether a trial court has abused its discretion.[8]

We agree with the majority approach. An order of dismissal is obviously a death sentence for a plaintiff's action. But as the U.S. Supreme Court has stated, in appropriate circumstances, a district court must have the discretion to impose the extreme sanction of dismissal: This discretion exists "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."[9] In this case, we will set out the standard, as a matter of law, for dismissing an action when a party has invoked his or her privilege against self-incrimination.

ANALYSIS

The court apparently did not issue a written order compelling discovery or overruling the plaintiffs' motion to stay. In its order dismissing the action, the court assumed that Behrens had a right to refuse to respond to discovery on Fifth Amendment grounds. But it concluded that the plaintiffs could not maintain their civil action against the defendants because Behrens had asserted his privilege against self-incrimination.

The defendants rely on cases in which courts have held that a civil case can be dismissed if the plaintiff invokes his or her privilege against self-incrimination and refuses to permit discovery.[10] But the most recent federal appellate case they cite

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[8] See, *Southern New England Telephone Co. v. Global NAPs*, 624 F.3d 123 (2d Cir. 2010); *Garcia v. Berkshire Life Ins. Co. of America*, 569 F.3d 1174 (10th Cir. 2009); *Phillips v. Cohen*, 400 F.3d 388 (6th Cir. 2005); *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Rice v. City of Chicago*, 333 F.3d 780 (7th Cir. 2003); *U.S. v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003); *Gonzalez, supra* note 6; *Mut. Federal Sav. & Loan v. Richards & Associates*, 872 F.2d 88 (4th Cir. 1989).

[9] *National Hockey League, supra* note 6, 427 U.S. at 643.

[10] See, e.g., *Stockham v. Stockham*, 168 So. 2d 320 (Fla. 1964); *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194 (1968); *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955); *Laverne v. Incorporated Vil. of Laurel Hollow*, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966).

was decided in 1969.[11] And the Ninth Circuit later backed away from that case. It clarified that under U.S. Supreme Court precedent, a plaintiff's proper invocation of the Fifth Amendment cannot result in automatic dismissal.[12]

And federal cases that are more recent agree with that statement. Federal courts have rejected automatic dismissal of a civil action based solely on the plaintiff's invocation of his or her Fifth Amendment privilege against self-incrimination during discovery.[13] We agree with these courts that a rule of automatic dismissal is inconsistent with U.S. Supreme Court precedent and discovery rules protecting the privilege.

[5] As we have previously recognized, under U.S. Supreme Court decisions, the constitutional privilege against self-incrimination applies to discovery in a civil action:

> "Though by its terms applicable only in criminal proceedings, the Fifth Amendment privilege against self-incrimination has long been held to be properly asserted by parties or witnesses in civil proceedings.[14] The privilege may be invoked by anyone whose statements could incriminate him, either by directly admitting the commission of illegal acts or by relating information which would 'furnish a link in the chain of evidence needed to prosecute the claimant.'[15] The privilege protects persons 'against being forced to make incriminating disclosures at any stage of the proceeding if they could not be compelled

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[11] See *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969).

[12] See *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979).

[13] See, *McMullen v. Bay Ship Management*, 335 F.3d 215 (3d Cir. 2003); *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *Campbell, supra* note 12. See, also, *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990); *Attorney General of U.S. v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); 8 Charles Alan Wright et al., Federal Practice and Procedure § 2018 (3d ed. 2010) (citing cases).

[14] *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

[15] *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

> to make such disclosures as a witness at trial.'[16] It therefore applies not only at trial, but at the discovery stage as well.[17]"[18]

Under this precedent, Behrens, as a plaintiff, was obviously a party that could assert the privilege in response to requests for incriminating information or materials.

[6,7] We recognize that the Fifth Amendment privilege against compulsory self-incrimination is personal; it attaches to the person, not to potentially incriminating information or materials in the hands of third parties.[19] But the record does not reflect that Behrens turned over any of the requested information or materials to the receiver. So for this analysis, we assume that Behrens validly invoked the privilege. We have also held that a corporation has no right to invoke the privilege against self-incrimination.[20] Here, the court did not consider separate sanctions against these plaintiffs. Thus, we consider only whether its sanction of dismissal was proper based on Behrens' invocation of his Fifth Amendment privilege.

[8] Under Neb. Ct. R. Disc. § 6-337(b)(2), if a party fails to obey a court order to provide or permit discovery, the court may impose further "orders in regard to the failure as are just," including "dismissing the action." But the rule is not without limitations. Under Neb. Ct. R. Disc. § 6-326(b)(1), a party may obtain discovery "regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, *whether it relates to the claim or defense* of the party seeking

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[16] *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983).

[17] See, *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973); *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970).

[18] *Wilson v. Misko*, 244 Neb. 526, 546-47, 508 N.W.2d 238, 252 (1993), quoting *Kramer v. Levitt*, 79 Md. App. 575, 558 A.2d 760 (1989).

[19] See, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984); *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

[20] See *Schuessler, supra* note 19.

discovery." (Emphasis supplied.) Thus, under § 6-326(b)(1), whether a party seeking discovery is the plaintiff or defendant, that party is only entitled to discovery of nonprivileged information or material.

Section 6-326(b)(1) of our discovery rules mirrors Fed. R. Civ. P. 26(b)(1). Because the Fifth Amendment privilege applies to material subject to discovery, federal courts have held that a valid invocation of the privilege is proper under rule 26 and does not justify a court's imposition of sanctions.[21] In addition, the U.S. Supreme Court has prohibited states from imposing penalties that make it costly for a party to invoke the privilege:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." . . .
>
> In this context "penalty" is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."[22]

Following Supreme Court precedent, federal courts have also held that an automatic dismissal is a costly and impermissible penalty for invoking the privilege.[23] Yet, federal courts have recognized that due process precludes plaintiffs from proceeding to trial while denying the very materials needed by their adversaries to mount a defense: "In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to

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[21] See, *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187 (3d Cir. 1994); *Wehling, supra* note 13.

[22] *Spevack v. Klein*, 385 U.S. 511, 514-15, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (citations omitted).

