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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 21, 2011 and AUGUST 4, 2011

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXXI

PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge[1]
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge
MICHAEL W. PIRTLE, Associate Judge[2]

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

[1]Until April 16, 2011
[2]As of July 6, 2011

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
		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
		Timothy P. Burns	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	John E. Samson	Blair
		Geoffrey C. Hall	Fremont
		Paul J. Vaughan	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	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
		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
		Marcela A. Keim	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	Robert A. Ide	Holdrege
		Michael Offner	Hastings
		Michael P. Burns	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	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

ATTORNEYS
Admitted Since the Publication of Volume 280

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NEERAJ AGARWAL
ANTHONY JAMES ALT
CAMERON JOEL ARCH
DAVID SAMAD BARARI
WILLIAM PAUL BARESEL
MELISSA KATHERINE BEEHNER
SHANNON LEE BENASH
KRISTEN MARIE BLANKLEY
JASON BLAKE BRINKLEY
CHRISTOPHER JOHN BUCKLEY
ERIKA YOLANDA BUENROSTRO
ROBERT GREGORY BUSCH
CLINTON DANIEL CADWALLADER
JONATHAN WADE CARLSON
DAZMI HAZANETTE CASTREJON
CHARLES RICHARD CLARK II
GAGE RANDOLPH COBB
ANN NICOL COENEN-DAVIS
BETHANY ANN CONNOR
KRISTIN ANN CONTRYMAN
ANNA LOUISE CRAMER
CHARLES ANTHONY CRNIC III
DANIEL HENRY CUNEO
BRIAN PATRICK DANIS
TARA BAO NGOC DECAMP
MARY MULLIN DVORAK
FRANKLIN JOHN FALEN
THOMAS C. FARRENS
KERRY CHRISTINE FELD
STEPHANIE NICOLE FLYNN
EDWARD MARION FOX II
JOSEPH SCOTT FOX
ROBERT WERNER FUTHEY
TANA MARIE FYE
TRINIDAD PARRA GALDEAN
MALLORY NICOLE GARTH
JANE MARIE GILES
JASON WILLIAM GRAMS
ADAM DOUGLAS GRIESER
KATHRYN LYNAM HARTNETT
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MICHAEL DONN HOOPER
JASON C. HUBBARD
JENNIFER JO JORGENSEN
GRAHAM CHARLES JURA
ASHLEY ANN KISSEL
KENDALL KAY KRAJICEK
MARK ANDREW LARSON
MARK JOHN LAUGHLIN
DAVID ROBERT MADDEN
WILLIAM HUMMEL MARION
CRAIG MATTHEW MARTIN
ALEXANDER HERMAN MCATEE
NANCY RAE MCEVOY
CHRISTOPHER RYAN MILLER
ANDREW NELS MONSON
JACOB BRIAN NATWICK
JOHN FRANCIS NELSON
CARA CHRISTINE NESBITT
DAVID MARTIN NEWMAN
ANTHONY MICHAEL NICASTRO
GWENDOLYN E. OLNEY
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LINDSEY DAWN PARLIN

DANIEL CHASE PAULEY
MICHAEL CHRISTOPHER PAYNE
ROSS RICHARD PESEK
LISA M. PETERS
JASON WAYNE POHREN
NATASHA MARIE PRESTON
COADY HUDSON PRUETT
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JEFFREY MICHAEL SPECTOR
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JACOB ALLAN STEINER
BRETT CHRISTOPHER STOHS
RYAN PATRICK SULLIVAN
STEVEN LEE THEESFELD
ANTHONY DOMENIC TODERO
MANDY LEE WHIDDON
CHRISTINE HIGGINS WILCOX
RYAN DOUGLAS WILKINS
JUSTIN LEE WILLIAMS
NATALIE KAY WINEGAR
LECIA ELAINE WRIGHT
TIMOTHY BRIAN YOUNG

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No. S-10-502: **Klotz v. Klotz**. Reversed and remanded with directions. McCormack, J. Wright, J., not participating.

No. S-10-619: **State v. Sing**. Affirmed. Gerrard, J. Wright, J., not participating.

No. S-10-743: **Munger v. Garringer**. Affirmed. Heavican, C.J. Wright, J., not participating.

No. S-10-891: **State v. Fruchtl**. Affirmed. McCormack, J. Wright, J., not participating.

No. S-10-943: **County of Webster v. Wigert**. Affirmed. Stephan, J. Wright, J., not participating.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-10-042: **Kilgore v. Health & Human Servs**. Stipulation allowed; appeal dismissed.

No. S-10-471: **State v. Grizzle**. Appellant's motion to proceed to issue decision is overruled; appeal dismissed as moot.

No. S-10-988: **State v. Vo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-10-1010: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-10-1073: **In re Guardianship & Conservatorship of Haneborg**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-10-1201: **State v. Sims.** Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

No. S-11-035: **State v. Williams**. By order of the court, appeal dismissed for failure to file briefs.

No. S-11-090: **State v. Ramirez**. Appeal dismissed. See § 2-107(A)(2).

Nos. S-11-238, S-11-239: **State v. Seberger**. Appeal dismissed. See, § 2-107(A)(2); *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

No. S-11-273: **In re Interest of H.M**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-09-019: **Bauermeister v. Waste Mgmt. Co**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-667: **State v. Passerini**, 18 Neb. App. 552 (2010). Petition of appellee for further review denied on January 27, 2011.

No. A-09-867: **Morehouse v. Nast**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-951: **In re Guardianship & Conservatorship of Shannon**. Petition of appellant for further review denied on March 30, 2011.

No. A-09-1042: **Lenners v. St. Paul Fire & Marine Ins. Co.**, 18 Neb. App. 772 (2010). Petition of appellee St. Paul Fire & Marine Ins. Co. for further review denied on May 11, 2011.

No. A-09-1042: **Lenners v. St. Paul Fire & Marine Ins. Co.**, 18 Neb. App. 772 (2010). Petition of intervenor-appellee for further review denied on May 11, 2011.

No. A-09-1089: **State v. Balvin**, 18 Neb. App. 690 (2010). Petition of appellant for further review denied on January 27, 2011.

No. A-09-1210: **In re Interest of P.A**. Petition of appellant for further review denied on May 11, 2011.

No. A-09-1211: **Lewis v. Vacanti**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-1279: **JONWL, L.L.C. v. Starostka**. Petition of appellee for further review denied on February 9, 2011.

No. S-09-1309: **Estate of Teague v. Crossroads Co-op Assn**. Petition of appellant for further review sustained on July 13, 2011.

No. A-10-011: **Monica S. v. Nguyen**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-016: **Reynolds v. Reynolds**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-017: **Larsen v. Union Pacific RR. Co**. Petition of appellee for further review dismissed on March 9, 2011, as moot.

No. A-10-031: **In re Interest of Josiah J**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-046: **E & A Consulting Group v. RSV**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-059: **State v. Marsh**. Petition of appellant for further review denied on March 16, 2011.

No. A-10-094: **In re Interest of Justin H. et al.**, 18 Neb. App. 718 (2010). Petition of appellee for further review denied on January 27, 2011.

No. A-10-150: **State v. Hubbard**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-170: **Shuck v. Shuck**, 18 Neb. App. 867 (2011). Petition of appellant for further review denied on May 11, 2011.

No. A-10-170: **Shuck v. Shuck**, 18 Neb. App. 867 (2011). Petition of appellee for further review denied on May 11, 2011.

No. A-10-179: **State v. Gonzalez**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-183: **State v. Beins**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-184: **State v. Neal**. Petition of appellant for further review denied on January 19, 2011, as untimely filed.

No. A-10-200: **Krivohlavek v. Dorchester Farmers Co-op**. Petition of appellant for further review denied on January 19, 2011.

No. S-10-208: **In re Interest of Jamyia M.**, 18 Neb. App. 679 (2010). Petition of appellee for further review sustained on February 24, 2011.

No. A-10-209: **In re Interest of Ayla R. & Marciana R**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-209: **In re Interest of Ayla R. & Marciana R**. Petition of appellee State for further review denied on January 27, 2011.

No. A-10-219: **State v. Abram**. Petition of appellant for further review denied on March 9, 2011.

Nos. A-10-227, A-10-228: **Monahan v. Douglas Cty. Bd. of Equal**. Petitions of appellant for further review denied on April 13, 2011.

No. S-10-235: **Armstrong v. County of Dixon**. Petition of appellant for further review sustained on April 21, 2011.

No. A-10-236: **In re Loyal W. Sheen Family Trust**. Petition of appellee for further review denied on March 9, 2011.

No. S-10-250: **Devese v. Transguard Ins. Co**. Petition of appellant for further review sustained on February 9, 2011.

No. A-10-251: **Green v. Beatty**. Petition of appellants for further review denied on March 30, 2011.

No. A-10-275: **State v. Roberts**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-279: **Masek v. Estate of Masek**. Petition of appellant for further review denied on February 9, 2011.

No. S-10-295: **State v. Alfredson**. Petition of appellant for further review sustained on June 15, 2011.

No. A-10-297: **State v. Meints**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-303: **Sims v. Sims**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-330: **Brown v. Drivers Mgmt**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-336: **Killinger v. Grand Island Radiology Assocs**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-353: **State v. White**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-375: **In re Interest of J.M**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-410: **Sobotka v. Woockman**. Petition of appellants for further review denied on February 9, 2011.

No. A-10-411: **Pittman v. Stickney**. Petition of appellant for further review denied on April 13, 2011.

Nos. A-10-414, A-10-415: **State v. Deckard**. Petitions of appellant for further review denied on March 23, 2011.

No. A-10-419: **State v. Donovan**. Petition of appellant for further review denied on March 23, 2011.

No. A-10-426: **State v. Cross**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-427: **State v. Lopez**. Petition of appellant pro se for further review denied on March 30, 2011.

No. A-10-452: **In re Interest of Jalen D**. Petition of appellant for further review denied on June 8, 2011.

No. A-10-453: **State v. Buckman**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-461: **Schmitt v. Schmitt**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-480: **State v. Rosberg**. Petition of appellant for further review denied on February 22, 2011.

No. A-10-492: **Arlt v. Farmers Co-op**. Petition of appellant for further review denied on June 29, 2011.

No. A-10-511: **Marvel Precision v. Marvel**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-514: **Swedlund v. Phillips**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-525: **Johnson v. Trident Builders**. Petition of appellants for further review denied on May 18, 2011.

No. A-10-535: **Shannon v. Omaha Pub. Power Dist**. Petition of appellee for further review denied on April 21, 2011.

No. A-10-581: **State v. Bruna**. Petition of appellant for further review denied on July 13, 2011.

Nos. A-10-602, A-10-603: **State v. Spidell**. Petitions of appellant for further review denied on January 27, 2011.

No. A-10-604: **State v. Thompson**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-612: **Dawson v. Zachry Constr. Corp**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-658: **State v. Muhammad**. Petition of appellant for further review denied on May 25, 2011.

No. A-10-683: **Onuachi v. Meylan Enterprises**. Petition of appellant for further review denied on January 19, 2011.

No. A-10-689: **In re Interest of Nevaeh M**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-694: **State v. Purvis**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-714: **In re Interest of Nevaeh W**. Petition of appellant for further review denied on January 19, 2011.

No. A-10-725: **State v. Porter**. Petition of appellant for further review denied on June 8, 2011.

No. S-10-734: **In re Interest of Breana M.**, 18 Neb. App. 910 (2011). Petitions of appellees for further review sustained on June 15, 2011.

No. A-10-740: **In re Interest of Amanda C. et al**. Petition of appellee for further review denied on March 23, 2011.

No. A-10-770: **Purdie v. Purdie**. Petition of appellant for further review denied on February 9, 2011.

Nos. A-10-772 through A-10-774: **In re Interest of Frank S. et al**. Petitions of appellant for further review denied on March 9, 2011.

No. A-10-781: **Stinson v. Nebraska Furniture Mart**. Petition of appellant for further review denied on April 13, 2011.

No. A-10-782: **Matlock v. Matlock**. Petition of appellant for further review denied on June 15, 2011.

No. A-10-786: **State v. Tyler**. Petition of appellant for further review denied on June 29, 2011.

No. A-10-802: **State v. Benish**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-836: **State v. Carmona-Marichal**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-870: **Schlichtman v. Jacob**. Petition of appellant for further review denied on July 13, 2011.

No. A-10-875: **In re Interest of Jaiden D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-876: **In re Interest of Ashton D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-877: **In re Interest of Sean D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-893: **In re Interest of Corey W. et al**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-895: **State v. Weaver**. Petition of appellant for further review denied on March 16, 2011.

No. A-10-906: **In re Interest of Javontae T**. Petition of appellant for further review denied on May 18, 2011.

No. A-10-910: **State v. Buckley**. Petition of appellant for further review denied on June 29, 2011.

No. A-10-914: **Commercial Flooring Systems v. Denenberg**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-915: **K & L Decks & Remodeling & Custom Painting v. Denenberg**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-936: **In re Interest of Leland B.**, 19 Neb. App. 17 (2011). Petition of appellee State for further review denied on June 29, 2011.

No. A-10-944: **State v. Romero**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-956: **State v. Echols**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-972: **State v. Williams**. Petition of appellant for further review denied on April 13, 2011.

No. A-10-976: **In re Interest of Renan P. et al**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-983: **State v. Hansen**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-1016: **In re Interest of Cole G. et al**. Petition of appellant for further review denied on June 8, 2011.

No. A-10-1060: **State v. Tyler**. Petition of appellant for further review denied on January 28, 2011, for failure to comply with § 2-102(F)(3).

Nos. A-10-1076, A-10-1077: **State v. Mohamed**. Petitions of appellant for further review denied on April 13, 2011.

No. A-10-1081: **Lyons-Meyer v. Health & Human Servs**. Petition of appellant for further review denied on May 18, 2011.

No. A-10-1090: **State v. Smith**. Petition of appellant pro se for further review denied on April 13, 2011.

No. A-10-1112: **In re Interest of Lokani M**. Petition of appellant for further review denied on June 15, 2011.

No. A-10-1117: **State v. Bellis**. Petition of appellant for further review denied on July 13, 2011.

No. A-10-1127: **Widtfeldt v. Tax Equal. & Rev. Comm**. Petition of petitioner-appellant for further review denied on June 8, 2011, as having been prematurely filed. See § 2-102(F)(1).

No. A-10-1145: **State v. Coufal**. Petition of appellant for further review denied on May 11, 2011.

Nos. A-10-1149, A-10-1150: **State v. Ballard**. Petitions of appellant for further review denied on June 29, 2011.

No. A-10-1164: **State v. Witmer**. Petition of appellant for further review denied on June 22, 2011.

No. A-10-1166: **State v. Castonguay**. Petition of appellant for further review denied on July 1, 2011, for lack of jurisdiction.

No. A-10-1185: **State v. Seizys**. Petition of appellant for further review denied on May 11, 2011.

No. A-10-1193: **State v. McIntire**. Petition of appellant for further review denied on June 22, 2011.

No. A-11-014: **State v. Mackey**. Petition of appellant for further review denied on July 13, 2011.

No. A-11-085: **State v. Milton**. Petition of appellant for further review denied on May 11, 2011.

No. A-11-141: **State ex rel. Jacob v. Houston**. Petition of appellant for further review denied on May 18, 2011.

No. A-11-248: **State v. Flynn**. Petition of appellant for further review denied on June 8, 2011.

No. A-11-276: **McSwine v. Health & Human Servs**. Petition of appellant for further review denied on June 29, 2011.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. LEOPOLDO J. GARCIA, APPELLANT.

792 N.W.2d 882

Filed January 21, 2011. No. S-10-231.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
3. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures.
5. **Constitutional Law: Investigative Stops: Motor Vehicles: Search and Seizure.** A vehicle stop constitutes a seizure within the meaning of the Fourth Amendment.
6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Probable Cause.** After observing suspicious and dangerous driving behavior on private property and watching the driver enter, under suspicious circumstances, onto a public road, a police officer should not have to wait to observe further dangerous driving behavior, subjecting the public to potentially serious harm, before stopping the driver to investigate.
8. **Drunk Driving: Prior Convictions: Proof: Words and Phrases.** While Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008) defines a prior conviction,

§ 60-6,197.02(2) defines what shall constitute the State's prima facie case proving such prior conviction.

9. **Drunk Driving: Prior Convictions: Proof: Legislature: Intent.** In providing for a simple and straightforward means of establishing the State's prima facie evidence of prior convictions, as defined by Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008), the Legislature implicitly acknowledged that it would be impractical, if not impossible, for the prosecution to prove particular factual predicates which may be necessary elements in Nebraska, but of no concern somewhere else.
10. **Drunk Driving: Prior Convictions: Sentences.** The fact that a defendant has previously been convicted of driving under the influence is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out.
11. **Sentences: Prior Convictions: Proof.** In a sentence enhancement proceeding, it is not fundamentally unfair to consider the relative positions of the defendant and the prosecution and to place at least the burden of production on the defendant to show that a prior conviction cannot be used for enhancement.
12. **Prior Convictions: Right to Counsel: Waiver: Records: Proof: Sentences.** A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction, because the State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence in the first instance.
13. **Right to Counsel: Records: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Leopoldo J. Garcia appeals his conviction of driving under the influence (DUI), third offense, with a breath alcohol concentration of .15 or greater, in violation of Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2007). The police officer who conducted the stop had observed Garcia driving erratically in a car dealership lot after business hours and then colliding with

a pole before quickly driving onto a public highway and leaving his vehicle's bumper behind in the lot. Garcia asserts that because the observed behavior occurred on private property, the officer lacked a reasonable, articulable suspicion that he had or was about to be engaged in criminal activity. Garcia also asserts that two prior California DUI convictions were inadmissible for purposes of enhancement because California DUI laws apply anywhere in the state, while, in Nebraska, they apply only to highways and to private property open to public access.

II. BACKGROUND

1. Traffic Stop

At 12:11 a.m. on October 20, 2008, Officer Emily Noordhoek was waiting in her police cruiser at a red light when she observed someone driving a black Nissan in the parking lot of a car dealership located directly to her left. It was after business hours. Noordhoek stated that the driver's behavior was "odd." The vehicle was moving backward and forward, as if the driver were trying to get it turned around. It then ran into a wooden light pole. Noordhoek heard a loud noise, saw the vehicle's rear bumper fall to the ground, and watched the driver speed away out of the lot, leaving the bumper behind. Noordhoek was not able to observe at that time whether the light pole had been damaged.

Noordhoek decided to stop the vehicle. It passed her cruiser, heading in the opposite direction at the traffic light, and Noordhoek activated her cruiser's overhead lights and made a U-turn to follow. She testified that the vehicle was slow to stop and that she followed it approximately three or four blocks before the driver pulled over.

When Noordhoek was finally able to stop the vehicle and approach, the driver identified himself as Garcia. He presented a California identification card. He did not have a driver's license or registration papers for the vehicle. Noordhoek smelled a very strong odor of alcohol emanating from Garcia, and she observed that his eyes were watery and red and that he was slumped over as if he were about to fall asleep. When Garcia was asked to exit the vehicle, he was unable to stand

or walk without physical assistance. He was transported to "detox," where field sobriety tests were conducted. His performance indicated intoxication, and an Intoxilyzer test conducted approximately 40 minutes after the stop revealed his breath alcohol level to be .190 of 1 gram of alcohol per 210 liters of breath.

Garcia was charged with DUI, third offense, with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath. Garcia filed a motion to suppress all evidence against him on the ground that Noordhoek lacked reasonable suspicion to initiate the stop. Garcia argued that because he was not on a public roadway and because Noordhoek did not observe any damage to private property or know whether Garcia had any right to be there, there was no basis for her to believe that he had committed a crime. The trial court overruled the motion to suppress, reasoning that any officer observing Garcia's behavior in the car dealership lot could have formed a reasonable suspicion that some crime had been committed. There were "issues of trespass, possible property damage, maybe suspicion of DUI." A bench trial was held on stipulated facts, and Garcia was found guilty of DUI with a concentration of more than .15.

2. Enhancement

An enhancement hearing was held to determine whether Garcia's sentence would reflect the DUI as his third offense. Garcia objected to the admission of two prior California DUI convictions: (1) a 2004 conviction for driving with an alcohol concentration of .08 of 1 gram or more of alcohol per 210 liters of breath and (2) a 2007 conviction for driving with a concentration of .08 of 1 gram or more, enhanced by reason of having a concentration of .15 of 1 gram or more of alcohol per 210 liters of breath. Both convictions were obtained upon pleas of guilty. Garcia asserted that the State had failed to show, as required by Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008), that he had been convicted in California of offenses which "at the time of the conviction . . . would have been a violation of section 60-6,196." Garcia also asserted that the exhibits in support of his 2004 conviction failed to make the necessary showing that he was represented by counsel. The

trial court overruled Garcia's objections to the exhibits and found him punishable under § 60-6,197.03(6). He was sentenced to probation, with 180 days' incarceration as a term of the probation. Garcia appeals.

III. ASSIGNMENTS OF ERROR

Garcia argues that the trial court erred in (1) overruling his motion to suppress the traffic stop and all evidence obtained therefrom, (2) permitting his prior convictions under California law for purposes of enhancement under § 60-6,197.02(1)(a)(i)(C), and (3) imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[1]

[2] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.[2]

[3] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

V. ANALYSIS

1. Reasonableness of Stop

Garcia argues that the stop which eventually led to his arrest for DUI violated his Fourth Amendment rights and that the trial court erred in overruling his motion to suppress all evidence obtained from the stop. In reviewing a trial court's ruling

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[1] *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[2] *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

[3] *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

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. Whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[4]

[4-6] The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures.[5] And a vehicle stop constitutes a seizure within the meaning of the Fourth Amendment.[6] We have said that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[7] But Garcia argues that he was on private property when Noordhoek observed the behavior that formed the basis for her decision to make the stop. He asserts that the rules of the road do not apply to private property and that thus, Noordhoek could not have observed any possible violation of traffic laws.

Contrary to Garcia's contention, many rules of the road are applicable to private property. Neb. Rev. Stat. § 60-6,108(1) (Reissue 2004) states that "sections 60-6,196, 60-6,197, 60-6,197.04, and 60-6,212 to 60-6,218 shall apply upon highways and anywhere throughout the state except private property *which is not open to public access*."[8] (Emphasis supplied.) However, because the trial court made no factual determinations concerning whether the car dealership lot was open to public access, we will assume for purposes of this appeal that Garcia did not violate any rules of the road while in the lot. This does not mean that Noordhoek was unjustified in stopping Garcia's vehicle.

[7] It is undisputed that by the time Noordhoek initiated the stop, Garcia was driving on a public road. Garcia believes it is dispositive that Noordhoek did not observe any unusual driving

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[4] *State v. Scheffert, supra* note 1.

[5] See *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

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

[7] *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

[8] See, also, *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

behavior during the short period Garcia drove on the road before he was stopped. But that does not matter. Noordhoek observed Garcia driving in the lot. Garcia's driving behavior in the lot demonstrated his failure to control his vehicle. In particular, he appeared to be incapable of safely completing a simple driving maneuver in a relatively unobstructed space, instead, running into a light pole with enough force that his vehicle's rear bumper fell off. Garcia's "odd" and reckless driving behavior created a reasonable suspicion, if not probable cause, that Garcia was driving while impaired by drugs or alcohol.[9] Whether it was against the law to drive while impaired on the private lot, an officer observing this behavior could conclude that the driver remained thus impaired when he sped out from the lot and onto a public road. After observing suspicious and dangerous driving behavior on private property and watching the driver enter, under suspicious circumstances, onto a public road, a police officer should not have to wait to observe further dangerous driving behavior, subjecting the public to potentially serious harm, before stopping the driver to investigate.

Because Noordhoek had reasonable suspicion that Garcia was driving under the influence, the stop of Garcia's vehicle did not violate his Fourth Amendment right to be free of unreasonable search and seizure. We need not address additional nontraffic related offenses that may have also justified the stop. The evidence of Garcia's impairment derived from the stop was admissible, and his conviction for DUI over .15 is affirmed.

2. Enhancement

(a) "[W]ould have been a violation of" Neb. Rev. Stat. § 60-6,196 (Reissue 2004)

We also conclude that the trial court did not err in considering Garcia's prior California DUI convictions in sentencing him under § 60-6,197.03(6). Garcia's primary contention is that the State failed to sustain its burden to show that the

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[9] See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

prior convictions satisfied the requirements of § 60-6,197.02. Section 60-6,197.02(1)(a) provides that, for purposes of enhancement,

> [p]rior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed as follows:
>
> . . . .
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,196[.]

Garcia argues that under § 60-6,197.02(1)(a)(i)(C), in order to enhance based on a prior out-of-state DUI conviction, it is the State's burden of proof and of production to show either (1) that the laws of Nebraska and the foreign jurisdiction have the same scope of application or (2) that the peculiar facts surrounding the prior out-of-state DUI conviction would have been punishable under Nebraska law. On their face, California's DUI prohibitions apply to any kind of property,[10] while Nebraska motor vehicle laws prohibit only driving under the influence on highways or on private property that is "open to public access."[11] Thus, Garcia argues that it was the State's burden to show what kind of property was involved in his prior California DUI convictions. Since the record of the prior California convictions submitted by the State does not reflect this, he argues that his sentence must be reversed.

The State, in contrast, asserts that by presenting certified copies of the prior convictions and establishing, in accordance with our case law,[12] those convictions were counseled, it made a prima facie case for enhancement and that the burden shifted to Garcia to show why the prior offenses would not qualify under § 60-6,197.02. It relies on later subsections of § 60-6,197.02, which state:

> (2) In any case charging a violation of section 60-6,196 or 60-6,197, the prosecutor or investigating agency shall

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[10] Cal. Veh. Code §§ 23100 and 23152 (West 2000 & Cum. Supp. 2011).

[11] § 60-6,108(1).

[12] See, e.g., *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994).

> use due diligence to obtain the person's driving record from the Department of Motor Vehicles and the person's driving record from other states where he or she is known to have resided within the last twelve years. The prosecutor shall certify to the court, prior to sentencing, that such action has been taken. The prosecutor shall present as evidence for purposes of sentence enhancement a court-certified copy or an authenticated copy of a prior conviction in another state. *The court-certified or authenticated copy shall be prima facie evidence of such prior conviction.*
>
> (3) For each conviction for a violation of section 60-6,196 or 60-6,197, the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the convicted person's prior convictions. *The convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.*

(Emphasis supplied.)

[8] We agree that subsections (2) and (3) must be read in conjunction with subsection (1)(a)(i)(C) and that they clearly set forth the burdens of production of the respective parties as concerns whether out-of-state convictions are "prior convictions" for purposes of DUI enhancement. While § 60-6,197.02(1)(a)(i)(C) defines a "prior conviction," § 60-6,197.02(2) defines what shall constitute the State's "prima facie" case proving "such prior conviction." And § 60-6,197.02(2) simply requires a court-certified or authenticated copy of the out-of-state conviction.

It is understood that the prior conviction must be for the offense of DUI.[13] But we do not read § 60-6,197.02 as placing upon the State the initial burden of showing a substantial similarity of every element of the respective DUI laws or that the facts surrounding the prior conviction would have resulted in a violation of Nebraska DUI laws as they existed at that

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[13] See § 60-6,196.

time. Not only does subsection (2) fail to include such facts in its articulation of the State's "prima facie evidence of such prior conviction," but subsection (3) provides that after the court has made a finding of the "prior convictions," the burden falls to the defendant to "*bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions*." (Emphasis supplied.)

In *State v. Williams*,[14] the West Virginia Supreme Court of Appeals addressed enhancement based on a prior DUI conviction from another state which prohibited any "operation" of a vehicle while under the influence, including running the engine while parked. West Virginia's DUI laws extended only to "driving," which required movement of the vehicle. West Virginia's DUI statute provided for enhancement based on a prior out-of-state conviction "'of an offense which has the *same elements*'" as West Virginia's DUI statute.[15] The court concluded that, despite the fact that the term "'operate'" is a broader concept than to "'drive,'" the "mere use of the term 'operate' in [the other state's DUI] statute is insufficient to find that [the] 'same elements'" have not been met.[16]

The court reasoned that most out-of-state DUI convictions would include the factual prerequisite of vehicular movement. It would be "'improvident to indiscriminately expunge a defendant's prior DUI offenses for sentence enhancement purposes'" when the elements necessary for a conviction under the respective DUI statutes are otherwise consistent.[17] The wholesale elimination of the use of prior convictions from a state which uses the term "operate," or from any state with a similar minor

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[14] *State v. Williams*, 200 W. Va. 466, 490 S.E.2d 285 (1997), *overruled in part, State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001).

[15] *Id*. at 469 n.3, 490 S.E.2d at 288 n.3. See, also, W. Va. Code Ann. § 17C-5-2 (LexisNexis 2009).

[16] *State v. Williams, supra* note 14, 200 W. Va. at 470, 490 S.E.2d at 289. See, also, *State ex rel. Conley v. Hill*, 199 W. Va. 686, 487 S.E.2d 344 (1997), *overruled in part, State v. Hulbert, supra* note 14.

[17] *State v. Williams, supra* note 14, 200 W. Va. at 469, 490 S.E.2d at 288, quoting *State ex rel. Conley v. Hill, supra* note 16.

variance, would also be contrary to the legislature's intent to increase the severity of sentences for recidivistic drunk driving. Therefore, insofar as it were possible that the defendant, in connection with the prior DUI, was operating but not "driving" the vehicle, the court held that the prosecution makes a prima facie case for enhanced punishment as a second offense when it presents evidence demonstrating the fact of an out-of-state DUI conviction.[18] The burden of going forward to show a factual predicate in relation to the prior offense that would not fit the "driving" element of the West Virginia statute then shifted to the defendant.[19] Absent such a showing by the defendant, the enhancement would stand.

Likewise, most out-of-state DUI convictions used for enhancement in Nebraska will involve the factual predicate, necessary under our DUI scheme, that the operation of the vehicle be on public property or on private property open to public access. The fact that another state's DUI laws apply more broadly to "all property" does not mean that it is the State's burden of production to come forward with evidence showing the exact location of the defendant's prior DUI—because of the theoretical possibility that it was committed on a kind of property to which Nebraska DUI laws would not apply. Section 60-6,197.02(2) states that, to the contrary, the State makes its prima facie case by presenting an authenticated or certified copy of the prior conviction.

[9] All states prohibit driving under the influence of alcohol or drugs.[20] But subtle variations on that general theme are as numerous as the states themselves. It was not our Legislature's intent to prohibit the consideration of prior out-of-state DUI convictions simply because differing elements of the offense or differing quantums of proof make it merely *possible* that the defendant's behavior would not have resulted in a violation of § 60-6,196, had it occurred here. In providing for a

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[18] *State v. Williams, supra* note 14. See, also, *State ex rel. Conley v. Hill, supra* note 16.

[19] See *id.*

[20] See, National Survey of State Laws 137 (Richard A. Leiter ed., 6th ed. 2008); Annot., 17 A.L.R.3d 815 (1968 & Supp. 2010).

simple and straightforward means of establishing the State's prima facie evidence of "prior convictions," as defined by § 60-6,197.02(1)(a)(i)(C), the Legislature implicitly acknowledged that it would be impractical, if not impossible, for the prosecution to prove particular factual predicates which may be necessary elements in Nebraska, but of no concern somewhere else. In this case, for instance, whether Garcia was on a public highway or on private property with "public access" is not likely to be reflected anywhere in the record of the prior California convictions, even assuming there were any obtainable records not already presented.

[10] Garcia, on the other hand, can easily attest to where he was operating his vehicle in connection with the prior California DUI convictions. Even in a criminal prosecution, we have said that "'if a negative is an essential element of the crime, and is "peculiarly within the knowledge of the defendant," it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced.'"[21] This policy is even more apparent when the fact in question pertains not to an element of a criminal offense, but goes to punishment only.[22] The fact that the defendant has previously been convicted of DUI is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out.[23]

[11] The U.S. Supreme Court has explained that it is appropriately tolerant of the wide variety of approaches and procedures which states have adopted for addressing recidivism.[24] This includes burden-shifting rules designed to simplify the prosecution's ability to make a prima facie case for purposes of enhancement.[25] The U.S. Supreme Court has said that it is not fundamentally unfair to consider the relative positions of

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[21] *State v. Minor*, 188 Neb. 23, 26, 195 N.W.2d 155, 156-57 (1972), quoting *State v. Krasne*, 103 Neb. 11, 170 N.W. 494 (1918).

[22] See *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). See, also, *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992).

[23] See *State v. Werner*, 8 Neb. App. 684, 600 N.W.2d 500 (1999).

[24] See *Parke v. Raley, supra* note 22.

[25] See *id.*

the defendant and the prosecution in this regard and to place at least the burden of production on the defendant to show that a prior conviction cannot be used for enhancement. In a case challenging a statute which presumed out-of-state prior convictions to be valid until the defendant presented evidence showing otherwise, the Court explained:

> When a defendant challenges the validity of a previous guilty plea, the government will not invariably, or perhaps even usually, have superior access to evidence. Indeed, when the plea was entered in another jurisdiction, the defendant may be the only witness who was actually present at the earlier proceeding. If raising a . . . claim and pointing to a missing record suffices to place the entire burden of proof on the government, the prosecution will not infrequently be forced to expend considerable effort and expense attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable. To the extent that the government fails to carry its burden due to the staleness or unavailability of evidence, of course, its legitimate interest in differentially punishing repeat offenders is compromised.[26]

Due process, the Court concluded, does not require a state to adopt one procedure over another simply on the basis that it may produce results more favorable to the accused.[27] The Court held that the statute was not unconstitutional.

The prosecution presented prima facie evidence of Garcia's prior convictions by presenting a certified copy of his California DUI convictions, which, as discussed further below, the State demonstrated were counseled. The burden thus shifted to Garcia to produce evidence rebutting the statutory presumption that those documents did not reflect that an "offense for which the person was convicted would have been a violation of section 60-6,196."[28] Despite the statutory possibility that a person convicted of DUI in California may have been operating a

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[26] *Parke v. Raley, supra* note 22, 506 U.S. at 32.

[27] See *id.*

[28] § 60-6,197.02(1)(a)(i)(C).

vehicle while intoxicated on private property not open to public access—behavior which is not a DUI offense in Nebraska—Garcia has never even argued that his California DUI convictions were for crimes that actually took place on such property. Absent a showing to the contrary, the trial court was correct to conclude, based upon the State's prima facie evidence, that there were prior convictions which could be considered in enhancing Garcia's sentence.

(b) Right to Counsel

[12,13] Garcia also contends that the State failed to show that at the time of his 2004 California DUI conviction, he either had or waived counsel. We have held that a transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction, because the State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence in the first instance.[29] Furthermore, we have held that where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.[30] Otherwise, a sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.[31]

The certified copies of documents relating to the 2004 conviction show that Garcia entered his plea and was sentenced during a hearing on September 17, 2004. The judge's minutes listed the constitutional rights of which Garcia was advised and stated that "defense counsel concurs in [Garcia's] plea and/or admissions." A "Case Print" reflects the same information. The "Case Print" also reflects that during a pretrial hearing, Garcia was represented by "Deputy Public Defender M. Williams." An advisement of rights, waiver, and plea form initialed and

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[29] See *State v. Ristau, supra* note 12.

[30] *Id.*

[31] *State v. Reimers, supra* note 2.

signed by Garcia also shows the "Signature of Defendant's Attorney." The signature, albeit largely illegible, attests to an "Attorney's Statement" that the form was reviewed by the attorney with Garcia and that all rights were reviewed and questions answered.