[23] See, e.g., *Serafino, supra* note 13; *Wehling, supra* note 13; *Campbell, supra* note 12.

consideration as well."[24] Instead of upholding a dismissal anytime a plaintiff invokes the Fifth Amendment, these courts have concluded that the issue is whether the court can accommodate the privilege and maintain fairness for the party seeking discovery. These courts require a balancing of the parties' competing interests and consideration of less drastic remedies.[25]

> When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.
>
> The district court's task in this case was complicated by the presence of competing constitutional and procedural rights. In focusing solely on [the defendant's] right to the requested information, the court failed to attribute any weight to [the plaintiff's] right to his day in court. . . . [T]he court should have measured the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible. This balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate.[26]

It is true that in some circumstances, dismissal may be necessary to prevent prejudice to the party seeking discovery.[27] In those circumstances, a court may impose a dismissal as a necessary measure to prevent unduly disadvantaging the opponent—not as a sanction for invoking the privilege against self-incrimination.[28] But "'[t]he detriment to the party asserting [the privilege against self-incrimination] should be no more than is

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[24] *Graystone Nash, Inc., supra* note 21, 25 F.3d at 191. Accord *Wehling, supra* note 13.

[25] See, *McMullen, supra* note 13, citing *Graystone Nash, Inc., supra* note 21; *Serafino, supra* note 13; *Wehling, supra* note 13; and 8 Wright et al., *supra* note 13.

[26] See *Wehling, supra* note 13, 608 F.2d at 1088.

[27] See *Serafino, supra* note 13.

[28] See *id.*, citing *Wehling, supra* note 13.

necessary to prevent unfair and unnecessary prejudice to the other side.'"[29]

[9] We have previously held that "[t]here is no constitutional right to have civil proceedings stayed pending the outcome of a criminal investigation."[30] But we nonetheless required trial courts to balance the competing needs of the parties under their inherent power to do justice.[31] Consistent with that opinion, we adopt the reasoning of these federal courts. We hold that before a trial court dismisses an action because the plaintiff has invoked the Fifth Amendment in response to discovery requests, it must first (1) balance the parties' interests and (2) consider whether a less drastic remedy could accommodate the plaintiff's privilege against self-incrimination and maintain fairness to the defendant.

Here, the only finding in the court's order relevant to this balancing was that the possible delay would prejudice the defendants if Behrens' trial did not take place as scheduled. We conclude that the court's finding was insufficient to support the court's dismissal of the plaintiffs' action as a matter of law.

In his responses to discovery requests, Behrens stated that he would respond to the requests after his criminal trial. And when the court entered its order, Behrens' trial was scheduled to begin in 40 days. This was not a case in which the criminal indictment was uncertain or the speculative nature of the delay was unreasonably long. Although judicial efficiency is desirable, delay may sometimes be required to reach a just result under § 6-337(b)(2) of our discovery rules.[32] Nor did the court explain how a further delay of 40 days would prejudice the defendants or consider the hardship imposed on Behrens by proceeding with the civil action before the criminal trial.

Because the court's findings were insufficient to support an order of dismissal, we reverse the order and remand the cause for further proceedings.

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[29] *McMullen, supra* note 13, 335 F.3d at 218, quoting *Graystone Nash, Inc., supra* note 21. Accord *Wehling, supra* note 13.

[30] *Schuessler, supra* note 19, 243 Neb. at 428-29, 500 N.W.2d at 534.

[31] See *id.* at 429, 500 N.W.2d at 534.

[32] See, e.g., *McMullen, supra* note 13; *Wehling, supra* note 13.

CONCLUSION

We conclude that the court erred in applying a rule of automatic dismissal when a plaintiff invokes his or her privilege against self-incrimination during discovery. We determine that in such circumstances, a trial court must balance the parties' interests and consider whether a less drastic remedy would suffice. Under this rule, the court's findings were insufficient to support an order of dismissal. We reverse the order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

ZIAD L. ZAWAIDEH, M.D., APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEES.

792 N.W.2d 484

Filed January 7, 2011. No. S-10-158.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, taken as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Rules of the Supreme Court: Constitutional Law.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) is required for the Nebraska Supreme Court to address a constitutional claim.
6. **Due Process.** Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due?
7. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests

within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.

8. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
9. **Parties: Appeal and Error.** Only a party aggrieved by an order or judgment can appeal, and one who has been granted that which he or she sought has not been aggrieved.
10. ____: ____. A party is not entitled to prosecute error upon that which was made with his or her consent.
11. **Compromise and Settlement: Judgments.** Where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no basis for that party to upset the compromise.
12. **Courts: Pleadings.** Courts are not required to accept as true legal conclusions or conclusory statements in a pleading—instead, while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.
13. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
14. **Contracts: Fraud.** One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
15. **Fraud.** In fraudulent concealment cases, existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.
16. **Contracts.** A fact basic to a transaction is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, and they may be material, but they are not basic.
17. **Fraud.** A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not.
18. ____. A statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue. When such a statement is made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient.
19. **Fraud: Intent.** Whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows

> or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand. The recipient is entitled to know the undisclosed facts insofar as they are material and to form his or her own opinion of their effect.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William M. Lamson, Jr., and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and CARLSON, Judges.

GERRARD, J.

Nebraska's Uniform Credentialing Act (UCA)[1] regulates persons providing health and health-related services. The UCA permits complaints against a credential holder to be resolved by entry of an "assurance of compliance," a voluntary agreement between the Attorney General and the credential holder that the credential holder will not engage in specified conduct. The appellant in this case, Ziad L. Zawaideh, M.D., entered into such an assurance of compliance. He asserts that although the assurance of compliance was not supposed to be a disciplinary sanction, it actually had the effect of one because of its collateral consequences on his career.

The primary issue Zawaideh presents in this appeal is whether the execution of the assurance of compliance, and the Attorney General's refusal to vacate it, deprived Zawaideh of due process of law. We find no merit to Zawaideh's due process arguments. But we do find that Zawaideh has alleged sufficient facts to at least state a claim for fraudulent concealment, and we reverse the district court's order of dismissal to that extent.

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[1] See Neb. Rev. Stat. §§ 38-101 to 38-1,140 (Reissue 2008 & Cum. Supp. 2010).

BACKGROUND

Legal Context

The UCA provides for the credentialing of persons and businesses that provide health, health-related, and environmental services,[2] including physicians.[3] We are aware that the UCA has been substantially recodified since some of the underlying events in this case took place[4]; however, Zawaideh's arguments appear to be directed at the statutes as they currently exist, and neither party has identified any relevant changes; so for the sake of simplicity and convenience, we cite to the current statutory scheme.