The trial court did not clearly err in concluding that the prior California convictions were counseled.

Garcia concedes that his argument concerning his sentence of 180 days' jail time was addressed in *State v. Dinslage*.[32] In *Dinslage*, we concluded that it was within the trial court's discretion to impose up to 180 days' confinement as a condition of probation. We find no error in Garcia's sentence.

VI. CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

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[32] *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

JESUS TAPIA-REYES, APPELLEE, V.
EXCEL CORPORATION, APPELLANT.
793 N.W.2d 319

Filed January 21, 2011. No. S-10-474.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
2. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Workers' Compensation: Evidence: Appeal and Error.** The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
4. **Workers' Compensation: Appeal and Error.** Appeals from a workers' compensation trial court to a review panel are controlled by the statutory provisions found in the Nebraska Workers' Compensation Act.
5. **Workers' Compensation.** The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.

6. **Principal and Agent: Words and Phrases.** Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act.
7. **Constitutional Law: Witnesses: Interpreters: Public Policy.** It is the public policy of this state that the constitutional rights of persons unable to communicate the English language cannot be fully protected unless interpreters are available to assist such persons.
8. **Constitutional Law: Witnesses: Interpreters.** While a word-for-word translation best ensures that the quality of the translation does not fall below the constitutionally permissible threshold, there is no constitutional right to a flawless interpretation.
9. **Rules of the Supreme Court: Interpreters: Appeal and Error.** The failure to strictly adhere to the Nebraska Code of Professional Responsibility for Interpreters does not of itself create reversible error in an appeal from judicial proceedings.
10. **Judges: Evidence: Presumptions.** It is presumed that judges disregard evidence which should not have been admitted.
11. **Trial: Witnesses: Interpreters.** Matters concerning interpreters' conduct during judicial proceedings are left to the sound discretion of the court.

Appeal from the Workers' Compensation Court. Reversed and remanded for further proceedings.

James D. Hamilton and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Jesus Tapia-Reyes, pro se.

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

MCCORMACK, J.

NATURE OF CASE

Jesus Tapia-Reyes suffered a permanent injury to his back while working as a loader for Excel Corporation (Excel). After 8 years of working in a different position offered by Excel to accommodate his physical restrictions, Tapia-Reyes was fired for an alleged act of sexual harassment of a coworker. After that, he filed his workers' compensation claim, which had been tolled by Excel's voluntary medical and partial disability payments. At the hearing before a single judge of the Nebraska Workers' Compensation Court, Tapia-Reyes and the alleged victim of the harassment testified with the assistance

of an interpreter. The single judge awarded a 30-percent permanent impairment, but denied vocational rehabilitation based on its finding that Tapia-Reyes was fired for cause. Tapia-Reyes appealed to the review panel. He alleged several errors, including that the interpreter had inappropriately commented on the testimony. The review panel agreed, and reversed and remanded for a hearing before a new judge. The panel did not address Tapia-Reyes' other assignments of error. Excel appeals and asks that we affirm the award of the single judge. Excel asserts that any interpreter error was harmless, because the reason for Tapia-Reyes' discharge is irrelevant to the question of entitlement to vocational rehabilitation. Excel also argues that this alleged error and others were not properly before the review panel, because it lacked authority to consolidate separate but timely filed applications for review by Tapia-Reyes' attorney and by Tapia-Reyes, pro se. We hold that the review panel erred in reversing on the issue of the interpreter, and we reverse the order of reversal on review and remand the cause to the review panel for consideration of the remaining errors presented in Tapia-Reyes' consolidated application for review.

BACKGROUND

In September 1999, Tapia-Reyes was hired by Excel to work on the "kill floor" as a loader. Prior to this, Tapia-Reyes worked several other jobs involving medium to heavy physical activity which did not require that he be proficient in English. He is 42 years old, and his education is limited to five grades of primary school. He suffers from epilepsy and, because of a seizure-related traffic incident, is currently unable to obtain a driver's license.

On April 13, 2000, Tapia-Reyes injured his lower back while working at Excel, lifting and twisting with boxes of meat product. A functional capacity examination conducted in 2002 recommended that Tapia-Reyes work under permanent work restrictions within a light to medium demand level. The compensation court appointed a vocational rehabilitation consultant who performed a loss of earning power evaluation and determined Tapia-Reyes had a 20-percent permanent loss.

Tapia-Reyes obtained a rebuttal evaluation assigning a 40- to 45-percent loss. Excel voluntarily paid Tapia-Reyes' continuing medical expenses and placed him in the liver packaging and labeling department, a job within his physical restrictions. Excel also voluntarily paid Tapia-Reyes compensation based upon the 20-percent loss of earning power found by the court-appointed consultant. Tapia-Reyes did not pursue a workers' compensation award at that time. In August 2008, Tapia-Reyes was fired for the alleged sexual harassment of a female coworker.

Workers' Compensation Court

On August 25, 2008, Tapia-Reyes, through his attorney, filed a petition before a single judge of the compensation court. The petition sought continuing reimbursement of medical bills, a determination of permanent partial disability benefits, and vocational rehabilitation.

On November 21, 2008, the single judge granted Tapia-Reyes' application for appointment of a new vocational rehabilitation consultant to redetermine Tapia-Reyes' loss of earning capacity and create a vocational rehabilitation plan. The newly appointed consultant evaluated Tapia-Reyes' loss of earning capacity at 30 percent, noting that the previous loss of earning capacity report had improperly utilized Tapia-Reyes' hourly wage rather than his average weekly wage. A new rebuttal evaluation assigned a 40- to 45-percent loss of earning capacity.

The court-appointed consultant's report also indicated that Tapia-Reyes had been actively seeking employment since August 2008 and had been unable to obtain any interviews. It was the consultant's conclusion that Tapia-Reyes lacked the English reading and writing skills needed to independently complete a job application and which would also be needed to work many jobs otherwise suitable to his physical restrictions and lack of ability to drive. The consultant set forth a 6-month plan designed to improve Tapia-Reyes' English skills. Excel objected to the plan on the grounds that Excel had continued to accommodate Tapia-Reyes and that Tapia-Reyes had lost his employment for reasons unrelated to his injury.

The hearing before the single judge was held on May 4, 2009. The principal issue at the hearing was whether Tapia-Reyes' employment was terminated for cause. Tapia-Reyes testified with the aid of an interpreter, who clarified that he was registered, but not certified. Tapia-Reyes did not object to the interpreter's qualifications.

Tapia-Reyes testified that he was fired based on Excel's belief that he had inappropriately touched a female coworker. But he denied that he had done anything wrong and explained that he had unintentionally touched his coworker during an epileptic seizure. Medical records showed a history of epileptic seizures, some of which involved inappropriate behavior. Tapia-Reyes described that in August 2008, while at work, he felt an epileptic seizure coming on. He reached over to touch his coworker who was standing next to him to tell her he was not feeling well. Just then, he had a seizure and his hand unintentionally "slid down her back." The incident was captured by a video surveillance camera. Tapia-Reyes testified that his supervisor showed him the video when he was fired but that Tapia-Reyes believed the video portrayed events in a manner consistent with a seizure. By the time of the hearing before the compensation court, the video was no longer available. Excel had destroyed it after 30 days, as was its customary practice.

On cross-examination, Tapia-Reyes was asked about a prior complaint made against him in 2004 for using inappropriate language to his coworkers. He admitted that, because of prior complaints, he was put on "final warning status." Tapia-Reyes testified that he was guilty of yelling at his coworkers when they did not keep up with their work on the line and that he recognized he did not have the authority to do so. He denied using any vulgar language other than once saying, "hurry up, huevona."

At this point, the interpreter interjected and the following exchange took place:

> THE INTERPRETER: Huevona is usually applied to men. It means you've got more in your pants than you've got in your head is what the technical expression means, but he said —

> [Attorney for Tapia-Reyes]: Excuse me, is the witness testifying to that?
>
> THE INTERPRETER: He is saying — he did say that. On one occasion I said to some, apurase, hurry up, huevona. I'm explaining huevona literally — huevona is somebody that's got more in his pants than he's got in his head. That's the technical translation for huevona. Not a good word.
>
> [Attorney for Tapia-Reyes]: I would ask that the translator's interpretation be stricken.
>
> THE COURT: All right. I will disregard the editorial comment, but he defined the word.

The coworker who Tapia-Reyes allegedly sexually harassed also testified at the hearing with the assistance of the interpreter. She described the August 2008 incident in detail. She stated that she was in her work area waiting for the livers to come for packing and that she felt Tapia-Reyes' hands from behind, going underneath her apron, and "up and down my back and my legs." She stated that she told her supervisor, but did not make a formal report of the incident right away. A few days later, Tapia-Reyes told her, "very offensively," to hurry up. At that point, she made a written complaint and Tapia-Reyes was fired. The coworker explained that Tapia-Reyes had not used foul language when he yelled at her a few days after the incident but that he did say, "I'm going to be waiting for you until you get ready." When the coworker was cross-examined about raising for the first time at the hearing the allegation that Tapia-Reyes had threatened her, the interpreter interjected:

> THE INTERPRETER: Well, my interpretation of her, I'm going to be waiting for you. I didn't say it the way she said it exactly because I said literally what she said. I'm going to be waiting for you. The implication is not I'm going to wait for you for something bad. The implication is I'm going to wait for you sexually.
>
> [Attorney for Tapia-Reyes]: Your Honor, I object to the interpretation. We're getting nuances of what should be a fairly word-for-word interpretation, and this interpreter in

> this case has several times editorialized to be generous. I have no further questions of the witness.
>
> THE COURT: I think it depends on context, just the way English words can be interpreted differently, used in context, and I have never before had any concern about [the interpreter's] services.
>
> [Attorney for Tapia-Reyes]: Okay. I'll accept the Court's clarification. And I have no further questions. Thank you very much, Your Honor.

The coworker also explained that she did not believe Tapia-Reyes had a seizure when he touched her, because, in the days following, he told her, "fucking old lady, why didn't you say do that to me again instead of what you said?"

The award was entered on July 16, 2009. The single judge concluded that Tapia-Reyes experienced a 30-percent permanent loss of earning power which entitled him to $82.37 per week for permanent partial indemnity from and after April 13, 2000, for 300 weeks. Excel was entitled to credit for indemnity paid. The court also ordered that Excel continue to pay for medical expenses in relation to the injury. The single judge denied Tapia-Reyes' request for vocational rehabilitation services. The court explained, "But for his employment misconduct, he could have continued his accommodated employment with [Excel] and is therefore not entitled to vocational rehabilitation services."

Review Panel

On July 28, 2009, Tapia-Reyes filed the following unedited, handwritten document with the compensation court:

> Id like To appeal the decition for award From Judge Brown July-16-09 Because my Atorney . . . Don't help my How I need Because Don't give me a Chance To brin my witnes and Don't give me a chance To explein to the Judge was wrong with the Company and Co Worker.

On July 30, Tapia-Reyes' attorney filed an application for review, alleging that the single judge erred in failing to award vocational rehabilitation services and in finding that Tapia-Reyes suffered only a 30-percent loss of earning power. Tapia-Reyes' attorney asked that the review panel reverse or modify

the award, because Tapia-Reyes was entitled to vocational rehabilitation services and to indemnity benefits for a 40- to 45-percent loss of earning power.

Excel moved to dismiss the July 30, 2009, application for review on the ground that because Tapia-Reyes apparently no longer wished for his attorney to represent him, it was unfair to force Excel to respond to two appeals instead of one. Tapia-Reyes' attorney responded with a motion to consolidate the two applications for review. On September 4, Tapia-Reyes' attorney filed an application to withdraw, noting that Tapia-Reyes had filed a complaint against him before the Counsel for Discipline of the Nebraska Supreme Court and that Tapia-Reyes had otherwise indicated by his pro se filing that he no longer wished for counsel to represent him.

While counsel's motion to withdraw was pending, the review panel overruled Excel's motion to dismiss. The review panel noted that at the time the applications were filed, Tapia-Reyes' attorney had not been discharged. The review panel noted further that Tapia-Reyes had indicated he wished the application for review filed by his attorney of record to apply and help define the basis for his appeal. The review panel found no real prejudice to Excel and granted Tapia-Reyes' motion to consolidate the applications.

Tapia-Reyes' attorney had also moved to amend the application for review to include allegations relating to the interpreter's qualifications and conduct at the May 4, 2009, hearing. Counsel explained that one of the aspects of this challenge, that the interpreter had failed to file an affidavit as required by Workers' Comp. Ct. R. of Proc. 5 (2009), was only recently discovered. The review panel granted the motion to amend, over Excel's objection. After these matters were settled, the review panel granted counsel's motion to withdraw.

The review panel summarized the consolidated and amended application for review as alleging the following assignments of error: (1) The single judge erred in concluding that Tapia-Reyes was not entitled to vocational rehabilitation services; (2) the single judge erred in concluding that Tapia-Reyes had suffered only a 30-percent loss of earning power; (3) the interpreter used at the trial herein was not certified by the State of

Nebraska, and he gave explanations and elaborations in his interpretation of certain trial testimony that may have affected the outcome of the proceedings; and (4) the acts and omissions of Tapia-Reyes' attorney prejudiced the presentation of Tapia-Reyes' case, to his detriment.

The review panel reversed on the third assignment of error and concluded that it was unnecessary to reach any of the remaining assignments of error. While the review panel rejected Tapia-Reyes' argument that the interpreter's lack of certification or affidavit was in itself reversible error, it did conclude that the interpreter's commentary was inappropriate and prejudicial. The panel found that the interpreter added to and explained that which was stated by a witness, in violation of Canon 1 of the Nebraska Code of Professional Responsibility for Interpreters.[1] The panel remanded the case for a new hearing before a different judge, explaining that it knew of no other satisfactory remedial measure that would satisfy the policy of this state concerning non-English-speaking litigants as established by the Nebraska Legislature.[2] Excel appeals the review panel's decision. Tapia-Reyes does not cross-appeal.

ASSIGNMENTS OF ERROR

Excel asserts that the review panel erred in (1) overruling its motion to dismiss the July 30, 2009, application for review filed by Tapia-Reyes' former counsel; (2) consolidating the July 28 application for review filed by Tapia-Reyes and the July 30 application for review filed by his former counsel; (3) granting the motion to amend the application for review; (4) finding the interpreter added to and explained that which was stated by the witnesses; (5) finding it was unable to state that the actions of the interpreter were harmless; (6) remanding the matter for a new trial rather than a less extreme remedy; (7) ordering that on remand, the case should be assigned to a different judge so as to avoid any appearance of possible bias or prejudice by the trier of fact; and (8) failing to affirm the decision of the single judge in all respects.

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[1] See Neb. Ct. R. § 6-701 et seq., appendix 1.

[2] See Neb. Rev. Stat. § 25-2401 et seq. (Reissue 2008).

STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[3]

[2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[4]

[3] The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.[5]

ANALYSIS

Applications for Review

[4] We first address Excel's assignments of error relating to the facts that the review panel allowed Tapia-Reyes' attorney to file an application for review and a motion to amend and granted the attorney's motion to consolidate all assigned errors. Appeals from a workers' compensation trial court to a review panel are controlled by the statutory provisions found in the Nebraska Workers' Compensation Act.[6] Under Neb. Rev. Stat. § 48-170 (Reissue 2004), every order and award of a single judge of the compensation court shall be binding unless an application for review has been filed within 14 days after the date of entry of the order or award. Neb. Rev. Stat. § 48-179 (Reissue 2004) provides that the application must be specific as to each finding of fact and conclusion of law urged as error and the reason therefor. The party or parties appealing for

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[3] *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006). See, also, *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000).

[4] *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[5] *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995).

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

review shall be bound by the allegations of error contained in the application.[7]

Excel argues that because §§ 48-170 and 48-179 refer in the singular to "the" or "an" application for review, the Nebraska Workers' Compensation Act does not authorize the filing of multiple applications. In this case, ultimately, there was only one consolidated application for review. Excel asserts, however, that because there was no authority for the multiple filings in the first place, Tapia-Reyes' attorney's application, which was second in time, should have been treated as a nullity. Excel argues that the review panel thus lacked authority to consolidate the alleged errors.

Under the facts of this case, we do not view the act as prohibiting the review panel's decision to consolidate the assigned errors. Both Tapia-Reyes' pro se application for review and that of his attorney were filed within the 14-day statutory period. As the review panel noted, there was no harm to Excel, because it was timely made aware of the alleged errors. Neb. Rev. Stat. § 48-162.03(1) (Reissue 2004) provides that the compensation court or any judge thereof may rule upon any motion by any party to a suit or proceeding, "including, but not limited to, motions for summary judgment or other motions for judgment on the pleadings but not including motions for new trial or motions for reconsideration." Tapia-Reyes' motion, being neither a motion for new trial nor a motion for reconsideration, appears to be permissible under the broad language of § 48-162.03(1).

[5] Furthermore, the act is construed liberally to carry out its spirit and beneficent purposes.[8] In order to justly carry out the spirit of the act, other provisions of the act generally state that "[t]he Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure, other than as

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[7] § 48-179.

[8] *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008).

herein provided . . . .”[9] We conclude it would be contrary to the spirit and beneficent purposes of the act to forever bar an applicant from supplementing alleged errors mistakenly omitted from “the” application for review. This is especially true when the application is corrected within the 14-day statutory period for the filing.

Excel also argues that because Tapia-Reyes apparently wished to proceed pro se, his attorney lacked the authority, under agency principles, to file the application, motion to consolidate, and motion to amend. Excel argues that at the very least, the review panel should have conducted an inquiry into whether the attorney was really acting as Tapia-Reyes' agent.

[6] Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent of the other to so act.[10] When Tapia-Reyes hired his attorney, they established such an agency relationship.[11] While Tapia-Reyes later expressed dissatisfaction with his attorney's representation, the attorney was not immediately discharged. The attorney's motion to withdraw was still pending when the attorney made the filings here in issue. Furthermore, Tapia-Reyes had confirmed his attorney's agency by indicating to the review panel that he wished the attorney's application for review to apply and help define the basis for his appeal. We find no merit to Excel's argument that the attorney's filings must be treated as nullities or that the review panel erred in considering them because of a lack of agency. We affirm the review panel's decision allowing Tapia-Reyes to amend and consolidate the alleged errors in the applications for review.

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[9] Neb. Rev. Stat. § 48-168(1) (Cum. Supp. 2010). See, also, *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

[10] *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010).

[11] See, *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008); *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002).

INTERPRETER

[7] We next address Excel's argument that the review panel erred in reversing the decision of the single judge because of the interpreter's improper explanations of testimony. Section 25-2401 provides generally that it is the public policy of this state that the constitutional rights of persons unable to communicate the English language cannot be fully protected unless interpreters are available to assist such persons. This policy applies in "any legal proceeding."[12] The requirement that an interpreter provide an accurate translation implicates a defendant's due process right to a fair trial as guaranteed by the Fifth Amendment,[13] the ultimate question being whether the translator's performance has rendered the trial fundamentally unfair.[14]

[8] It has been said that while a word-for-word translation best ensures that the quality of the translation does not fall below the constitutionally permissible threshold, there is no constitutional right to a "flawless" interpretation.[15] "[C]ourtroom interpretation is a demanding and inexact art, and . . . the languages involved may not have precise equivalents for particular words or concepts."[16] Minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable and do not warrant relief where the translation is on the whole reasonably timely, complete, and accurate, and the defects do not render the proceeding fundamentally unfair.[17]

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[12] § 25-2402(3).

[13] See, generally, Annot., 32 A.L.R.5th 149 (1995). See, also, e.g., *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429 (8th Cir. 2007); *U.S. v. Si*, 333 F.3d 1041 (9th Cir. 2003); *Amadou v. I.N.S.*, 226 F.3d 724 (6th Cir. 2000); *U.S. v. Gomez*, 908 F.2d 809 (11th Cir. 1990).

[14] See 32 A.L.R.5th, *supra* note 13. See, also, *U.S. v. Edouard*, 485 F.3d 1324 (11th Cir. 2007); *U.S. v. Huang*, 960 F.2d 1128 (2d Cir. 1992).

[15] *U.S. v. Gomez, supra* note 13, 908 F.2d at 811. See, also, *Thongvanh v. State*, 494 N.W.2d 679 (Iowa 1993).

[16] 32 A.L.R.5th, *supra* note 13, § 72 at 470 (and cases cited therein). See, also, *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947), *abrogated on other grounds, Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

[17] 32 A.L.R.5th, *supra* note 13.

In §§ 25-2401 to 25-2407, the Legislature sets forth the procedure for the appointment of interpreters, which is "to avoid injustice and to assist such persons in their own defense."[18] The Code of Professional Responsibility for Interpreters is incorporated into § 25-2407, insofar as it states that any person who serves as an interpreter for persons unable to communicate the English language in court proceedings or probation services shall meet the standards adopted by the Supreme Court. Section 25-2407 explains that the Supreme Court standards "shall require that interpreters demonstrate the ability to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary special vocabulary."

The Nebraska Code of Professional Responsibility for Interpreters was enacted with the recognition that "[i]t is essential that the resulting communication barrier be removed, as far as possible, so that [persons with limited English proficiency or a speech or hearing impairment] are placed in the same position as similarly situated persons for whom there is no such barrier."[19] Canon 1 of the code states: "Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and *without explanation*."[20]

Canon 1 follows verbatim the same canon of the Model Code of Professional Responsibility for Interpreters in the Judiciary.[21] While the Nebraska Code of Professional Responsibility for Interpreters has no commentary, the commentary to Canon 1 of the model code explains that "[v]erbatim, 'word for word,' or literal oral interpretations are not appropriate when they distort the meaning of the source language . . . ."[22] On the other hand, "every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This

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[18] § 25-2401.

[19] § 6-701 et seq., *supra* note 1, preamble.

[20] § 6-701 et seq., *supra* note 1 (emphasis supplied).

[21] William E. Hewitt, Nat. Ctr. for State Courts, Court Interpretation: Model Guides for Policy and Practice in the State Courts 197 (1995).

[22] Hewitt, *supra* note 21 at 200. See, also, 65 Am. Jur. *Trials* 1, § 49 (1997).

includes apparent misstatements."[23] The commentary further explains:

> Interpreters should never interject their own words, phrases, or expressions. If the need arises to explain an interpreting problem (e.g., a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify), the interpreter should ask the court's permission to provide an explanation. . . .
>
> . . . .
>
> The obligation to preserve accuracy includes the interpreter's duty to correct any error of interpretation discovered by the interpreter during the proceeding.[24]

In the first instance of alleged interpreter error and misconduct at Tapia-Reyes' hearing before the single judge, the interpreter was clearly attempting to provide an explanation of the word "huevona," which did not appear to have a direct equivalent in the English language. To the extent that the interpreter's explanation involved any unnecessary editorializing, the single judge specifically stated that he would disregard the editorial comment. The single judge correctly found that the interpreter was simply trying to define the word "huevona" to the best of the interpreter's ability.

It is less clear that the other alleged error of interpretation, that of the phrase "I'm going to be waiting for you until you get ready," similarly necessitated explanation by virtue of there being no direct English equivalent. The interpreter appeared to be trying to clarify a misunderstanding. But this is not the same as a duty to correct an error of interpretation. And it was not a "misunderstanding that only the interpreter can clarify."[25] The misunderstanding could have been clarified through continued examination of the witness by counsel with continued literal interpretation by the interpreter.

But, when Tapia-Reyes' attorney objected to the interpreter's explanation of what the phrase "I'm going to be waiting for

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[23] Hewitt, *supra* note 21 at 200 (emphasis omitted).

[24] *Id.* at 200-01.

[25] See *id.* at 201.

you until you get ready" implied, the single judge understood that the interpreter was only placing the phrase in context. While this may have been an unnecessary "explanation," prohibited by Canon 1 of the Nebraska Code of Professional Responsibility for Interpreters, there was no allegation that the explanation was false.

[9-11] The failure to strictly adhere to the Nebraska Code of Professional Responsibility for Interpreters does not of itself create reversible error in an appeal from judicial proceedings. We conclude that any missteps by the interpreter were minor and did not deny Tapia-Reyes his constitutional or statutory rights. It is presumed that judges disregard evidence which should not have been admitted.[26] And matters concerning interpreters' conduct during judicial proceedings are left to the sound discretion of the court.[27] While we can imagine circumstances in which a judge is unaware at trial of the errors in interpretation and cannot respond to the error, such was not the case here. The single judge was well advised by Tapia-Reyes' attorney of the interpretation errors in issue, and it appears from the record that the single judge properly disregarded inappropriate additions made to the testimony. We therefore agree with Excel that it was error for the review panel to reverse for a new trial because of the quality of the interpretation.

CONCLUSION

Although we find merit to Excel's fourth and fifth assignments of error, we cannot, as Excel urges, simply affirm the decision of the single judge. Not only was the single judge's decision based almost entirely on a theory of law which Excel now claims was in error, but the review panel has not had the opportunity to review most of the assignments of error Tapia-Reyes presented to it. Those assignments, accordingly, have not been fully briefed to this court. We reverse the order of reversal

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[26] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). See, also, *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985) (applying this standard to find harmless error in workers' compensation case).

[27] See, *State v. Topete*, 221 Neb. 771, 380 N.W.2d 635 (1986); *Prokop v. State, supra* note 16.

on review and remand the cause to the review panel for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JEREMY RAY ERICKSON, APPELLANT.
793 N.W.2d 155

Filed January 28, 2011. No. S-09-1152.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
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. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
8. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
9. **Lesser-Included Offenses: Jury Instructions.** Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions.
10. **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.

11. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
12. **Venue: Proof.** In order for a defendant to successfully move for a change of venue based on pretrial publicity, he must show that the publicity has made it impossible to secure a fair and impartial jury. A number of factors must be evaluated in determining whether that burden has been met, including the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire was drawn.
13. **Venue: Appeal and Error.** A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.
14. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
15. **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.
16. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
17. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
18. ____. 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.
19. ____. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing.

Appeal from the District Court for Kimball County: DEREK C. WEIMER, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Jeremy Ray Erickson (Erickson) was convicted by a jury of intentional child abuse resulting in the death of his 15-month-old son, Tristen Erickson (Tristen). Erickson was sentenced to a term of 90 years to life in prison. He appeals.

SCOPE OF REVIEW

[1-3] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009). Whether jury instructions given by a trial court are correct is a question of law. *Id.* When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions. *Id.*

[4] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[5] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

FACTS

On December 9, 2008, at 5:30 p.m., the Kimball County sheriff's office received a 911 emergency dispatch call from Erickson, who requested an ambulance because his son, Tristen, was turning blue. The 911 dispatcher gave Erickson instructions on how to provide cardiopulmonary resuscitation (CPR) for an infant.

An ambulance was dispatched from Kimball, Nebraska, to Erickson's home in Dix, Nebraska, at 5:31 p.m. At about the same time, Ericka Wittrock, Tristen's mother, called 911 and reported that Erickson had telephoned her and stated that there was something wrong with Tristen.

Sam Gingrich, an emergency medical technician, arrived at Erickson's home at 5:35 p.m. and found Tristen on the floor of the living room. Erickson was kneeling next to the child. Tristen was not breathing and had no pulse.

Erickson told Gingrich that the child had been ill for about a week and had been vomiting and exhibiting flu-like symptoms. Erickson said that Tristen had been in his crib and that he picked up Tristen and shook him to try to get him to respond. Gingrich began CPR, but Tristen did not start breathing on his own.

On the way to the hospital in Kimball, the ambulance was intercepted by Dr. James Platte, who took over the respiratory care of Tristen while Gingrich continued cardiac compressions. At the hospital, Platte intubated Tristen and his heart began beating. Tristen had no spontaneous respirations, and his pupils did not react to light, which indicated a lack of brain function. Tristen was subsequently taken by helicopter to a hospital in Denver, Colorado.

Tristen arrived in Denver in "very critical condition." Dr. Katherine Wells, a pediatrician who specializes in child abuse and neglect, stated that Tristen was being entirely supported by machines. Wells stated, to a reasonable degree of medical certainty, that the constellation of injuries sustained by Tristen was not consistent with an accident. On December 11, 2008, after a series of examinations determined that Tristen was brain dead, the decision was made to remove him from life support.

An autopsy revealed that Tristen's cause of death was blunt trauma to the head and neck. Dr. Michael Arnall, a forensic pathologist, stated that there were no external signs of bruising or other injury to the back of Tristen's head but that the internal examination showed two contusions to the middle of his scalp and a 4½-inch-long complex fracture to the back of the skull. Arnall stated that injuries to Tristen's neck muscles were from severe flexion and extension of the neck. The muscles were stretched sufficiently to tear the blood vessels and cause hemorrhage. The neck injuries were consistent with a baby's head being shaken or moved back and forth violently. There was evidence of extensive bleeding, including subarachnoid,

subdural, and epidural hemorrhages on Tristen's head. Arnall opined that blunt trauma caused the complex skull fracture, contusions to the scalp, subdural hematomas, injury to the spinal column, and contusions on the back. He said the blunt trauma came from more than one direction.

Erickson was the only adult present when Tristen stopped breathing. Wittrock testified she left the house between 3:30 and 4 p.m. to pick up prescriptions for Tristen and get dinner. Between 5 and 5:10 p.m., she sent Erickson a text message asking him to give the children a snack because they had had a light lunch and telling him she would not be home until 5:30 p.m. Erickson responded by text message. A short time later, Erickson called Wittrock and told her something was wrong with Tristen. Wittrock told Erickson to hang up and call 911.

According to Wittrock, Erickson claimed that when he picked up Tristen from his playpen, "his neck turned to the side like he was having a seizure." Erickson told a deputy sheriff that as he picked up Tristen to change his diaper, Tristen had a "panic attack or something and then he went limp." Erickson tried to get a response by shaking Tristen, rubbing him, and biting him, but the child did not respond.

Erickson testified that as he approached the playpen, he noticed vomit on Tristen's pillow. Erickson started to pick up Tristen, but he was not responsive. Erickson said he panicked and tried to do a couple of chest compressions. Tristen did not respond. Erickson shook Tristen, and when he still did not respond, Erickson bit him on the chest. Erickson testified that he panicked and ran out to his car with Tristen to try to drive him to the hospital. The car's windshield was frosted over with ice, and Erickson did not think it was safe to drive with poor visibility.

Erickson called Wittrock and told her something was wrong with Tristen, and she told Erickson to call 911. As he ran back into the house, Erickson dialed 911. The 911 operator gave him instructions on CPR, and Gingrich arrived shortly thereafter. Erickson admitted to shaking Tristen "pretty violently" and biting him, but claimed he was trying to see if Tristen would respond.

A few weeks earlier, on the Saturday after Thanksgiving 2008, Erickson called Wittrock at work and told her that Tristen had fallen and reportedly had a "knot" on the back of his head. Wittrock said she found no lump on Tristen's head when she arrived home.

Around December 1, 2008, Tristen had trouble keeping food down and Wittrock called the emergency room. She was advised to give him Pedialyte and Benadryl. He had been vomiting and had had diarrhea for about 2 weeks before the December 9 incident.

Tristen was seen for his 15-month checkup on December 8, 2008, by Dr. Brandon Taylor. According to Taylor, Tristen was developmentally "on track." Taylor saw no evidence of any kind of head injury or any bruising or abrasions. Wittrock discussed with Taylor the possibility of Tristen's having an asthma problem, because she was concerned about Tristen's breathing. He seemed "raspy," and his lips were blue.

Following a jury trial, Erickson was found guilty of intentional child abuse resulting in the death of Tristen, in violation of Neb. Rev. Stat. § 28-707 (Reissue 2008). He was sentenced to a term of 90 years to life in prison, with credit given for 313 days previously served.

ASSIGNMENTS OF ERROR

Erickson assigns as error the trial court's failure to instruct the jury on the lesser-included offense of manslaughter and its denial of his motion to change venue. He also claims that his sentence is excessive.

ANALYSIS

Jury Instructions

[6] Erickson argues that the trial court erred in failing to instruct the jury on the lesser-included offense of manslaughter. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to

give the tendered instruction. *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009).

[7,8] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *Id*. To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case. *Id*.

In the case at bar, the jury was instructed that it could return one of three verdicts: guilty of intentional child abuse resulting in the death of a minor child, guilty of negligent child abuse, or not guilty. The jury instructions defined the elements of intentional child abuse resulting in death as placing Tristen in a situation that endangered his life or physical health "knowingly or intentionally, that is willfully, or purposely and not accidentally or involuntarily" and that such conduct was the proximate cause of Tristen's death. The elements of the lesser-included crime of negligent child abuse were defined as placing Tristen in a situation that endangered his life or physical health negligently.

The jury was also given a step instruction. It was instructed to first consider the crime of intentional child abuse resulting in death. If it found that the State proved each element beyond a reasonable doubt, then the jury was to end its deliberations. If the jury found the State did not prove each element, then it was to consider the elements of negligent child abuse.

Erickson objected to the instruction defining the elements of intentional child abuse resulting in death and argued that the trial court should also instruct upon the lesser-included offenses of manslaughter and knowing infliction of child abuse resulting in serious bodily injury. The objection was overruled.

Erickson claims that the trial court should have instructed the jury that manslaughter is a lesser-included offense of intentional child abuse. We agree. In *Sinica, supra*, we concluded

that manslaughter is a lesser-included offense of intentional child abuse resulting in death and that the trial court erred in failing to instruct the jury on the lesser-included offense. However, we determined that the step instruction given in that case did not prejudice the defendant.

In *Sinica, supra*, the jury was specifically instructed that if it determined the State had proved each element of intentional child abuse resulting in death beyond a reasonable doubt, it must find the defendant guilty of that offense and proceed no further. "When such a step instruction is given, we presume that the jury followed the instruction and did not consider any of the purported lesser-included offenses after finding that the defendant was guilty of the charged offense." *Id.* at 640, 764 N.W.2d at 119. Because the jury specifically found that the defendant acted intentionally, it could not have found that he committed negligent child abuse and acted without intent.

The case at bar is similar to *Sinica, supra*. The jury was given a step instruction and was told to first consider the crime of intentional child abuse resulting in death. If it found that the State had proved each element beyond a reasonable doubt, it was to end its deliberations.

[9] The trial court erred in refusing to give a manslaughter instruction; however, the error was harmless. "Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions." *Id.* at 639, 764 N.W.2d at 119.

Pursuant to the step instruction, the jury found that Erickson knowingly and intentionally placed Tristen in a situation that endangered his life and that such conduct was the proximate cause of Tristen's death. The jury then ended its deliberations.

The medical experts testified that Tristen's injuries were not accidental. Wells stated, to a reasonable degree of medical certainty, that the constellation of injuries sustained by Tristen was not consistent with an accident. The autopsy showed that Tristen's cause of death was blunt trauma to the head and neck. He had two contusions to the middle of his scalp and a 4½-inch-long complex skull fracture. Arnall stated, to a reasonable

degree of medical certainty, that the injuries to Tristen's neck muscles were consistent with a baby's head being shaken or moved back and forth violently. Tristen also sustained subarachnoid, subdural, and epidural hemorrhages to the head.

Erickson was the only adult present when Tristen stopped breathing. Erickson admitted that he shook Tristen "pretty violently" in an attempt to get a response. Wells opined that the injuries sustained by Tristen were not those that any reasonable person would have caused in trying to revive a baby. Tristen had been seen by a physician the day before the incident, and there were no indications of head injury or abrasions.

[10] The jury first considered the elements of intentional child abuse resulting in death, and once it determined that all elements had been proved, it ended its deliberations. As in *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009), the step instruction was not prejudicial even though it did not include manslaughter. 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. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

The trial court's failure to instruct the jury that manslaughter is a lesser-included offense of intentional child abuse resulting in death was error, but it was not prejudicial to Erickson. He is not entitled to relief because of this error.