When a complaint is made against a credential holder pursuant to the UCA, the Division of Public Health of the Department of Health and Human Services (Department) is responsible for the initial investigation.[5] The Department is required, for most professions or businesses, to provide the Attorney General with a copy of all complaints it receives and advise the Attorney General of any investigation that may involve a credential holder's violation of statutes, rules, or regulations.[6] The Attorney General then determines what statutes, rules, or regulations may have been violated and the appropriate legal response.[7]

One of the Attorney General's options is to refer the matter to the appropriate professional board for the opportunity to resolve the matter by recommending that the Attorney General enter into an assurance of compliance with the credential holder in lieu of filing a disciplinary petition.[8] Upon the board's advice, the Attorney General may contact the credential holder to agree to an assurance of compliance.

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[2] See § 38-103.

[3] See § 38-101(19).

[4] See 2007 Neb. Laws, L.B. 463.

[5] See §§ 38-114 and 38-1,124.

[6] See § 38-1,107(1).

[7] *Id.*

[8] *Id.*

> The assurance shall include a statement of the statute, rule, or regulation in question, a description of the conduct that would violate such statute, rule, or regulation, the assurance of the credential holder that he or she will not engage in such conduct, and acknowledgment by the credential holder that violation of the assurance constitutes unprofessional conduct. Such assurance shall be signed by the credential holder and shall become a part of the public record of the credential holder. The credential holder shall not be required to admit to any violation of the law, and the assurance shall not be construed as such an admission[.][9]

The UCA expressly provides that "[a]n assurance of compliance shall not constitute discipline against a credential holder."[10]

Plaintiff's Allegations

The district court dismissed Zawaideh's complaint in this case pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). As a result, the following facts are taken from the allegations made in the complaint[11]:

Zawaideh alleged that he is a physician, licensed by and practicing in the State of Nebraska. In 2006, the Department began an investigation into a case involving obstetrical care Zawaideh provided to a patient in 2001. Terri Nutzman, an assistant attorney general, sent Zawaideh a proposed petition for disciplinary action and offered the option of an agreed settlement that would have constituted a disciplinary action against Zawaideh's license. Zawaideh refused, denying any unprofessional conduct. After another proposed disciplinary settlement was refused, Nutzman offered Zawaideh an assurance of compliance, to provide that Zawaideh would no longer provide obstetrical care. Nutzman emphasized that the assurance of compliance was not a disciplinary procedure. Zawaideh had already given up obstetrical care, so he agreed.

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[9] § 38-1,108(1).

[10] § 38-1,107(1).

[11] See *Central Neb. Pub. Power Dist. v. North Platte NRD, ante* p. 533, 788 N.W.2d 252 (2010).

Zawaideh alleges that he was not informed of any adverse effects that might be caused by the assurance of compliance. But, according to Zawaideh, the Attorney General's office knew or should have known that as a practical matter, assurances of compliance were causing professional difficulties for many physicians who had signed them.

As provided by the UCA, Zawaideh's assurance of compliance was made part of his public record.[12] He alleges that it is referenced on the Department's Web site and is available to the general public upon request.

Zawaideh is also licensed to practice medicine in the State of Washington. Zawaideh alleges that the Washington Department of Health learned "via public record" of the assurance of compliance and initiated a disciplinary action based solely on the assurance of compliance. Washington entered a disciplinary order that was reported to the National Practitioner Data Bank.[13] And Zawaideh alleges that the assurance of compliance has led to the termination of his professional board certification and board eligibility which, in turn, has "created difficulties" for him in recredentialing with hospitals and insurance plans.

Zawaideh alleges that he would not have entered into the assurance of compliance had he known about the potential consequences, which he alleges were issues known to Nutzman at the time she assured Zawaideh that the assurance of compliance was not disciplinary. According to Zawaideh, the incident that formed the basis of the investigation into his conduct is no longer subject to discipline under Nebraska law,[14] and terminating the assurance of compliance would allow him to have the Washington disciplinary order removed and restore his board eligibility with the American Board of Family Medicine. So, Zawaideh asked the Department and the Attorney General to rescind the assurance of compliance and expunge the public record. Each declined.

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[12] See § 38-1,108(1).

[13] See 42 U.S.C. § 11101 et seq. (2006).

[14] See *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

Based on these facts, Zawaideh's complaint asserts four claims for relief against the Department and the Attorney General:

(1) The UCA is facially unconstitutional because it permits discipline to be carried out without due process of law, as assurances of compliance are not appealable.

(2) The UCA is unconstitutional as applied in this case because Zawaideh no longer practices obstetrics, of his own accord, and the underlying occurrence is no longer subject to discipline under Nebraska law.

(3) The Attorney General carried out his statutory authority in an arbitrary and capricious manner.

(4) The Attorney General committed fraudulent misrepresentation by concealing the material fact that the assurances of compliance were having the effect of a disciplinary order on other physicians.

Procedural History

The Department and the Attorney General filed a motion to dismiss the complaint pursuant to § 6-1112(b)(6). After a hearing, the district court granted the motion. The district court found that Zawaideh had not alleged that the assurance of compliance damaged any of Zawaideh's liberty or property interests. So, the court concluded that Zawaideh had not stated a constitutional due process claim. The court found no merit to Zawaideh's assertion that the Attorney General had acted in an arbitrary and capricious manner. And the court rejected Zawaideh's fraudulent misrepresentation claim, based on its conclusion that the Attorney General had no duty to disclose the possibility of collateral consequences to the assurance of compliance. Zawaideh appeals.

ASSIGNMENTS OF ERROR

Zawaideh assigns that the district court erred in finding (1) that his complaint failed to state a claim with regard to the constitutionality of the UCA, on its face and as applied; (2) that the Attorney General's office did not act in an arbitrary and capricious manner in carrying out its statutory duties; and (3) that Nutzman's conduct in negotiating the assurance of compliance did not constitute fraudulent misrepresentation.

STANDARD OF REVIEW

[1-4] An appellate court reviews a district court's order granting a motion to dismiss de novo.[15] When reviewing a dismissal order, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[16] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, taken as true, to state a claim to relief that is plausible on its face.[17] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[18]

ANALYSIS

Generally speaking, this case presents an instance of buyer's remorse. Zawaideh entered into a voluntary agreement with the Attorney General, but later found he did not like the deal—at least the deal as Zawaideh claims it was represented to him by the Attorney General. But as explained in more detail below, Zawaideh's change of mind does not mean that the agreement was unlawful or that the Attorney General was obliged to release Zawaideh from it. Instead, Zawaideh's only viable claim for relief rests on his allegation that the Attorney General concealed the potential consequences of the agreement from him before he entered into it.