VENUE

Erickson argues that the trial court erred in denying his motion to change venue for the trial. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

The record shows that voir dire was conducted with a pool of 90 potential jury members. Of the 90 potential jurors, 41 were excused for cause.

During voir dire, Erickson's counsel made an oral motion for a change of venue. He claimed that there were a "vast number of people that have expressed an inability to decide this case and to be impartial," which indicated a likelihood that there was "an undercurrent of animus and [bias] against" Erickson.

Counsel conceded there had not been a great amount of publicity about the case, but he asserted there had been a good deal of discussion by word of mouth. The trial court took the matter under advisement and reserved ruling until questioning of the panel had been completed.

Erickson's counsel renewed the motion for change of venue at the conclusion of voir dire. The trial court reviewed the factors to be considered in moving a trial, as identified in *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992). It then overruled Erickson's motion for change of venue. After 41 persons had been excused for cause, 49 potential jurors remained. Peremptory strikes were exercised, and a 12-member jury, including 2 alternates, was seated.

Erickson does not challenge the participation of any particular juror. Instead, he argues that in a small community with no large media outlets, the residents are subject to "'coffee shop talk,'" including hearsay, rumor, innuendo, and gossip. See brief for appellant at 9. He suggests that the majority of the community had formed or expressed an opinion concerning Erickson's guilt, as reflected by the fact that a large percentage of the jury panel was struck for cause.

[11] We have stated that under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue. *Schroeder, supra*.

> Due process does not require that a defendant be granted a change of venue whenever there is a "'reasonable likelihood'" that prejudicial news prior to trial would prevent a fair trial. Rather, a change of venue is mandated when a fair and impartial trial "cannot" be had in the county where the offense was committed.

Id. at 211, 777 N.W.2d at 804, quoting *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). See, also, Neb. Rev. Stat. § 29-1301 (Reissue 2008).

The motion for a change of venue was made orally during voir dire. Erickson did not offer any evidence or affidavits in support of the motion. This is similar to the factual situation in *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007), in which the defendant based his argument in favor of changing venue on voir dire of potential jurors. There, the defendant

argued that a large number of potential jurors had seen or heard reports of the crime and had formed opinions regarding his guilt. We determined that the defendant had not shown a change of venue was necessary, because an impartial jury was selected, and that he therefore failed to show he could not receive a fair trial in the county in which the trial was held. We found no abuse of discretion in the trial court's denial of his motion for change of venue.

[12] Erickson cites the factors that can be used to determine whether a defendant has met the burden of showing that pretrial publicity has made it impossible to secure a fair trial and impartial jury. The factors include:

> (1) the nature of the publicity, (2) the degree to which the publicity has circulated throughout the community, (3) the degree to which the publicity circulated in areas to which venue could be changed, (4) the length of time between the dissemination of the publicity complained of and the date of the trial, (5) the care exercised and ease encountered in the selection of the jury, (6) the number of challenges exercised during voir dire, (7) the severity of the offenses charged, and (8) the size of the area from which the venire was drawn.

State v. Strohl, 255 Neb. 918, 931-32, 587 N.W.2d 675, 685 (1999).

The first four factors concern publicity about a trial: its nature, its circulation both in the community where the trial is scheduled and in areas to which venue might be changed, and the timespan between the publicity and the trial. Erickson has provided no evidence to suggest that publicity required a change of venue. He did not offer articles or news stories from any media outlet to demonstrate the nature of pretrial publicity. He did not provide any affidavits to support the need to move the trial to another venue.

While adverse pretrial publicity can create a presumption of prejudice in a community, making it difficult to believe the jurors' claims that they can be impartial, "'juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive[] the defendant of due

process.'" *State v. Galindo*, 278 Neb. 599, 637, 774 N.W.2d 190, 224 (2009), quoting *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). Nothing in the record suggests that Erickson was deprived of due process by pretrial publicity.

Erickson argues that the last four factors from *Strohl, supra*, weigh in favor of a change in venue: difficulty in seating a jury, majority of panel struck for cause, serious nature of the case, and the small size of the community. The record does not support a finding that the trial court had difficulty in seating the jury or that a majority of the panel was struck for cause. Ninety potential jurors were called and questioned as to their feelings about the case; 41 were dismissed for cause. Additional voir dire was conducted with 40 of the potential jurors. None of those individuals expressed that they had formed an opinion about the case. A number of the potential jurors had heard of the case through a newspaper, "gossip," or "hearsay," but most stated that they could be fair and make a decision based solely on the evidence presented at trial.

"[T]he law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence." *State v. Rodriguez*, 272 Neb. 930, 942, 726 N.W.2d 157, 170 (2007). The trial court was able to seat a fair and impartial jury. Erickson did not present any evidence to suggest otherwise.

This case involved the death of a child. During voir dire, jurors were informed as to the subject of the trial and were asked whether the serious nature of the charges affected their opinion. Any prospective juror who indicated a concern about the case because it involved the death of a child was removed from the panel. This factor does not weigh in favor of a change of venue.

The final factor from *Strohl, supra*, is the small size of the community. Erickson offered no evidence concerning the size of Kimball or of any venue to which the trial could have been moved.

[13] A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions

and pretrial publicity make it impossible to secure a fair and impartial jury. *Galindo, supra*. Erickson did not establish the need for a change of venue, and the trial court did not abuse its discretion in overruling his motion.

Excessive Sentence

Erickson asserts that the trial court abused its discretion in imposing an excessive sentence. Erickson was convicted of intentional child abuse resulting in death, a Class IB felony under § 28-707(6). He was sentenced to a minimum term of 90 years' imprisonment and a maximum term of life in prison. A Class IB felony is punishable by a minimum of 20 years in prison and a maximum of life in prison. Neb. Rev. Stat. § 28-105 (Reissue 2008).

[14,15] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[16-19] 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. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the

defendant's life. *Id*. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

Erickson was 24 years old at the time of the presentence investigation. He had completed the 10th grade at Kimball High School. He and Wittrock had three children together, including Tristen. All were under the age of 3. Erickson had another child as the result of a short-term relationship, but he had no contact with the child.

Erickson's criminal history shows that as a juvenile, he was charged with criminal mischief, unauthorized use of a motor vehicle, and being an uncontrollable child. As an adult, he has been charged with assault by mutual consent, minor in possession of liquor on three occasions, motor vehicle theft, third degree assault on two occasions, third degree domestic assault, and possession of a controlled substance.

On a risk assessment tool, Erickson was found to be in the high-risk range to reoffend. He has a history of using methamphetamine, and when using the drug, he has anger control problems. The assessment also indicated that Erickson is at high risk to exhibit antisocial behaviors. He scored in the problem-risk range for alcohol and in the maximum-risk range for drugs, violence, antisocial behavior, aggressiveness, and coping with stress. He also scored in the high-risk range to assault an intimate partner.

The trial court considered a number of factors, including Erickson's age, mentality, educational and work history, and cultural background. It also considered the nature and circumstances of the offense, the motivation for the offense, whether the offense involved violence, and whether there was any excuse or justification for the offense. It found Erickson's prior criminal and juvenile record troubling for a person his age. He had been convicted of assaultive behavior both inside and outside the home.

There is no evidence that the trial court abused its discretion in sentencing Erickson. The sentence is within the statutory limits and reflects the serious nature of the crime.

CONCLUSION

Erickson was not prejudiced by the trial court's error in failing to instruct the jury that manslaughter is a lesser-included offense of intentional child abuse resulting in death. The trial court did not err in denying Erickson's motion to change venue, and his sentence is not excessive. Therefore, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES F. ROBINSON, APPELLANT, V. DUSTROL, INC., A FOREIGN CORPORATION DOING BUSINESS IN NEBRASKA, APPELLEE.

793 N.W.2d 338

Filed January 28, 2011. No. S-10-045.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
4. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
5. **Negligence.** One is not negligent simply by failing to anticipate the negligence of another.
6. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Adam J. Sipple, of Johnson & Mock, for appellant.

Stephen G. Olson II and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Charles F. Robinson filed a suit for negligence against Dustrol, Inc. Following a jury trial, judgment was entered for Dustrol. Robinson appeals. We affirm.

FACTUAL BACKGROUND

ACCIDENT

This case involves injuries allegedly sustained by Robinson following a motorcycle accident which occurred in Wahoo, Nebraska, where he lived. Robinson had spent the evening of July 6, 2005, at a motorcycle show in Omaha, Nebraska. Robinson testified that while at the show, he had some food and drank one beer. According to Robinson, following the show, he and his friends went to another establishment for pizza. While at that establishment, Robinson ate some pizza and drank another beer. Upon returning to Wahoo, the group again stopped at a local establishment, where, Robinson testified, he drank a soda.

Robinson left for home on his motorcycle around midnight on July 7, 2005. He was riding on Fifth Street in Wahoo, heading westbound toward the intersection of Fifth Street and U.S. Highway 77. Robinson testified that the traffic light was red as he was headed toward the intersection, but that the light turned green prior to his reaching the intersection. As such, Robinson proceeded through the intersection at 20 to 25 m.p.h. Robinson testified that he did not observe any warning signs or other indication that construction was being conducted on the road ahead.

Robinson testified that upon entering the intersection of Fifth Street and Highway 77, his motorcycle dropped upon hitting an "edge" or a "mill cut." Robinson indicated that his motorcycle "bucked" and that he began applying the brakes. However, according to Robinson's testimony, he was unable to bring his motorcycle to a complete stop before hitting the "west edge" of the intersection. Robinson then testified:

> The motorcycle made contact with the west edge, there was a big bump, and the back end of the motorcycle started to come up. At the same time, I'm lunging forward, hanging onto the handlebars. About that time, then I let go of the brake instantaneous, and the bike popped up over the ledge. I'm trying to get my rear end down. In other words, my butt and legs back over the bike down. I was up over, and I'm trying to get back down to catch the floorboard. I stuck my left foot out to try to brace the bike. The bike at that time is starting to fall over.
>
> . . . .
>
> . . . The bike started to fall over. It weighs about 800 pounds, and once it started to go over, I tried putting my foot down. I couldn't stop it from going over because I couldn't back down in time.
>
> . . . .
>
> . . . I fell on the left side. I was hanging onto the handlebars, and it launched me over.

Robinson also testified that he hit his head on the concrete.

Robinson testified that he went home following the accident and woke his wife to tell her about what had happened. He returned to the scene in the morning to speak with representatives from the various contractors working on the road construction project. The next day, July 8, 2005, Robinson went to the local emergency room due to pain in his neck, head, shoulders, and left foot. Since that time, Robinson has been treated by several physicians and has had surgery, but reportedly continues to suffer from pain which he attributes to the July 7 accident.

CONSTRUCTION

The stretch of Highway 77 upon which Robinson claimed to be injured was, at the time of the accident, under construction. Pavers, Inc., was the general contractor chosen by the Nebraska Department of Roads to resurface this portion of the roadway. Pavers had at least two subcontractors on this job: Trafcon, Inc., which provided construction signs and traffic control, and Dustrol, which did the milling, or grinding, of the surface to remove the old asphalt layer.

The milling process is accomplished by using specialized equipment to remove, in this case, about 2½ inches of old asphalt from the surface of the road. In removing this layer, "edges" are left around utilities like manholes and water valves, as well as in intersections, because once the milling is complete, the milled surface sits at a level below the utility or cross street. Those edges can sometimes be of enough depth that they require "ramping," a process by which the edges are tapered to make the transition between the two surfaces more gradual. And the depth of these edges can sometimes be greater than the depth of asphalt being milled from the surface.

On July 6, 2005, Dustrol was milling the asphalt surface of Highway 77, while Pavers was working behind Dustrol to ramp the utilities. There are three different materials that can be used for ramping: excess millings, which is the debris left after the milling process; "hot mix," which is the material used to pave the roadway; and "cold mix," a sticky material which can also be used to fill potholes. In this case, Dustrol's milling foreman, Neil Thoene, testified that it was his understanding that Pavers was going to ramp all of the vertical edges. Thoene also testified that Dustrol did not have hot or cold mix onsite, that the excess millings were being hauled away from the site, and that Pavers did have hot mix available onsite and, in fact, was using that to ramp utilities.

At the conclusion of the workday, Dustrol pulled its equipment off the road and the crew began equipment maintenance offsite. Because Pavers was still ramping, a few Dustrol employees remained behind to flag traffic until Pavers was finished. Thoene left for the day around 8 p.m. and drove through the intersection of Fifth Street and Highway 77 on his way home. He did not notice that the edges had not been ramped. Thoene also indicated that he was not driving through the intersection to inspect for such edges.

In contrast to Thoene's testimony, Pavers' general manager testified that his crew was responsible for ramping the manholes in the center of the street, but when asked whether Pavers was "doing any type of ramping work with the side streets," he responded, "I do not believe we were, no." He further testified

that Pavers was using hot mix to ramp the manholes and that it had the ability to use the same hot mix to ramp Fifth Street at Highway 77.

Justin Grusing, a manager with Dustrol, also testified. He acknowledged that as a subcontractor, Dustrol had a responsibility to comply with the contract between Pavers and the Department of Roads, and that Dustrol, through its milling, created the dangerous condition. Grusing testified that the contract between Pavers and the Department of Roads provided that ramping would be done, but did not state who would do it. Grusing also testified that although there was "nothing in writing," it was his understanding that Dustrol was only milling the road surface and that Pavers would be doing the ramping because it had hot mix available. Grusing also indicated that based on his experience, Pavers would want to do the ramping, because it was in its best interests to control the ramping so that it was simpler for Pavers to clean up the ramping when it was later removed. Grusing additionally noted that it was general practice to not split the ramping: whoever did the ramping did all of it.

LAWSUIT

Robinson filed an amended complaint against Dustrol, Pavers, and Trafcon, on April 7, 2008. In the amended complaint, Robinson alleged that the defendants were negligent in failing to (1) warn of the danger of the mill cut; (2) properly block the millcut from motor vehicle traffic; (3) conform with applicable standards, regulations, or guidelines relating to the dropoff resulting from the mill cut; (4) sufficiently separate the construction work from the general public; (5) adequately supervise the construction activity; and (6) recognize and correct the pavement edge condition.

A jury trial was held with respect to Robinson's allegations. Pavers and Trafcon were not litigants and did not participate in this trial. The jury was instructed as follows with regard to Dustrol's alleged negligence:

> Robinson . . . claims that Dustrol . . . was negligent in one or more of the following ways:

1. In failing to recognize and correct the dangerous pavement edge condition that existed at the time of the accident.

2. In failing to properly warn [Robinson] of the danger associated with the millcut.

3. In failing to conform with reasonable standards in the road construction industry regarding the protection of drivers from edge drop-offs and large bumps on the road surface.

The jury found that Robinson had not met his burden and entered judgment for Dustrol. Robinson appeals.

ASSIGNMENTS OF ERROR

On appeal, Robinson assigns, renumbered, that the district court erred in (1) overruling Robinson's motion for directed verdict on the issues of negligence and proximate cause; (2) overruling Robinson's motion for new trial on the basis that the verdict was not supported by sufficient evidence; (3) giving instructions Nos. 2, 13, and 15 and thus submitting to the jury the issues of negligence and proximate cause; (4) defining negligence in instruction No. 10 as what a "reasonably careful person," rather than a "reasonably careful contractor," would do; and (5) failing to instruct that Dustrol was not excused from its duty to ramp the edges even if it was more convenient for Pavers to ramp the edges.

STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[1]

[2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[2]

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[1] *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010).

[2] *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

[3] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[3]

ANALYSIS

Directed Verdict and Motion for New Trial

In his first assignment of error, Robinson argues that the district court erred in denying his motion for a directed verdict and instead submitting the case to the jury. Robinson's second assignment is related: He contends the district court erred in denying his motion for new trial on the basis that the jury verdict was not supported by sufficient evidence. In particular, Robinson argues that certain uncontroverted facts establish Dustrol's negligence. These facts, as well as Dustrol's response to them, will be discussed in more detail below.

Robinson first argues that "Dustrol had knowledge the milling creates excessive vertical edges that are dangerous and require ramping if too deep" and that "Dustrol had knowledge the intersection was controlled by a traffic signal, increasing the risk presented by excessive unramped edges."[4] Dustrol responds that

> [h]aving knowledge that dangers exist and certain conditions increase risks associated with those dangers does not conclusively prove the issue at hand — whether Dustrol knew or should have known that the milling performed on the project in question created excessive vertical edges that Dustrol was responsible for ramping.[5]

The record shows that Dustrol knew that milling could create excessive vertical edges and that those edges can be dangerous. But the record also shows that Dustrol had reason to believe that Pavers was responsible for ramping those edges. Though there was no agreement in writing, Dustrol representatives testified that Pavers and Dustrol had an oral agreement that Pavers would ramp the vertical edges. Moreover, Dustrol did not have the necessary materials on hand to ramp vertical

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[3] *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[4] Brief for appellant at 15.

[5] Brief for appellee at 15.

edges—excess millings were being hauled away, and Pavers, not Dustrol, had access to hot mix. And Pavers employees were still present on the jobsite ramping vertical edges when Dustrol's employees were finished milling and began maintenance in preparation for the next day's work. Finally, there is no evidence that Dustrol was responsible for reopening the roadway to the traveling public. For these reasons, reasonable minds could differ as to whether Dustrol knew or should have known that the dangerous vertical edge was left unramped when the road was reopened.

Robinson next asserts that "Dustrol had the means to ramp any excessive edges with the day's old millings and had done so many times in the past."[6] While the record shows that Dustrol had used excess milling to ramp at other jobs in the past, the record also shows that excess millings were being hauled away from this particular site. Thus, reasonable minds could also differ as to whether Dustrol had the ability to ramp the vertical edges.

Robinson next contends that the following facts are uncontroverted: (1) "When Dustrol's foreman left the job site on July 6, the edges were between two and a half and four and [a] half inches at the intersection"; (2) "[h]aving done the milling that day, Dustrol knew or should have known of the four and a half inch edges"; and (3) "Dustrol's foreman knew a four and a half inch edge constituted a dangerous condition and was contrary to state regulations."[7]

We first note that as concluded above, reasonable minds could differ as to whether Dustrol left the jobsite the evening of July 6, 2005, aware that the roadway was left in a dangerous condition. Moreover, the evidence at trial was that the mainline of the intersection—where the traveling public drove—was at a vertical depth of 2½ inches, not the 4½ inches measured at the curb. In fact, the chief of police for the city of Wahoo testified that he drove through that intersection on his motorcycle the morning of July 7. He did not believe a

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[6] Brief for appellant at 16.

[7] *Id.*

dangerous condition existed and therefore did not close the road, although he had the power to do so. It is clear that reasonable minds could differ as to the conclusions one could draw from this evidence.

Robinson also asserts the evidence shows that Thoene, Dustrol's milling foreman, knew the edge was contrary to state regulations. But Thoene's only statement to that effect was that he thought the "State spec is anything over two inches has to be ramped." Robinson failed to introduce evidence as to any actual state regulations, thus no such regulations were presented to the jury. And the district court declined to give an instruction with respect to the violation of a state regulation. Robinson does not now appeal from this failure.

Robinson next argues that "Dustrol's foreman was one of the last workers to leave the job site and was both required and empowered by contract to correct the hazard by using Dustrol employees to ramp it, by calling Pavers to ramp it, or by calling Trafcon for signage" and that "[t]hough responsible under the contract to cause the placement of signs warning of existing hazards, Dustrol failed to request or otherwise cause such signage to be placed."[8]

Under the subcontract with Pavers, Dustrol was required to provide a competent person who was capable of indentifying existing and predictable hazards and authorized to take corrective action to eliminate such hazards. Moreover, Dustrol agreed to take "responsibility to protect [its] work . . . by lights, barricades, and signs so as to avoid injury or damage." But the contract did not explicitly require Dustrol to ramp any vertical edges. The record shows that as the general contractor, Pavers was responsible for overseeing its subcontractors, and that Dustrol was not generally in the position to oversee other contractors or subcontractors on a job.

Conversely, Pavers did actually contract with the Department of Roads that "someone on that job" would ramp vertical edges. The record demonstrates that at the very least, reasonable minds could differ as to whether Pavers had agreed to do

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[8] *Id.*

this ramping itself. In addition to the reasons set forth above, the record also shows that it was in Pavers' best interests to do the ramping itself because it was simpler for Pavers to clean up that ramping when it was later removed. Again, based on the above, reasonable minds could differ as to the conclusion that could be drawn from this evidence.

Robinson also asserts that "Dustrol's foreman was expected to inspect the area for hazards before leaving the job site, drove his vehicle through the intersection, but failed to notice the excessive edges because he assumed Pavers would ramp them because they had been ramping the manhole covers."[9] Again, reasonable minds could differ as to this fact. Thoene did drive through the jobsite and admittedly did not notice the vertical edge. But a review of the record shows Thoene complied with his job duties by making sure that all of the excess millings and other debris were removed from the road, as well as Dustrol's equipment, and that Dustrol's work had been otherwise completed satisfactorily. Reasonable minds could find that Thoene did not further inspect Pavers' work, because Pavers was still working when Dustrol finished its milling work.

Robinson also contends that "[a]fter a subsequent investigation, Dustrol gave its foreman a written warning for failing to address the hazard and instead assuming, absent a formal agreement, Pavers would do the ramping."[10] But a review of the record on this point shows that a Dustrol representative indicated the written warning was used as a "learning tool." There was no finding that Thoene and his crew were actually responsible for ramping the edge, only a finding that Thoene should have observed the absence of adequate ramping. We note that finding this "warning" was some proof of negligence provides no incentive to contractors to improve their safety records. Put another way, just because it might not have legally been negligence does not mean that Dustrol still does not have an interest in preventing accidents. Thus, again, reasonable minds could differ as to the conclusions to be drawn from this evidence.

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[9] *Id.*

[10] *Id.*

Finally, Robinson argues that "Dustrol admitted after investigating the accident it had no information suggesting Pavers was responsible."[11] But this is not an accurate recitation of the record. Robinson refers to the portion of the record wherein Dustrol representatives admit there was no written contract detailing who was responsible for ramping vertical edges. There was sufficient evidence presented that Pavers would be responsible for ramping vertical edges, and in fact, Pavers was undisputedly ramping utilities in the roadway. There was also evidence that at jobsites such as this, there was generally not a split in ramping duties—if you ramped some vertical edges, then you ramped all vertical edges.

[4,5] The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.[12] As is demonstrated by a review of the record, following the introduction by Robinson of his case in chief, Dustrol introduced contrary evidence that it was Pavers' action or inaction that was the sole proximate cause of this incident. The record shows that it would be reasonable for a fact finder to conclude that Pavers had agreed to ramp all vertical edges and thus proximately caused the accident. Moreover, one is not negligent simply by failing to anticipate the negligence of another[13]; thus Dustrol should not be found to have proximately caused the accident simply because it failed to anticipate that Pavers might be negligent.

Because reasonable minds could differ as to the conclusions to be drawn from the evidence presented, Robinson was not entitled to a directed verdict and his assignment of error to the contrary is without merit.

For these same reasons, we also conclude that the district court did not err in overruling Robinson's motion for a new trial. Therefore, Robinson's second assignment of error is also without merit.

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[11] *Id.* at 17.

[12] *Rasmussen v. State Farm Mut. Auto. Ins. Co.*, 278 Neb. 289, 770 N.W.2d 619 (2009).

[13] *Shupe v. County of Antelope*, 157 Neb. 374, 59 N.W.2d 710 (1953).

Instructions Nos. 2, 10, 13, and 15

In his third assignment of error, Robinson assigns that the district court erred in giving instructions Nos. 2, 13, and 15. Robinson does not allege that these three instructions were an incorrect statement of the law, but, rather, argues that the instructions were in error because the strength of the evidence against Dustrol suggested that a directed verdict on the issues covered by these instructions should have been granted. As we have concluded above, Robinson was not entitled to a directed verdict, thus it was not error for the district court to submit the issue of negligence to the jury.

[6] In his fourth assignment of error, Robinson assigns that the district court erred in giving instruction No. 10, which defines negligence as what a "reasonably careful person" would do. Robinson argues instead that the definition should be what a "reasonably careful contractor" would do. However, Robinson failed to object to the giving of this instruction. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.[14] Because no objection was made, we need not further address Robinson's argument.

Robinson's third and fourth assignments of error are without merit.

Proposed Instruction

[7] In his fifth and final assignment of error, Robinson argues that the district court erred in failing to instruct the jury that Dustrol was not excused from its duty to ramp the edges even if it was more convenient for Pavers to do so. However, Robinson failed to request this instruction. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[15] Therefore, we need not consider Robinson's fifth and final assignment of error.

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[14] *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

[15] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

JOCELYN SHEPHERD, APPELLANT, V. PHYLLIS CHAMBERS, DIRECTOR OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT SYSTEMS, AND DENIS BLANK, CHAIRPERSON OF THE NEBRASKA PUBLIC EMPLOYEES RETIREMENT BOARD, APPELLEES.

794 N.W.2d 678

Filed January 28, 2011. No. S-10-157.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

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

Timothy J. Cuddigan, Sean D. Cuddigan, and Jessica Levine Finkle, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellant.

Jon Bruning, Attorney General, and Lynn A. Melson for appellees.

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

STEPHAN, J.

After leaving her employment with a school district, Jocelyn Shepherd applied for disability retirement benefits under the School Employees Retirement Act (the Act).[1] The Nebraska Public Employees Retirement Board (the Board) conducted a hearing and denied Shepherd's application. She appealed to the district court for Lancaster County under the Administrative Procedure Act,[2] and that court affirmed the action of the Board. Shepherd filed this timely appeal from that order. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3] Finding no error, we affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

Shepherd was employed by the Millard public school system as an accountant from 1997 until March 2007. Her duties included preparing bank reconciliations and financial reports relating to grants. Upon commencement of her employment, Shepherd became a member of the Nebraska School Employees Retirement System.

Shepherd was diagnosed with relapsing remitting multiple sclerosis in 1999 or 2000. She did not take all the recommended medication for this condition from 2002 to March 2007, because she was attempting to become pregnant. On March 23, 2007, she was seen in an emergency room with complaints of decreased sensation below her waist. After this visit to the emergency room, Shepherd began taking all recommended medications to treat her multiple sclerosis.

On June 21, 2007, Shepherd ceased employment with the Millard public school system. She testified that due to the relapse of her condition, she was no longer able to perform the responsibilities of her job. On May 29, 2008, Shepherd filed an application for disability retirement with the Nebraska Public Employees Retirement Systems, which, pursuant to

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[1] Neb. Rev. Stat. §§ 79-901 to 79-977.03 (Reissue 2008).

[2] § 79-950; Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008).

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

§ 79-951(1), retained a neurologist, Dr. Joel T. Cotton, to examine Shepherd and make a disability determination.

Cotton conducted a neurological examination of Shepherd on August 1, 2008. His examination confirmed that Shepherd suffered from multiple sclerosis, but he could detect "little if any neurological impairment." Cotton further reported that he was unable to substantiate either the medical necessity for Shepherd's use of a walking cane or her subjective complaints of overwhelming fatigue, exhaustion, and lack of energy. Cotton concluded that in his opinion, and to a reasonable degree of medical certainty, Shepherd was not "unable to engage in a substantially gainful activity by reason of any medical[ly] determinable physical or mental impairment which can be expected to result in death or be of life long and indefinite duration." Cotton recommended denial of Shepherd's application for disability retirement.

Based on Cotton's examination and opinions, the Board denied Shepherd's application for disability retirement benefits on August 27, 2008. Shepherd appealed that decision pursuant to § 79-950, and a hearing was held before a hearing officer on February 5, 2009. At the hearing, Shepherd testified that she was 51 years old and had been suffering from symptoms associated with multiple sclerosis since 1999. Shepherd described symptoms of fatigue, weakness, and intermittent numbness in her hands and lower extremities. She stated that these symptoms made it difficult for her to walk and stand. She also described the problems she experienced at work, explaining that her brain function had slowed down and that she was easily distracted, which made completing the normal duties of her job increasingly difficult. Shepherd also testified that she experienced difficulties at work due to her increased urinary frequency and urgency. No other witness testified at the hearing.

In addition to her testimony, Shepherd offered various medical records as evidence of the progression of her disease, the development of her symptoms, and the impact of her condition on her ability to work. The Board offered several exhibits, including Cotton's report. The hearing officer received the medical records and the exhibits offered by the Board.

In a written order, the hearing officer affirmed the denial of Shepherd's application for disability retirement benefits. The hearing officer reasoned:

> By referring this matter to Dr. Cotton for an examination and considering his written report, the Board's decision to deny disability properly conformed to and complied with the . . . statutory requirements. Shepherd's evidence of disability was in the nature of documentary hearsay, which was objected to, and the objection sustained by the hearing officer. Legal counsel for the [Nebraska Public Employees Retirement] System[s] did not have any opportunity to confront or cross-examine any of the medical evidence contained in Exhibits 3 though 32. In the absence of any admissible evidence rebutting or refuting the conclusions of Dr. Cotton, the decision of the Board dated August 25, 2008, must be ratified and affirmed.

This order was accepted and adopted by the Board.

Shepherd appealed to the district court, arguing that the hearing officer erred in treating the medical records as inadmissible "documentary hearsay," because (1) the parties had agreed that the hearing would not be conducted under the formal rules of evidence and (2) the records were received without objection. Shepherd further alleged that if the medical records had been considered, they would have supported a finding that she was disabled within the meaning of the Act.

The district court agreed with Shepherd and concluded that the hearing officer and the Board erred in failing to consider the substantive content of the medical records offered by Shepherd. The court considered those records in its de novo review, but ultimately concluded that Shepherd's evidence was insufficient to rebut Cotton's opinion that Shepherd was not disabled within the meaning of the Act. In its final order, the court noted: "I do not believe this is a case in which I am free [to] roam through the medical records drawing my own conclusions. There must be evidence *in the form of a professional opinion* that Shepherd is unable to engage in substantially gainful activity." (Emphasis in original.) The district court therefore affirmed the decision of the Board denying Shepherd's application for disability retirement benefits.

ASSIGNMENTS OF ERROR

Shepherd assigns, restated, that the district court erred in (1) interpreting the statutory definition of "disability" for purposes of disability retirement under the Act and (2) finding that Shepherd is not disabled based on the evidence.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[5]

ANALYSIS

In support of her first assignment of error, Shepherd argues that the district court erred as a matter of law by requiring proof in the form of an expert medical opinion that she was "unable to engage in a substantially gainful activity" in order to establish her eligibility for disability retirement.[6] The starting point of our analysis is § 79-902(37), which states that for purposes of the Act, "[d]isability means an inability to engage in a substantially gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of a long and indefinite duration." This definition consists of two components

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[4] *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010); *Children's Hospital v. State*, 278 Neb. 187, 768 N.W.2d 442 (2009).

[5] *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009); *Wilczewski v. Neth*, 273 Neb. 324, 729 N.W.2d 678 (2007).

[6] See § 79-951(1).

linked in a causal relationship: (1) The individual must have a physical or mental impairment of the nature described, and (2) by reason of the impairment, the individual must be unable to engage in a substantially gainful activity. It is undisputed here that Shepherd's diagnosis of multiple sclerosis is an impairment which is "of a long and indefinite duration." But her inability to engage in a "substantially gainful activity" by reason of her multiple sclerosis was very much in dispute.

At the time Shepherd applied for disability benefits, the Act provided a mechanism for resolving issues of this nature at § 79-951(1):

> A member shall be retired on account of disability . . . if a medical examination, made at the expense of the retirement system and conducted by a competent disinterested physician legally authorized to practice medicine under the laws of the state in which he or she practices, selected by the retirement board, shows and the physician certifies to the retirement board that the member is unable to engage in a substantially gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or be of a long and indefinite duration. The medical examination may be waived if, in the judgment of the retirement board, extraordinary circumstances exist which preclude substantial gainful activity by the member. Such circumstances shall include hospice placement or similar confinement for a terminal illness or injury.

We read the plain language of this statute to require expert medical opinion to establish a disability as defined by the Act, except in those extraordinary circumstances where both the existence of a physical or mental impairment and its causal relationship to the employee's inability to engage in a substantially gainful activity are apparent to a layperson. The requirement of medical certification of a disability affecting a person's ability to work is not a novel concept. For example, we have long held in workers' compensation cases that to recover disability benefits, an injured worker must prove by competent medical testimony a causal connection between the

alleged injury, the employment, and the disability.[7] The district judge, by stating that she was not free to "roam through the medical records drawing [her] own conclusions," was simply stating that this was not a case in which a layperson, without the benefit of expert medical opinion, could determine whether there was a causal relationship between Shepherd's physical impairment and her claimed inability to engage in a substantially gainful activity. We agree with that assessment and conclude that the district court did not err in interpreting the applicable law.

By its use of the word "shall," § 79-951(1) requires the Board to retire a member on account of disability if the Board's retained medical examiner opines that the member is disabled as defined by the Act. But we do not read the statute to mean that a contrary opinion from the retained expert, such as Cotton's opinion in this case, precludes the Board or a reviewing court from considering other medical evidence offered on behalf of the member. The Act provides that an aggrieved member may request that the Board review its own actions, and further provides that any final order of the Board may be appealed in accordance with the Administrative Procedure Act.[8] This right of review would be meaningless if the opinion of the Board's retained medical examiner that the member is not disabled were deemed conclusive. The appellees acknowledge that a member "who disagrees with the Board's decision may appeal and has the opportunity to establish by competent medical evidence that he or she is unable to engage in gainful employment."[9] We therefore turn to Shepherd's second assignment of error in which she contends that the judgment of the district court is not supported by competent evidence.

[3,4] On this point, Shepherd's argument is twofold. First, she contends that although the district court correctly considered the medical records which were not considered by the hearing examiner, it did not have an opportunity to observe

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[7] See, e.g., *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

[8] See § 79-950.

[9] Brief for appellees at 11.

and hear her testimony in conducting its de novo review of the administrative record. Without citation to any authority, she argues that her due process rights have been violated because "no trier of fact has considered all of her evidence and observed her testimony."[10] The district court reviewed the order of the Board in accordance with § 84-917(5)(a), which requires that "the review shall be conducted by the court without a jury de novo on the record of the agency." Shepherd did not contend in the district court, nor did she assign as error in this appeal, that her due process rights were violated by the district court's review de novo on the record pursuant to § 84-917(5)(a). A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[11] And errors argued but not assigned will not be considered on appeal.[12] Accordingly, we do not reach Shepherd's argument that she was deprived of due process by virtue of the fact that the district court did not rehear her testimony.

For completeness, we note that in argument to the district court, Shepherd did contend that her due process rights were violated by the hearing examiner's refusal to consider the documentary medical evidence which she presented at the administrative hearing. But the district court resolved that issue in Shepherd's favor by determining that the hearing examiner erred in this regard and stating that it would consider the evidence in its de novo review. In appellate review of the district court's order, we do not focus on the findings of the hearing officer. Instead, we review the order of the district court for errors appearing on the record.[13] Shepherd acknowledges that the district court "corrected the hearing officer's evidentiary error."[14]

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[10] Brief for appellant at 26.

[11] *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008); *K N Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

[12] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010); *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[13] *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

[14] Brief for appellant at 26.