Due Process Claims

[5] We begin with Zawaideh's constitutional arguments, which underlie his first and second assignments of error. We first note that although Zawaideh is presenting a facial challenge to the constitutionality of a statute, he did not file a

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[15] *Central Neb. Pub. Power Dist., supra* note 11.

[16] *Id.*

[17] *Id.*

[18] *Id.*

notice of a constitutional question pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2008), which requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.[19] And we have repeatedly held that strict compliance with § 2-109(E) is required for the court to address a constitutional claim.[20] Therefore, we do not address Zawaideh's claims regarding the constitutionality of various statutes. However, we do consider his claims that the application of those statutes in this instance violated his right to due process.

The district court, in concluding that Zawaideh had not stated a claim for relief, relied upon the Eighth Circuit's decision in *Kloch v. Kohl*.[21] Because *Kloch* involved a similar argument against the predecessors to the same Nebraska statutes, it is worth examining in some detail. At the time *Kloch* was brought, the statutes at issue permitted the Attorney General to refer a complaint to the appropriate professional board for a recommendation of an assurance of compliance *or* "the opportunity to resolve the matter by issuance of a letter of concern."[22] Like an assurance of compliance, a "letter of concern" was not "discipline," but was part of the public record.[23] Unlike an assurance of compliance, however, a letter of concern was not the product of an agreement between the credential holder and the Attorney General.[24]

The plaintiff in *Kloch* was a credentialed physician who received a letter of concern arising out of an allegation that he had failed to keep proper medical records.[25] The plaintiff denied the allegation and asked the Board of Medicine to reconsider, but it refused, so he sued, alleging that his due process rights

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[19] See *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

[20] See *id.*

[21] *Kloch v. Kohl*, 545 F.3d 603 (8th Cir. 2008).

[22] See Neb. Rev. Stat. § 71-171.01 (Reissue 2003).

[23] See *id.*

[24] See *id.*

[25] *Kloch, supra* note 21.

had been violated because he had been denied notice and an opportunity to be heard.[26]

But the Eighth Circuit concluded that the plaintiff had not alleged the deprivation of a protected liberty or property interest. The court explained that "[a] plaintiff is entitled to due process only when a protected property or liberty interest is at stake. . . . Abstract injuries, by themselves, do not implicate the due process clause."[27] The court noted that a letter of concern differed from a formal censure or other discipline, and found that "the significance of a letter of concern to subsequent proceedings was minimal."[28] The court concluded that although the public availability of letters of concern could be cause for apprehension, "[a]s a constitutional matter, however, [the plaintiff] is not entitled to due process protection for damage to his reputation alone; and he has failed to show that his medical license was tangibly impaired."[29]

Zawaideh argues that *Kloch* is distinguishable, because in this case, he alleged practical consequences to the assurance of compliance: the effects on his Washington license and his board certification. We agree that *Kloch* is distinguishable in those respects, although a good argument can be made that Zawaideh's complaint should be directed in part at the State of Washington, not the State of Nebraska. But *Kloch* is also distinguishable in a more fundamental way that demonstrates the defect in Zawaideh's due process claim: unlike a letter of concern, an assurance of compliance is *voluntary*.

[6-8] Although Zawaideh is not perfectly clear on this point, it is apparent that he is advancing a procedural due process claim. Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due

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[26] See *id.*

[27] *Id.* at 607 (citation omitted). See, also, *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003); *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

[28] *Kloch, supra* note 21, 545 F.3d at 608.

[29] *Id.* at 609.

Process Clause and (2) if so, what process is due?[30] Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.[31] The concept of due process embodies the notion of fundamental fairness and defies precise definition.[32]

[9,10] It is difficult to see how Zawaideh was denied notice and an opportunity to be heard when he negotiated with the Attorney General and affirmatively agreed to the entry of the assurance of compliance. Zawaideh's argument seems to be that due process requires some sort of review procedure for the *continuation* of the assurance of compliance. But it is well established that only a party aggrieved by an order or judgment can appeal, and one who has been granted that which he or she sought has not been aggrieved.[33] A party is not entitled to prosecute error upon that which was made with his or her consent.[34] Zawaideh entered into the assurance of compliance voluntarily, and the fact that he is dissatisfied with his choice does not mean his due process rights were violated by the State.[35]

And Zawaideh does not dispute the fact that had he refused the assurance of compliance, any discipline imposed upon him would have required a hearing and permitted a judicial review

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[30] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[31] *Hess, supra* note 30; *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

[32] *Hess, supra* note 30; *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). See, also, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[33] See, e.g., *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

[34] See *id.*

[35] See, e.g., *Lighton v. University of Utah*, 209 F.3d 1213 (10th Cir. 2000); *Dorr v. Bd. of Cert. Public Accountants*, 146 P.3d 943 (Wyo. 2006); *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W.2d 509 (1942).

that would have satisfied the requirements of due process. That process was available to him—he simply declined to pursue it, and settled the complaint instead. In other words, the review procedure to which Zawaideh claims he was entitled was available to him, but he waived it.[36]

Zawaideh contends that the Attorney General's refusal to discontinue the assurance of compliance is "arbitrary and capricious." We read this argument as being part of Zawaideh's due process claim, because simply alleging an "arbitrary and capricious" action is not, in itself, a claim for relief.

Zawaideh argues the Attorney General's action was arbitrary and capricious because, under our decision in *Mahnke v. State*,[37] entered after his assurance of compliance, he would no longer be subject to disciplinary action because the investigation into his conduct "was based on a single incident."[38] But we held in *Mahnke* that "a physician should not be subject to discipline for a single act *of ordinary negligence*."[39] A physician is still subject to discipline for a "single incident" *other* than ordinary negligence.[40] And Zawaideh's complaint alleges *none* of the facts regarding the underlying incident, other than that it "involv[ed] the provision of obstetrical care to a patient . . . on December 14, 2001." This provides us with no factual basis to conclude that the underlying incident involved only ordinary negligence.

[11,12] It is far from clear that *Mahnke*, even if it applied to the incident underlying the investigation, would provide any basis for relief. Generally speaking, where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no

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[36] See *Garcia Financial Group v. Virginia Accelerators*, 3 Fed. Appx. 86 (4th Cir. 2001). See, also, *Schwartz v. U.S.*, 976 F.2d 213 (4th Cir. 1992); *Pitts v. Bd. of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555 (10th Cir. 1989); *Stewart v. Bailey*, 556 F.2d 281 (5th Cir. 1977).

[37] *Mahnke, supra* note 14.

[38] Brief for appellant at 9.

[39] *Mahnke, supra* note 14, 276 Neb. at 70, 751 N.W.2d at 645 (emphasis supplied).

[40] See, e.g., § 38-179.

basis for that party to upset the compromise.[41] But even if an attack on the assurance of compliance was permitted, Zawaideh has only alleged a legal conclusion regarding the applicability of *Mahnke*—not the facts supporting that conclusion. And courts are not required to accept as true legal conclusions or conclusory statements—instead, while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.[42] On this particular issue, Zawaideh has made no well-pleaded factual allegations.

In sum, we find no merit to the due process claims presented in Zawaideh's first and second assignments of error. Zawaideh voluntarily entered into the assurance of compliance, and notions of "fundamental fairness"[43] are not violated by the State's refusal to permit Zawaideh to withdraw it.

Fraudulent Misrepresentation or Concealment

[13] Zawaideh also argues he stated a claim for fraudulent misrepresentation or concealment, based upon the allegedly false impression given by the Attorney General's failure to inform Zawaideh of other cases involving collateral consequences to assurances of compliance. To prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.[44] We note that the only issue presented in

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[41] See *Dodge, supra* note 35.

[42] See *Doe v. Board of Regents, ante* p. 492, 788 N.W.2d 264 (2010).

[43] See *Hess, supra* note 30, 261 Neb. at 374, 622 N.W.2d at 899.

[44] *Knights of Columbus Council 3152 v. KFS BD, Inc., ante* p. 904, 791 N.W.2d 317 (2010).

this appeal is whether Zawaideh has alleged facts supporting the existence of a duty on the part of the Attorney General to disclose the possible collateral consequences of the assurance of compliance. Other aspects of Zawaideh's fraudulent concealment claim, and possible defenses to that claim, are not at issue here.

[14,15] Zawaideh's argument relies upon the Restatement (Second) of Torts § 551,[45] under which one who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but *only* if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.[46] Existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.[47]

Although the circumstances of each case typically determine whether a duty to disclose exists, there are several situations which have been consistently recognized as creating a duty to disclose,[48] and Zawaideh relies upon three in particular: (1) matters known to the defendant that the plaintiff was entitled to know because of a fiduciary or other similar relation of trust or confidence between them; (2) matters known to the defendant that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and (3) facts basic to the transaction, if the defendant knows that the plaintiff is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably

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[45] Restatement (Second) of Torts § 551 (1977).

[46] *Knights of Columbus Council 3152, supra* note 44.

[47] See, Restatement, *supra* note 45, comment *m*.; *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152, supra* note 44.

[48] See *Streeks, supra* note 47.

expect a disclosure of those facts.[49] But we note that, generally speaking, the adversarial context of settlement negotiations weighs against a duty to disclose.[50]

First, Zawaideh argues that the Attorney General owed him a fiduciary duty, based in the fiduciary relationship between public officers and the people they have been elected or appointed to serve.[51] But we have never held that a public officer's duty to act in the public interest extends to particular members of the public, particularly those whose conduct is being investigated by the public officer. The Attorney General's fiduciary duties were owed to the public in general, not Zawaideh in particular, and it would place the Attorney General in an untenable position to suggest that his duty to the public generally requires him, in an adversarial proceeding, to act with the adversary's interests in mind. There is simply nothing in the facts alleged in this case to imply that the Attorney General had a confidential relationship to an opposing party in an adversarial proceeding.

[16] Nor do we agree that the collateral consequences of an assurance of compliance were facts basic to the transaction. A "fact basic to the transaction" is a "fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with."[52] Other facts may serve as important and persuasive inducements to enter into the transaction, and they may be material, but they are not basic.[53] Nutzman was under no duty, generally speaking, to inform Zawaideh of the consequences of the assurance of compliance. As explained below, it was Nutzman's decision to discuss *some* but not *all* of those consequences that may have triggered a duty of disclosure. In other words, any duty

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[49] See *id.*

[50] See, e.g., *Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 682 S.E.2d 726 (2009); *Kwiatkowski v. Drews*, 142 Wash. App. 463, 176 P.3d 510 (2008); *Poly Trucking v. Concentra Health Services*, 93 P.3d 561 (Colo. App. 2004).

[51] See *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[52] See Restatement, *supra* note 45, comment *j.* at 123.

[53] See *id.*

to disclose arose as a result of Nutzman's statement that the assurance of compliance was not disciplinary—it did not exist simply because of the nature of the transaction.

[17] But finally, Zawaideh argues that the Attorney General was required to disclose the possibility of collateral consequences in order to prevent Zawaideh from being misled by Nutzman's representation that the assurance of compliance was not disciplinary. Nutzman's representation was literally true, at least as far as Nebraska law is concerned.[54] But literal truth is not the standard. A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not.[55]

[18,19] For instance, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.[56] So when such a statement is made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient.[57] And whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand.[58] The recipient is entitled to know the undisclosed facts insofar as they are material and to form his or her own opinion of their effect.[59]

In this case, Zawaideh alleges that he was told that the assurance of compliance "was not a disciplinary procedure." In law, "discipline" usually refers to a sanction or penalty imposed after an official finding of misconduct.[60] But the word "discipline"

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[54] See § 38-1,107(1).

[55] See Restatement, *supra* note 45, comment *g*. See, also, *Knights of Columbus Council 3152, supra* note 44.

[56] See Restatement, *supra* note 45, § 529, comment *a*.

[57] See *id*., § 551, comment *g*. See, also, *Knights of Columbus Council 3152, supra* note 44.

[58] See Restatement, *supra* note 45, § 529, comment *b*.

[59] See *id.*

[60] Black's Law Dictionary 531 (9th ed. 2009).

can more generally denote punishing or rebuking someone formally for an offense.[61] Given Zawaideh's allegations, the procedural posture of this case, and our standard of review, we find it at least plausible that Nutzman's representation that the assurance of compliance was not disciplinary led Zawaideh to believe that the assurance of compliance would result in no punishment or rebuke. And Zawaideh alleged that Nutzman attended a meeting of the Nebraska Board of Medicine and Surgery, at which meeting, the board discussed problems that other physicians were having as a consequence of assurances of compliance. So it is a plausible allegation Nutzman knew that Zawaideh could also face such consequences and that informing Zawaideh of that possibility might affect his decision to sign the assurance of compliance.