Shepherd also argues that the opinions of the health care providers who treated her, as set forth in the medical records, were entitled to more weight than the opinion of Cotton, who examined her only once. We interpret this argument to be that there is not competent evidence in the record to support the district court's findings.[15] In this context, "competent evidence" means evidence that tends to establish the fact in issue.[16]

Clearly, Cotton's opinion constitutes competent evidence in that it goes to the central fact at issue in this case, namely, whether Shepherd is unable to engage in a substantially gainful activity by reason of her physical impairment. As the district court noted, the record contains no expert medical opinion directly contradicting that of Cotton. And contrary to Shepherd's argument, the medical records completed by the medical professionals who treated her do not unequivocally establish that she is disabled. Indeed, some of the records support Cotton's opinion, at least to some degree. For example, on March 5, 2007, a representative of the Department of Neurology at Creighton University Medical Center completed a U.S. Department of Labor form. This form asked whether it would be necessary for Shepherd to work intermittently or on a less-than-full schedule as a result of her medical condition. The answer given was, "No – will occasionally miss work for neurological appointments and/OR relapses of her multiple sclerosis." The same person indicated on the form that Shepherd was "not incapacitated."

Another health care provider noted on May 8, 2007, that while Shepherd was then unable to work, she could return to her job on a part-time basis on May 14, and that her continuing ability to work would need to be reassessed at that time. A clinical psychologist who examined Shepherd noted in a report dated January 16, 2008, that she had sufficient concentration

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[15] See, *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[16] *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009); *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987).

and attention needed for task completion, although she was "slow due to multiple sclerosis." The psychologist also noted that Shepherd was not restricted in activities of daily living, had no difficulty in maintaining social functioning, was able to carry out short and simple instructions under ordinary supervision, could relate appropriately to coworkers and supervisors, and could adapt to changes in her environment. The psychologist concluded that Shepherd "has the mental capacity to assume an entry level job commensurate with her training and experience; however, she presents with slow mobility and significant weakness in speed of recall even though her recall is not generally significantly impaired." He concluded that Shepherd "should continue in supportive counseling" and that the "prognosis for the immediate future seems favorable."

We acknowledge Shepherd's testimony that she felt unable to continue in her job due to her symptoms and the existence of other medical records which support her position testimony to some degree. But under our standard of review, we cannot weigh the evidence and reach our own factual conclusion if there is competent evidence to support the findings of the district court. The opinion expressed by Cotton and the other evidence summarized above clearly constitute competent evidence which supports the findings and judgment of the district court. Accordingly, we find no merit in Shepherd's second assignment of error.

CONCLUSION

For the reasons discussed, we conclude that the judgment of the district court affirming the decision of the Board conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

WRIGHT, J., not participating.

WILLIE BANKS, JR., APPELLANT, V. THE HOUSING AUTHORITY OF THE CITY OF OMAHA ET AL., APPELLEES.

795 N.W.2d 632

Filed January 28, 2011. No. S-10-302.

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. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it.
3. **Administrative Law.** Administrative action must not be arbitrary or capricious.
4. **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.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Liliana E. Shannon and Scott M. Mertz, of Legal Aid of Nebraska, for appellant.

George B. Achola and Natalie Baumgarten, of Housing Authority of the City of Omaha, for appellees.

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

WRIGHT, J.

NATURE OF CASE

The Housing Authority of the City of Omaha (OHA) terminated housing benefits for Willie Banks, Jr., after he was allegedly involved in criminal activity. A hearing officer confirmed the termination of benefits, and Banks filed a petition in error in Douglas County District Court. The court affirmed the hearing officer's decision. Banks 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).

FACTS

In 2008, Banks resided in a unit of OHA-operated housing on Florence Boulevard (Florence unit). In early 2009, while Banks was still living in the Florence unit, he was approved for a federally subsidized housing choice voucher program, commonly referred to as "Section 8" housing, which is also administered by OHA.

Based on a report that Banks had committed an assault and robbery, his lease for the Florence unit was terminated. When he did not move out as requested, OHA filed a forcible entry and detainer action (restitution action) in county court. Before a hearing was held on the restitution action, Banks moved out of the Florence unit and into the Section 8 housing. OHA determined that Banks had previously been evicted from OHA housing, and it terminated his Section 8 benefits. At Banks' request, an informal hearing was held on the termination of benefits, and the hearing officer upheld the termination. The district court affirmed the hearing officer's finding.

A detailed chronology of the events follows:

• December 12, 2008: Banks was allegedly involved in an assault and robbery when he knocked down a person and took the person's billfold, which contained $6 and identification.

• December 17, 2008: OHA staff received a report that Banks was involved in an assault and robbery.

• January 5, 2009: Banks' application for assistance under Section 8 was approved.

• January 14, 2009: OHA mailed a "***THREE DAY NOTICE FOR FAILURE TO COMPLY WITH LEASE*** (Eviction for Criminal Activity)" to Banks at the Florence unit. The notice stated that Banks had violated the lease and the "'**One Strike and You're Out**'" addendum to the lease. The notice stated: "**YOUR RENTAL AGREEMENT WILL BE CONSIDERED AUTOMATICALLY TERMINATED ON THE THIRD DAY AFTER RECEIPT OF THIS NOTICE AND YOU SHALL IMMEDIATELY QUIT, VACATE AND SURRENDER POSSESSION OF THE ABOVE-DESCRIBED PREMISES**,"

and "You are not entitled to a grievance hearing in this termination."

• February 3, 2009: OHA filed the restitution action against Banks after he refused to vacate the Florence unit as directed by the 3-day notice. Trial was set for February 17.

• February 5, 2009: Banks' Section 8 housing passed inspection.

• February 12, 2009: E-mail correspondence in the record indicates that according to OHA personnel, Banks was evicted from the Florence unit and turned in his keys. One e-mail noted that the "eviction hearing" was scheduled for February 17 but that OHA counsel would dismiss the restitution action because Banks turned in his keys to the unit. A reply e-mail stated that the Section 8 housing Banks planned to move to had passed inspection, but stated: "We will process all the paper work and give the owner a 30 day notice and terminate him just as soon as we receive the lease and contracts."

• February 17, 2009: The restitution action was dismissed at the request of OHA.

• March 10, 2009: Banks was notified that his Section 8 benefits would be terminated effective May 1 because "**[y]ou were evicted from [the] Florence [unit]. You were served with a 3 day notice on January 14, 2009. Per OHA legal Department you surrendered your keys on February 12, 2009.**" The letter quoted two sections of the federal regulations: "**CFR 982.551 Obligations of participant.** *(e) Violation of lease. The family may not commit any serious or repeated violation of the lease. (g) Owner eviction notice. The family must promptly give the* [*public housing agency*] *a copy of any owner eviction notice*," and "**CFR 982.552** [**Public housing agency**] **denial or termination of assistance for family.** *(ii) If any member of the family has been evicted from federally assisted housing in the last five years*." The letter also advised Banks that he had the right to an informal hearing. Attached was a document titled "**TENANT HEARING/REVIEW RIGHTS**." A notice was also sent to the landlord of the Section 8 property.

• March 12, 2009: Banks submitted a request for an informal hearing, stating: "You siad [sic] that I got evicted From [the] Florence [unit] but I didn't."

• March 31, 2009: An informal hearing was held before a hearing officer.

• April 14, 2009: The hearing officer issued a two-page decision in which she stated that the notice for criminal activity served on Banks gave him 3 days to vacate and surrender the premises. The "eviction action" was filed to obtain restitution when Banks did not vacate after the 3 days expired. OHA dismissed the court proceedings when Banks turned in his keys prior to the court date. Based on the evidence presented during the hearing, the hearing officer determined that Banks should remain terminated from the Section 8 program.

The district court determined that the evidence was sufficient to support the decision of the hearing officer and that the decision was not arbitrary or capricious. Because Banks vacated the Florence unit prior to the hearing for restitution, there was no need for OHA to further pursue its action in court; it had obtained the relief it sought. Banks chose to vacate the premises rather than contest the eviction proceeding in court. OHA's dismissal of the restitution action was "appropriate and logical."

The district court stated that adopting Banks' position would frustrate the intent of federal housing laws and their enforcement because a public housing tenant could avoid the consequences of his own behavior by willfully failing to comply with the terms of the lease; refusing to vacate and surrender the premises, forcing the housing authority to take legal action; vacating the premises prior to a court hearing; and then arguing that he was entitled to continue to receive housing assistance because there was no court order evicting him. The court affirmed the hearing officer's decision. Banks appeals.

ASSIGNMENTS OF ERROR

Banks assigns the following errors: (1) The district court erroneously upheld the termination of Banks' Section 8 housing benefits, in that the hearing officer's decision was not supported in law or by fact; (2) the administrative decision violated OHA's administrative plan by finding that an eviction occurred when there was no legal eviction order; and (3) the

district court exceeded its authority by making findings of fact not properly before the reviewing court.

ANALYSIS

[2-4] Our review of OHA's decision requires us to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. See *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did based on the testimony and exhibits contained in the record before it. *Id.* In addition, the administrative action must not be arbitrary or capricious. *Id.* 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. *Id.*

The issue before us is whether Banks' Section 8 housing benefits were properly terminated, as determined by the hearing officer and affirmed by the district court.

OHA is a public housing agency established pursuant to state and federal housing programs. *Thirty LLC v. Omaha Housing Authority*, 17 Neb. App. 715, 771 N.W.2d 165 (2009). OHA operates a public housing program, which provides housing such as the Florence unit, and the Section 8 program, under which low-income individuals are eligible for rent subsidies that can be applied to a home of their choice in the private sector. *Id.* An individual may apply for Section 8 benefits, and if qualified, the individual is issued a housing voucher. See *id.* The individual is responsible for finding a suitable housing unit of his or her choice, which the owner agrees to rent under the program. See *id.* Section 8 housing is a federal program created by the U.S. Department of Housing and Urban Development.

OHA operates pursuant to the Nebraska Housing Agency Act (Act), Neb. Rev. Stat. §§ 71-1572 to 71-15,168 (Reissue 2009). See *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). Under the Act, the landlord-tenant relationship and the termination of such relationship are governed by state law applicable to privately owned residential

property. § 71-15,138. Concerning termination of tenancy, § 71-15,139 states:

> (1) A housing agency may adopt and promulgate reasonable rules and regulations consistent with federal and state laws, rules, and regulations and the purposes of the . . . Act concerning the termination of tenancy. Any resident so terminated shall be sent a written notice of termination setting out the reasons for such termination, and any resident served with a notice shall be given the opportunity to contest the termination in an appropriate hearing by the housing agency. A resident may contest the termination in any suit filed by the housing agency in any court for recovery of possession of the premises.
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> . . . .
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> (3) A housing agency may, after three days' written notice of termination and without an administrative hearing, file suit and have judgment against any resident for recovery of possession of the premises if the resident, any member of the resident's household, any guest, or any other person who is under the resident's control or who is present upon the premises with the resident's consent, engages in any drug-related or violent criminal activity on the premises, or engages in any activity that threatens the health, safety, or peaceful enjoyment of other residents or housing agency employees. Such activity shall include, but not be limited to, any of the following activities of the resident, or the activities of any other person on the premises with the consent of the resident: (a) Physical assault or the threat of physical assault . . . .

Thus, under the Act, OHA has the authority to file suit for recovery of the premises if the resident engages in violent criminal activity. The definition of criminal activity includes the commission of physical assault or the threat of physical assault. Banks was accused of committing an assault and robbery, and the OHA acted within its jurisdiction in filing the restitution action.

Federal regulations also set out the grounds upon which a public housing agency may deny admission or terminate assistance. See 24 C.F.R. § 982.552(c) (2010). These grounds

include: "[i]f any member of the family has been evicted from federally assisted housing in the last five years" and "[i]f the family has been engaged in criminal activity or alcohol abuse as described in § 982.553." § 982.552(c)(1)(ii) and (xi). A public housing agency may prohibit admission to a housing program if any household member is engaged in or has engaged in "(2) Violent criminal activity; (3) Other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity." 24 C.F.R. § 982.553(a)(2)(ii)(A) (2010). The regulations provide that the agency

> may terminate assistance for criminal activity by a household member as authorized in this section if the [agency] determines, based on a preponderance of the evidence, that the household member has engaged in the activity, *regardless of whether the household member has been arrested or convicted for such activity*.

§ 982.553(c) (emphasis supplied).

Under these regulations, Banks' housing benefits could have been terminated solely based on the alleged assault, even though he was not charged with any crime. The original 3-day notice Banks received was subtitled "Eviction for Criminal Activity." The hearing officer's decision noted that Banks was served a 3-day notice for "criminal activity." There was evidence presented at the hearing that Banks had committed an assault and robbery. This court cannot reweigh the evidence or make independent findings of fact. We determine whether the evidence supports the agency decision. Because federal regulations allow the agency to terminate assistance if a family member is involved in criminal activity, which can include an assault, the agency's decision to terminate Banks' housing benefits is supported by the evidence.

Banks next argues that he voluntarily moved out of the Florence unit and that, therefore, he was not evicted. A public housing agency may deny assistance or terminate benefits if the individual or family "has been evicted from federally assisted housing in the last five years." § 982.552(c)(1)(ii). Banks asserts that because he turned in his keys and the restitution action was dismissed, he had not been "evicted" within

the previous 5 years, and that, therefore, his benefits could not be terminated. However, he fails to recognize that his benefits could also be terminated for participation in criminal activity, and he does not deny that he committed a criminal act.

It is true that no judicially executed judgment of eviction was entered, because OHA dismissed the action after Banks turned in his keys to the Florence unit. However, if OHA had proceeded with the hearing and evidence was presented that Banks had moved out of the unit, the restitution action would have been found to be moot.

OHA had the authority to deny Banks benefits based on federal regulations that allow a public housing agency to deny or terminate benefits to a tenant who has taken part in violent criminal activity. Banks knocked down another person, reached into the person's jacket, and took a billfold. There was sufficient evidence before the hearing officer to support the finding that Banks was evicted for criminal activity. The decision was not arbitrary or capricious.

Banks also argues that the hearing officer's decision violated OHA's administrative plan by finding that an eviction occurred when there was no legal eviction order. The portion of the administrative plan Banks asks this court to consider was offered at the hearing on the petition in error, but it was not presented to the hearing officer. The district court made no ruling on the exhibit. 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. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008). The hearing officer did not have the administrative plan before her, and the district court made no ruling on whether the administrative plan should have been received into evidence. We cannot review any alleged violation of the administrative plan when it was not properly before the hearing officer.

Finally, Banks claims that the district court exceeded its authority by conducting a de novo review of the facts and making findings of fact that were not part of the record before the agency. He argues that the language in the court's order

questioned Banks' motives, which should not have been an issue before the court.

The district court stated, "Instead of contesting the eviction proceeding in court, Banks chose to vacate the premises." Banks argues that this is a finding of fact that goes beyond the hearing officer's order. However, this finding had been made by the hearing officer, who stated that Banks turned in his keys prior to the court date, which resulted in OHA's dismissal of the court proceedings. The district court's comment was merely part of its analysis. It was not a new finding of fact or the result of de novo review.

CONCLUSION

The decision of OHA to terminate Banks' housing benefits was not arbitrary or capricious. The evidence showed that he had been involved in criminal activity, and federal regulations provide that a public housing agency may deny or terminate benefits on that basis. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF C.R., ALLEGED TO BE DEVELOPMENTALLY DISABLED AND A THREAT OF HARM TO OTHERS.
STATE OF NEBRASKA, APPELLEE, V.
C.R., APPELLANT.

793 N.W.2d 330

Filed January 28, 2011. No. S-10-307.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Mental Health: Proof.** The Developmental Disabilities Court-Ordered Custody Act requires that the State prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment.
4. **Mental Health: Public Health and Welfare: Proof: Words and Phrases.** A threat of harm to others, as contemplated by the Developmental Disabilities

Court-Ordered Custody Act, can be shown by proof that the subject committed an act that would constitute a sexual assault or attempted sexual assault.

5. **Mental Health: Public Health and Welfare: Proof.** The Developmental Disabilities Court-Ordered Custody Act does not require proof of future harm before a court determines that the subject is in need of court-ordered custody and treatment.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Jessica L. Milburn for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

WRIGHT, J.

NATURE OF CASE

The State filed a petition pursuant to the Developmental Disabilities Court-Ordered Custody Act (DDCCA), Neb. Rev. Stat. § 71-1101 et seq. (Reissue 2009), in which the State alleged that C.R. is a person with a developmental disability who poses a threat of harm to others and is in need of court-ordered custody and treatment. C.R. filed a motion asking the Lancaster County District Court to hold the DDCCA unconstitutional. The court held the DDCCA to be constitutional and determined that C.R. is a person in need of court-ordered custody and treatment. C.R. appeals.

SCOPE OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

FACTS

C.R. is an adult male who has a developmental disability consistent with a diagnosis of mild mental retardation, as defined by § 71-1110. He has significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior.

In April 2007, C.R. subjected C.L. to sexual penetration without her consent. C.R. admitted that he committed the sexual act even though C.L. told him to stop.

On May 31, 2007, C.R. was charged with first degree sexual assault. On November 15, the court determined that C.R. was not mentally competent to stand trial. C.R. was committed to the Lincoln Regional Center. After periodic review hearings over the next 2 years, the court found that C.R. remained incompetent to stand trial and continued his commitment to the Lincoln Regional Center for treatment.

On October 6, 2009, the State, pursuant to the DDCCA, requested a determination whether C.R. is a person with a developmental disability who poses a threat of harm to others and whether he is in need of court-ordered custody and treatment. The district court found that C.R. remained incompetent to stand trial and that there was not a substantial probability that he would become competent to stand trial in the foreseeable future.

C.R. moved the district court to declare the DDCCA unconstitutional because it does not require the State to prove at trial that a substantial likelihood exists that a person with developmental disabilities will engage in dangerous behavior in the future. C.R. also alleged the act violates substantive due process by allowing the court to determine that a subject is in need of court-ordered custody and treatment without first finding that the subject poses a risk of future harm to others. In addition, C.R. claimed the DDCCA violates his right to due process because it does not require the State to prove at trial a nexus between the developmental disability and the risk of harm.