In other words, Zawaideh has alleged that the Attorney General misled him by stating only favorable matters and omitting unfavorable ones. Those facts could, if substantiated, support a finding that Nutzman had a duty to inform Zawaideh of the fact that other physicians had suffered "disciplinary" consequences from assurances of compliance. Other issues, such as whether the fact was within Zawaideh's reasonably diligent attention or whether Zawaideh reasonably relied on Nutzman's statement, or any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them. Rather, those matters are left to further proceedings in the district court following remand.

CONCLUSION

We affirm the district court's order of dismissal with respect to Zawaideh's due process claims—his first, second, and third claims for relief. However, we reverse the district court's order with respect to Zawaideh's fraudulent concealment claim and remand the cause for further proceedings on that claim.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and CONNOLLY, JJ., not participating.

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[61] Concise Oxford American Dictionary 255 (2006).

Eric Fleming and Fraternal Order of Police Lodge No. 8, appellants, v. Civil Service Commission of Douglas County, Nebraska, and Douglas County, Nebraska, appellees.

792 N.W.2d 871

Filed January 14, 2011. No. S-10-166.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
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. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
5. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
6. **Administrative Law: Words and Phrases.** Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
7. **Contracts: Intent.** Parties are generally bound by the terms of their contract, even though their intent might be different from what is expressed in the agreement.
8. **Administrative Law: Due Process.** Procedural due process requires a neutral, or unbiased, adjudicating decisionmaker.
9. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
10. **Administrative Law: Recusal: Presumptions: Proof.** The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.
11. **Administrative Law: Presumptions.** Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship.
12. **Administrative Law: Recusal: Presumptions.** An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Steven E. Achelpohl for appellants.

Timothy K. Dolan, Deputy Douglas County Attorney, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Eric Fleming, a Douglas County corrections officer, was terminated from his employment by the Director of Corrections. The Douglas County Civil Service Commission (Commission) upheld the termination. Fleming and the Fraternal Order of Police Lodge No. 8 (Union) filed a petition in error in the district court for Douglas County. The court denied the petition and affirmed the termination of Fleming's employment.

SCOPE OF REVIEW

[1] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Scott v. County of Richardson, ante* p. 694, 789 N.W.2d 44 (2010).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

FACTS

Fleming was employed as a corrections officer by the Douglas County Department of Corrections (Department). On June 11, 2008, while on duty, Fleming had a physical altercation with a pretrial detainee. The detainee was seated in a waiting area and

was making noise. A corrections employee became annoyed and asked the detainee to stop. When the detainee did not stop, corrections officers were called to deal with the detainee. The officers, including Fleming, attempted to remove the detainee to a holding cell.

The detainee claimed that in the holding cell, one officer held him down while another punched and kneed him in the face and on the head. The corrections officers testified that the detainee had grabbed Fleming's collar and was repeatedly asked to let go. Fleming testified that he hit the detainee's arms in an attempt to get him to release Fleming's collar. In any case, after the incident, the detainee required medical treatment.

The sheriff's report stated that the detainee had numerous lumps on his forehead and a large knot on the left side of his head just behind his ear. He had a gash in his right eyebrow, and his right eye was bloodshot and swollen. The detainee's nose was swollen and had dried blood in and around it. He also had an abrasion on his chin.

Fleming and the other officers involved failed to file a report about the incident. The Director of Corrections deemed the altercation a violation of the Department's excessive force policy. As a result of this violation, he fired Fleming on July 11, 2008.

Criminal charges were filed against Fleming as a result of the incident. On November 17, 2008, Fleming entered a plea of no contest in the county court for Douglas County. As a result of that plea, the court convicted Fleming of the Class I misdemeanor of assault and battery. Sentencing was scheduled for March 26, 2009.

On December 4, 2008, Fleming appealed his July 11 termination to the Commission. There were two issues presented: (1) whether Fleming violated the Department's use of force policy and (2) whether Fleming violated Department policy in failing to file a report about the incident. The Commission found insufficient evidence to establish that Fleming had used excessive force and ordered Fleming reinstated. However, because Fleming failed to follow procedure by not filing a report about the incident, Fleming was not awarded backpay and an accrual of benefits.

On March 26, 2009, Fleming was sentenced by the county court to 3 days in jail, 24 hours of community service, and 6 months of probation as a result of his conviction of assault and battery. After this sentence, the Director of Corrections again terminated Fleming's employment and Fleming appealed to the Commission. There were two issues before the Commission: (1) whether Fleming had been convicted of a felony or crime that rendered him unfit to perform the duties of his position and (2) whether Fleming had violated Department regulations. The Department's "Employee Code of Conduct" provides that employees "shall conduct themselves, both on or off duty, in a manner that will not discredit the Department or the County."

Preliminary motions before the Commission included a request by Fleming that Commissioner Timothy Dunning be disqualified from participating in the appeal because he was the Douglas County sheriff. The incident involving Fleming and the detainee resulted in a criminal investigation and citation by a deputy of the Douglas County sheriff's office. The Department objected to the motion. Dunning stated that he was not directly involved with Fleming's investigation and that he could be fair in hearing the appeal. He declined to recuse himself.

Fleming also alleged that the Commission had heard the same case in December 2008 in which Fleming's employment was terminated for use of excessive force and that, therefore, this case should be dismissed because it constituted double jeopardy. The Commission disagreed, and following the presentation of exhibits and witnesses, it voted to uphold Fleming's termination of employment.

Fleming and the Union filed a petition in error in the district court for Douglas County. They alleged that the Commission's decision was arbitrary and capricious, that it violated agreed-upon procedural due process, that it violated contractual double jeopardy, and that the participation of Dunning violated Fleming's right to have an impartial and unbiased tribunal.

The district court denied the petition in error and affirmed the Commission's decision that upheld the termination of employment. The court found the Commission had sufficient evidence to support its decision and, therefore, did not act

arbitrarily and capriciously. The disciplinary procedure was satisfied because the Department disciplined Fleming for his conviction of assault and battery within 30 days of the disposition of the criminal matter. The court also concluded that Fleming's contractual double jeopardy claim failed because it was not a recognized doctrine in Nebraska. The court found that Fleming was not able to overcome the presumption that Dunning acted in an impartial manner while sitting on the Commission and that, therefore, Fleming was not denied his due process rights.

ASSIGNMENTS OF ERROR

Fleming and the Union assert, summarized and restated, the following as error: (1) The district court erred as a matter of law in finding that the decision to terminate Fleming's employment was supported by competent evidence and was not arbitrary and capricious, (2) the court erred when it found that evidence that other employees were not fired for conviction of crimes was irrelevant, (3) the court erred in not finding that termination of Fleming's employment twice for the same misconduct was contractual double jeopardy, and (4) the court erred in not finding that participation by the Douglas County sheriff as a member of the Commission violated Fleming's due process rights to a fair and unbiased tribunal.

ANALYSIS

Termination of Employment Was Supported by Evidence and Was Not Arbitrary and Capricious

[4-6] The following procedural standards govern our review: In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Scott v. County of Richardson, ante* p. 694, 789 N.W.2d 44 (2010). See *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

Barnett v. City of Scottsbluff, 268 Neb. 555, 684 N.W.2d 553 (2004). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000). Finally, agency action is "arbitrary and capricious" if it is "taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *Hickey*, 274 Neb. at 565, 741 N.W.2d at 657. Accord *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991).

Fleming and the Union first claim the Commission's decision was arbitrary and capricious and not supported by competent evidence. They advance two subarguments with respect to this point. First, they claim that Fleming engaged in no additional misconduct after he was reinstated and, thus, there was no evidence of wrongdoing. Second, they argue that the Department did not comply with the time restraints imposed by the disciplinary procedure required by the collective bargaining agreement (CBA) and incorporated documents.

The first argument of Fleming and the Union fails. Fleming's employment was terminated the second time for violating two provisions of article 22 of the Commission's personnel policy manual. Under article 22, section 5, the following are grounds for discipline: "1. The employee has been convicted of a felony or crime which renders him unfit to perform the duties of his/her position," and "4. The employee has violated any department, division, or institution regulation or order, or failed to obey any proper direction made and given by a supervisor." The department regulation that Fleming violated stated: "Staff shall conduct themselves, both on or off duty, in a manner that will not discredit the Department or the County."

The record includes the bill of exceptions from Fleming's criminal proceedings. It shows that Fleming was convicted of assault and battery, a Class I misdemeanor. There is clearly sufficient evidence showing that Fleming was convicted of a crime which renders him unfit to be a corrections officer.

Fleming and the Union argue it is undisputed that Fleming committed no additional act of misconduct after he was

reinstated following the first attempted termination. The first attempted termination of employment was based upon Fleming's alleged violation of the Department's excessive force policy as well as his failure to file a report regarding the incident with the detainee. The Commission found that there was insufficient evidence to support the termination of employment based on excessive force. Although the Commission knew that Fleming had been charged with assault at the time it heard his first appeal, the issue of whether Fleming had violated the rule against being convicted of crimes that render a person unfit for duty was not before the Commission. When that issue was later presented to the Commission, there was sufficient evidence to conclude that Fleming had violated the workplace rule against being convicted of certain crimes.

To the extent Fleming argues that he is impermissibly being punished twice for the same acts, this argument overlaps with his argument based on contractual double jeopardy, which is an argument we address later in our opinion.

The second argument by Fleming and the Union, that the Department did not comply with the time requirements, is similarly without merit. Article 27, section 2, of the CBA states that the "County must take action on a criminal complaint within thirty days of the disposition of the criminal matter." Fleming argues that this 30-day period commenced on November 17, 2008, the date he pleaded no contest and was convicted. Fleming was not sentenced until March 26, 2009. He received his termination letter on April 23. If Fleming and the Union are correct that the period commenced in November 2008, Fleming's termination of employment was untimely. However, if the "disposition of the criminal matter" did not occur until sentencing, then the termination of employment was timely.

A "disposition" is defined as "[a] final settlement or determination." Black's Law Dictionary 539 (9th ed. 2009). Our court has previously held that a conviction does not become final until a sentence is pronounced. See, e.g., *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006); *Kennedy v. State*, 170 Neb. 193, 101 N.W.2d 853 (1960). Accordingly, the disposition

of a criminal case cannot come before sentencing. Therefore, Fleming's termination of employment was timely.

Our review is whether the Commission acted within its jurisdiction and whether sufficient relevant evidence supports the decision appealed from. The evidence is sufficient to support the decision of the Commission. And the decision is not arbitrary or capricious. Fleming's conviction for assault and battery, which became final upon his sentence, supports the decision to terminate his employment.

Other Employees' Criminal Convictions

Fleming and the Union next argue that the district court erred in finding that other employees' criminal convictions and the discipline imposed as a result of the convictions were irrelevant. They argue that to ignore the criminal convictions of others renders the Commission's decision arbitrary and capricious.

Fleming's employment with the Department was governed by a CBA. The CBA, by its terms, incorporated the "Douglas County Civil Service Regulations and the [Department's] Standard Operating Procedures." See CBA article 6, section 2. Included within article 13 of the Commission's personnel policy manual is a section which requires that like penalties be imposed for like offenses. And article 22 of the same personnel policy manual establishes a rule against being "convicted of a felony or crime which renders him unfit to perform the duties of his/her position."

Fleming was convicted of assault and battery, which was charged as a Class I misdemeanor. This crime involved bodily injury. The other corrections officers to whom Fleming asks that his discipline be compared were all convicted of driving under the influence offenses in Iowa.

We conclude it was not error for the Commission to disregard the convictions of the other employees. Article 22 establishes a rule against being convicted of a crime that renders a person unfit to be a corrections officer. It is not a rule prohibiting people from just being convicted of a crime. It was not arbitrary to refuse to compare a conviction that involved violence and bodily injury imposed by a corrections officer

upon a detainee to the driving under the influence conviction of another employee. Corrections officers operate in a unique work environment in which there is always a potential for violent altercation. Selecting personnel who refrain from excessive or unnecessary violence is a reasonable practice for a corrections department. Imposing discipline on those who commit violent offenses without regard to what discipline was imposed on those who do not was not arbitrary. It was not error to refuse to consider the other employees' discipline.

The cases Fleming and the Union cite are of little use to Fleming's position. In *Schulz v. Board of Education*, 210 Neb. 513, 519, 315 N.W.2d 633, 637 (1982), we mentioned the performance records of other teachers only because we were at a loss as to how a teacher who routinely received "above average" ratings could be found to be incompetent. *Schulz*, by no means, stands for the proposition that employee discipline must always be compared to that imposed on other employees.

Lynn v. Deaconess Medical Center-West Campus, 160 F.3d 484 (8th Cir. 1998), is similarly inapposite. *Lynn* is a Title VII discrimination case. Under the body of case law regarding Title VII, when an employee does not put forward direct evidence of discrimination, the case is analyzed under a tripartite, burden-shifting framework. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The last part of the analysis allows an employee to demonstrate that a legitimate reason for the employment action offered by the employer is merely a pretext for the discrimination. Under the case law, "[i]nstances of disparate treatment can support a claim of pretext, but [the plaintiff] has the burden of proving that he and the disparately treated [employees] were 'similarly situated in all relevant respects.'" *Lynn*, 160 F.3d at 487, quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968 (8th Cir. 1994). In this case, Fleming has not brought a claim under any employment discrimination statute, so this route of analysis is inapplicable. See *Nebraska Dept. of Health & Human Servs. v. Williams*, 16 Neb. App. 777, 752 N.W.2d 163 (2008). And further, Fleming and his fellow officers are not similarly situated; their acts were not of "'comparable seriousness.'" *Lynn*, 160 F.3d at 488. They were convicted of very different criminal

offenses. In sum, we find the arguments by Fleming and the Union to be meritless.

Contractual Double Jeopardy

Fleming and the Union argue that termination of Fleming's employment violated the concept of contractual double jeopardy. While our courts have never recognized this doctrine, other courts have. See, e.g., *Zayas v. Bacardi Corp.*, 524 F.3d 65 (1st Cir. 2008); *Rochon v. Rodriguez*, 293 Ill. App. 3d 952, 689 N.E.2d 288, 228 Ill. Dec. 416 (1997); *Lundy v. University of New Orleans*, 728 So. 2d 927 (La. App. 1999).

The doctrine of contractual double jeopardy "enshrines the idea that an employee should not be penalized twice for the same infraction." 51A C.J.S. *Labor Relations* § 382 at 68 (2010). See, also, 48A Am. Jur. 2d *Labor and Labor Relations* § 2389 (2005 & Cum. Supp. 2010). Its protections are generally imported into a contract because they are "intrinsic to the notion of just cause or otherwise implicit in the labor contract." *Zayas*, 524 F.3d at 68.

[7] As we mentioned, the relationship of the parties in this case is governed by the CBA and incorporated documents. In pressing his double jeopardy argument, Fleming, in essence, is asking us to read or "import" into the CBA a term that he, or the Union, could have negotiated for but did not. This we refuse to do. Parties are generally bound by the terms of their contract, even though their intent might be different from what is expressed in the agreement. See *Professional Serv. Indus. v. J. P. Construction*, 241 Neb. 862, 491 N.W.2d 351 (1992). Only in a few limited circumstances may a court properly imply contractual terms not expressly provided for by the parties. See *id.* One of these rare implied terms is the covenant of good faith and fair dealing, which exists in every contract. See, *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002); *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000); *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). However, the scope of protection offered by the covenant is curtailed by the purposes and express terms of the contract. See *Spanish Oaks, supra.*

In other words, the nature and extent of the covenant's protections are measured by the justifiable expectations of the parties. See *id.*

The terms of the CBA seem to allow for two forms of discipline that could be applied to the same underlying facts. Article 27, section 2, of the CBA provides different timeframes in which discipline must be brought for noncriminal complaints and criminal complaints. Nothing in the CBA convinces us that the same underlying facts could not serve as a basis for criminal and noncriminal complaints and, thus, two different occasions for discipline.

In sum, the district court was correct in refusing to apply the doctrine of contractual double jeopardy.

Procedural Due Process

The final argument by Fleming and the Union is that Fleming's right to procedural due process was violated when Dunning, the Douglas County sheriff, sat on the Commission. They claim that Dunning's participation deprived Fleming of his right to an unbiased adjudicator. As evidence of bias, they point to two things. First, the accusation that Fleming had committed an assault was investigated by sheriff's deputies who work under Dunning. Second, Fleming and the Union point out that Dunning excused himself from the first Commission hearing because he said he had a "conflict," although Dunning later claimed that this was merely a scheduling conflict.

[8-12] Procedural due process requires a neutral, or unbiased, adjudicating decisionmaker. See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). Administrative adjudicators serve with a presumption of honesty and integrity. *Id.*; *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). The party seeking to disqualify an adjudicator on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *Murray*, *supra*; *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). Factors that may indicate partiality or bias on the part of an adjudicator are a pecuniary interest in the outcome of the proceedings, a familial or adversarial relationship with one of the parties, and a failure by the adjudicator to disclose the suspect relationship. *Murray, supra.*

An adjudicator should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the adjudicator's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Urwiller, supra*.

Courts, including the U.S. Supreme Court, see *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), have generally rejected the idea that the combination of investigatory and adjudicatory functions is a per se denial of due process. See, *Murray, supra*; *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988). Without a showing to the contrary, state administrators are assumed to be persons of conscience, capable of judging a particular controversy fairly on the basis of its own circumstances. *Murray, supra*.

The argument by Fleming and the Union seems to be that Dunning would be too deferential to the sheriff's report because his employees were the officers who wrote it. This argument fails for at least two reasons. First, the combination of investigatory and adjudicative functions is not a per se violation of due process. See, *id.*; *Dieter, supra*. Fleming and the Union have failed to show why this rule should not apply. Second, and more important, after Fleming's conviction, the details of the sheriff's report became irrelevant. Fleming's employment was terminated because he was convicted of a crime to which he pleaded no contest. Any factual issues investigated by the sheriff's office were resolved by the conviction and sentence. Thus, Dunning's supervision of the investigation would not have any effect upon the determination of whether Fleming had been convicted of a crime which rendered him unfit to perform the duties of his position. Dunning's role on the Commission was to determine whether there was sufficient evidence to support the decision to terminate Fleming's employment. A simple examination of court records would indicate that there was sufficient evidence. There was no need to even consider the reports of the deputies.

Fleming and the Union also point to the fact that Dunning had recused himself from the first hearing because of a "conflict." Dunning later claimed that this was just a scheduling conflict. Fleming and the Union have put forth no evidence to

the contrary. Nor have they shown that Dunning would have been required to recuse himself at the first hearing because of bias. Under our case law, it is Fleming's burden to show partiality. See, *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). He has failed to make this showing. Accordingly, this assignment of error is without merit.

CONCLUSION

We conclude that none of the assignments of error asserted by Fleming and the Union have merit. The Commission's findings were supported by sufficient evidence. Accordingly, we affirm its termination of Fleming's employment.

AFFIRMED.

HEADNOTES
Contained in this Volume