At a hearing on the State's petition, Mario Scalora, Ph.D., testified that he evaluated C.R. in 2007 for competency to stand

trial. His report stated that C.R. had an IQ of 62, which was in the extremely low range of functioning and qualified for a diagnosis of mild mental retardation.

There was no dispute that C.R. had sexual intercourse with C.L. in April 2007, but the evidence was in conflict whether the intercourse was consensual. The district court found that C.R. is a person with developmental disabilities as defined by the DDCCA; that in April 2007, he subjected C.L. to sexual penetration without her consent; and that C.R. poses a threat of harm to others. The court found no merit to C.R.'s constitutional arguments. It ordered the Nebraska Department of Health and Human Services (DHHS) to evaluate C.R. and submit within 30 days a plan for the custody and treatment of C.R. in the least restrictive alternative. C.R. appeals.

ASSIGNMENT OF ERROR

C.R. asserts that the district court erred in concluding that the DDCCA is constitutional. He argues that it violates substantive due process in two respects: Under the DDCCA, (1) the State is not required to prove that a person with developmental disabilities poses a risk of future harm to others before the court imposes involuntary custody or treatment and (2) the State is not required to prove a nexus between a person's developmental disability and his prior actions that required involuntary commitment.

ANALYSIS

This case presents our first opportunity to review the DDCCA. The act was passed in 2005 to provide a procedure for court-ordered custody and treatment for a person with developmental disabilities when he or she poses a threat of harm to others. § 71-1103. The Attorney General or a county attorney may file a petition in the district court alleging that the subject is a person in need of court-ordered custody and treatment. § 71-1117. The petition shall state that the subject has a developmental disability and poses a threat of harm to others, and the petition shall include a factual basis to support the allegations. *Id.*

The DDCCA defines a "[d]evelopmental disability" as "mental retardation or a severe chronic cognitive impairment, other

than mental illness, that is manifested before the age of twenty-two years and is likely to continue indefinitely." § 71-1107. "Mental retardation" is defined as "a state of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which originates in the developmental period." § 71-1110.

"Threat of harm to others" is defined as

> a significant likelihood of substantial harm to others as evidenced by one or more of the following: Having inflicted or attempted to inflict serious bodily injury on another; having committed an act that would constitute a sexual assault or attempted sexual assault; having committed lewd and lascivious conduct toward a child; having set or attempted to set fire to another person or to any property of another without the owner's consent; or, by the use of an explosive, having damaged or destroyed property, put another person at risk of harm, or injured another person.

§ 71-1115.

[3] The DDCCA requires that the State prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment. § 71-1124. Under the act, the district court shall make specific findings of fact and state its conclusions of law. *Id*. If the court finds that the subject is in need of court-ordered custody and treatment, DHHS shall, within 30 days of such finding, evaluate the subject and submit a plan for custody and treatment in the least restrictive alternative. *Id*. A dispositional hearing shall be held within 15 days after receipt of DHHS' plan, unless continued for good cause shown. *Id*.

C.R. asserts that the DDCCA violates his substantive due process rights because it does not require the State to prove that C.R. poses a future threat of harm to others before the court imposes involuntary custody or treatment and it does not require the State to prove a nexus between the disability and the prior action subjecting C.R. to commitment. Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Interest of J.R.*, 277

Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

C.R. contends that the DDCCA violates due process because it does not require completion of the risk analysis of the subject's potential for future dangerous behavior toward others until after the subject has been found to be in need of court-ordered custody and treatment. We disagree.

[4,5] We examine the DDCCA in the language in which it is presented, not as interpreted by C.R. The act places the burden on the State to prove by clear and convincing evidence that the subject is a person who has a developmental disability, is in need of court-ordered custody and treatment, and "poses a threat of harm to others." See §§ 71-1103 and 71-1124. The threat of harm to others can be shown by proof that the subject "committed an act that would constitute a sexual assault or attempted sexual assault." See § 71-1115. Thus, to meet its burden of proof, the State must provide clear and convincing evidence that a person with developmental disabilities demonstrates a "significant likelihood of substantial harm to others" if he or she commits one of the acts listed in § 71-1115. The DDCCA does not require proof of future harm before the court determines that the subject is in need of court-ordered custody and treatment.

The parties stipulated that C.R. has a developmental disability. C.R. does not dispute that he sexually assaulted C.L. Under the DDCCA, sexual assault is one of the manners in which a threat of harm to others can be shown.

As noted above, this court has not previously considered the DDCCA and its constitutionality. However, we have addressed a similar argument related to civil commitment under a prior version of the Nebraska Mental Health Commitment Act (MHCA), now codified at Neb. Rev. Stat. § 71-901 et seq. (Reissue 2009), in *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981).

The purpose of the MHCA is to provide for the treatment of persons who are mentally ill and dangerous, § 71-902, while the DDCCA provides a procedure for court-ordered custody

and treatment for a person with developmental disabilities when he or she poses a threat of harm to others, § 71-1103.

In *In re Interest of Blythman, supra*, the board of mental health of Lincoln County (Board) found clear and convincing evidence that the subject was a mentally ill dangerous person and that the least restrictive treatment available was involuntary commitment to the Lincoln Regional Center. The district court affirmed the finding of the Board.

In considering the subject's appeal in *In re Interest of Blythman*, we stated: "In order for a subject to be civilly committed pursuant to the [MHCA], there must be both a finding that the subject is mentally ill as well as a finding that he is dangerous, either to himself or to others." 208 Neb. at 55, 302 N.W.2d at 670. "For there to be compliance with the fourteenth amendment's due process clause, there must be an independent finding of dangerousness." *Id*., citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). At the time, the MHCA provided that dangerousness must be shown by a recent act or threat, and the subject in *In re Interest of Blythman* argued that the Board's decision was based on his actions from 5 years earlier, which were not "'recent acts.'" 208 Neb. at 55, 302 N.W.2d at 670.

We stated, "The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others." *Id*. at 56, 302 N.W.2d at 670-71. We held:

> To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. "While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. . . . To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another."

Id. at 57, 302 N.W.2d at 671, quoting *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

"In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue." *In re Interest of Blythman*, 208 Neb. 51, 58, 302 N.W.2d 666, 671 (1981). We determined there was sufficient evidence to support the Board's conclusion that the subject was a mentally ill dangerous person, and we held that proof of acts committed more than 5 years prior to the filing of the mental health proceedings did not contravene due process and equal protection guarantees where there was sufficient evidence that the acts were still probative of the subject's present state of dangerousness. *Id*.

The MHCA and the DDCCA both concern persons who present a risk of serious harm to another person. See §§ 71-908 and 71-1103. The MHCA governs individuals who are mentally ill and dangerous, while the DDCCA provides custody and treatment for persons with developmental disabilities. The DDCCA does not specifically require a finding of future harm, but it defines a threat of harm as a "significant likelihood" of harm as evidenced by past conduct. See § 71-1115. Thus, the two statutes serve similar purposes but are intended for persons with different conditions.

In *In re Interest of Blythman, supra*, we held that due process is satisfied if there is a finding that a person who is mentally ill is substantially likely to engage in dangerous behavior unless restrained or confined. We determined that a dangerous act in the recent past can demonstrate a likelihood to commit a dangerous act in the future. Here, C.R. committed the sexual assault in 2007. This act fits within the statutory definition of a threat of harm to others. See § 71-1115.

C.R. refers us to our previous consideration of the constitutionality of the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), in *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96, and *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. However,

the constitutional challenges in those cases did not argue that the statutes violated due process, but, instead, alleged that the SOCA violated equal protection and double jeopardy guarantees and that it was an impermissible ex post facto law. In addition, neither case concerned an individual with a developmental disability. Therefore, the cases are of limited value in our analysis here.

The SOCA is similar to the DDCCA in that it imposes a high standard of proof upon the State. "To subject a dangerous sex offender to inpatient treatment, the State must prove by clear and convincing evidence that involuntary treatment is the least restrictive alternative." *In re Interest of J.R.*, 277 Neb. at 378-79, 762 N.W.2d at 320. The DDCCA also requires the State to prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment, and the DHHS plan for custody and treatment must be the least restrictive alternative. § 71-1124. We have noted that "[p]ersons committed under [the] SOCA are suffering from a mental disorder or personality disorder that *prevents them from exercising control over their actions*." *In re Interest of J.R.*, 277 Neb. at 378, 762 N.W.2d at 320 (emphasis supplied). Persons with a developmental disability may also have difficulty exercising control over their actions.

In *In re Interest of J.R.*, we stated that the focus in determining whether a person is dangerous must be on the person's condition at the time of the commitment hearing and that the actions and statements of the person prior to the commitment hearing are probative of the person's present mental condition. We did not decide whether the "recent act" requirement of the MHCA was necessary for the subject in *In re Interest of J.R.* to be adjudged a dangerous sex offender, but we concluded that the evidence was sufficient to prove that he remained a danger.

We addressed the "recent act" argument in *In re Interest of O.S., supra*, in which we noted that the SOCA and the MHCA both aim to confine and provide treatment to mentally ill persons who pose a risk to society. However, those acts focus on individuals with different profiles, providing critical distinctions and differing conditions for commitment.

Under the MHCA, a mentally ill and dangerous person is defined as a person who is mentally ill or substance dependent and whose condition presents "[a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . ." § 71-908(1). The SOCA does not require proof of a recent act of violence or threats. *In re Interest of O.S., supra*. "[I]t satisfies due process by requiring the State to prove that a substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied." *Id.* at 584, 763 N.W.2d at 729.

The DDCCA requires that the State prove by clear and convincing evidence that the subject is a person with a developmental disability, is in need of court-ordered custody and treatment, and poses a threat of harm to others. It does not require a finding of future harm prior to the entry of a court order for custody and treatment. The DDCCA does not violate due process.

C.R. also contends that the DDCCA violates substantive due process because the State is not required to prove a nexus between a person's developmental disability and his prior actions that required involuntary commitment.

"Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' . . . that liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), quoting *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). "[A]n individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context." *Hendricks*, 521 U.S. at 356. "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Id.*, 521 U.S. at 357. The Court has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.*

In *Hendricks*, 521 U.S. at 350, the statutes under attack allowed for involuntary confinement of persons found to have a "'mental abnormality'" or a "'personality disorder'" and likely to engage in "'predatory acts of sexual violence.'" The Court determined that the relevant act's definition of "'mental abnormality'" satisfied substantive due process requirements. *Hendricks*, 521 U.S. at 356.

The act at issue in the case at bar, the DDCCA, concerns individuals with developmental disabilities. The U.S. Supreme Court was asked to determine the constitutionality of Kentucky statutes that provided separate procedures for involuntary civil commitments of those alleged to be mentally ill and those alleged to be mentally retarded. See *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The Court held that a lower standard of proof is permissible in commitments for mental retardation, which it concluded is "easier to diagnose than is mental illness." *Id.*, 509 U.S. at 322. The Kentucky statutes also provided a second prerequisite to commitment: that the person presented a danger or threat of danger to self, family, or others. The Court stated that the finding of danger is "established more easily, as a general rule, in the case of the mentally retarded." *Heller*, 509 U.S. at 323. "Mental retardation is a permanent, relatively static condition, . . . so a determination of dangerousness may be made with some accuracy based on previous behavior." *Id.*, 509 U.S. at 323.

The Court also stated that "because confinement in prison is punitive and hence more onerous than confinement in a mental hospital, . . . the Due Process Clause subjects the former to proof beyond a reasonable doubt, . . . whereas it requires in the latter case only clear and convincing evidence . . . ." *Heller*, 509 U.S. at 325 (citations omitted). The Court noted that a "large majority of States have separate involuntary commitment laws" for individuals who are mentally retarded and those who are mentally ill. *Id.*, 509 U.S. at 327.

Under the DDCCA, the State must prove by clear and convincing evidence that the subject is a person with a developmental disability who is in need of court-ordered custody and treatment and who poses a threat of harm to others. §§ 71-1117 and 71-1124. The DDCCA provides procedures and evidentiary

standards which protect an individual's constitutionally protected liberty interest. It does not violate the subject's due process rights.

CONCLUSION

The DDCCA is constitutional, and the decision of the district court is affirmed.

AFFIRMED.

DAVID DOBROVOLNY, APPELLANT, V. FORD MOTOR COMPANY, APPELLEE.

793 N.W.2d 445

Filed February 4, 2011. No. S-09-1118.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of 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. **Products Liability: Torts: Negligence: Strict Liability: Damages.** The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
3. **Products Liability: Contracts: Damages.** Whether the damage occurs gradually over time, or through an abrupt, accident-like event, a purchaser is confined to recovery in contract if the loss is purely economic.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Brown County, MARK D. KOZISEK, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas J. Walsh, Jr., of Walsh Law, P.C., for appellant.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Ford Motor Company (Ford) filed a petition for further review in response to the decision of the Nebraska Court of Appeals. The Court of Appeals reversed the decision of the Brown County District Court granting Ford's motion to dismiss. We granted Ford's petition for further review and reverse the decision of the Court of Appeals.

FACTS

David Dobrovolny purchased his 2005 Ford F-350 pickup truck on February 28, 2005. The truck caught fire in Dobrovolny's driveway on April 16, 2006. No one was injured, and no property other than the truck was damaged, but the truck was completely destroyed. Dobrovolny did not file suit until May 20, 2009. Dobrovolny alleged negligence, breach of the warranty of merchantability, and strict liability on the part of Ford. Dobrovolny sought to recover the cost of the truck. Ford filed a motion to dismiss, which the district court granted.

The district court found that *National Crane Corp. v. Ohio Steel Tube Co.*[1] prohibited Dobrovolny from recovering on the negligence and strict liability claims, because Dobrovolny did not allege any damage other than that to the truck. Under *National Crane Corp.*, the economic loss doctrine provides that a plaintiff cannot recover under strict liability if the only damages claimed are for "'"inadequate value, costs of repair and replacement . . . or consequent loss of profits—without any claim of personal injury or damage to other property . . . ."'"[2] The district court also found that Neb. U.C.C. § 2-725 (Reissue 2001) provides that any breach of contract claim must be commenced within 4 years after the cause of action accrues, which would be at the time of purchase. Dobrovolny would have had to pursue a breach of contract claim prior to February 28, 2009.

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[1] *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

[2] *Id.* at 786, 332 N.W.2d at 42.

Dobrovolny appealed, and the Court of Appeals reversed the decision of the district court.[3] The Court of Appeals distinguished Dobrovolny's case from that in *National Crane Corp.* and *Hilt Truck Line v. Pullman, Inc.*[4] Citing *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*,[5] the Court of Appeals determined that the failure and the "sudden, violent event"[6] could be one and the same and that Dobrovolny had presented enough evidence of a sudden, violent event to overcome the motion to dismiss. Ford petitioned for further review, alleging that the Court of Appeals had ignored standing Nebraska law. We granted Ford's petition and now reverse the decision of the Court of Appeals.

ASSIGNMENT OF ERROR

Ford assigns that the Court of Appeals erred when it held that the economic loss doctrine does not apply where a product self-destructs without causing damage to persons or other property.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's grant of 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.[7]

ANALYSIS

The sole issue in this case is whether the economic loss doctrine applies when a product self-destructs without causing damage to persons or other property. In determining that the doctrine did not apply, the Court of Appeals distinguished

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[3] See *Dobrovolny v. Ford Motor Co.*, 18 Neb. App. 483, 785 N.W.2d 858 (2010).

[4] *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 382 N.W.2d 310 (1986).

[5] *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479 (8th Cir. 2002).

[6] *Dobrovolny, supra* note 3, 18 Neb. App. at 487, 785 N.W.2d at 858.

[7] *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010).

National Crane Corp. and *Hilt Truck Line* and applied the reasoning in *Arabian Agri. Servs. Co.*[8]

In *National Crane Corp.*, the plaintiff purchased steel tubing from the defendant for use in the tilt cylinder mechanism of 1,232 cranes. The steel tubing eventually failed, and the plaintiff had to test and replace all potentially dangerous cylinders. The plaintiff filed suit to recover the economic losses associated with testing and replacing the steel tubing. We noted that "the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer under a claim of strict liability."[9] We went on to state:

> A majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product. . . . In essence, this court has reached the same result.[10]

[2] In *National Crane Corp.*, we determined that the only damages the plaintiff sought to recover were those incurred by replacing the defective product. We held that "the purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product."[11]

Hilt Truck Line presented a similar issue. In that case, the plaintiff contracted with the defendant for the construction and purchase of 30 trailers. After the trailers were put into service, problems with the side posts were noted and the trailers had to be repaired. The plaintiff sued to recover those costs, but its

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[8] *Arabian Agri. Servs. Co., supra* note 5.

[9] *National Crane Corp., supra* note 1, 213 Neb. at 787, 332 N.W.2d at 43.

[10] *Id.* at 789, 332 N.W.2d at 42.

[11] *Id.* at 790, 332 N.W.2d at 44.

case was deemed barred by the economic loss doctrine.[12] We stated that "in order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself."[13] Because the record showed no evidence of a sudden, violent event, the plaintiff could not recover in strict liability.

In the present case, the Court of Appeals distinguished Dobrovolny's claim from *National Crane Corp.* and *Hilt Truck Line* by finding that the fire which destroyed his truck was a sudden, violent event. Ford argued that a sudden, violent event must cause the failure; the failure itself cannot be the sudden, violent event. The Court of Appeals rejected that argument, relying on the reasoning in *Arabian Agri. Servs. Co*. In that case, the defendant built grain silos for the plaintiff. The silos collapsed, but no other property or persons were harmed. The plaintiff sued for damages in the federal district court for Nebraska under a variety of theories, including that of strict liability.

The defendant in *Arabian Agri. Servs. Co.* contended that under Nebraska law, a sudden, violent event must cause the failure, and that the failure itself cannot be considered the sudden, violent event. The Eighth Circuit rejected that argument, quoting from our opinion in *National Crane Corp.*:

> According to the Nebraska Supreme Court, it has, in essence, followed the "majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself [and] have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product." . . . Here, [the] damages were not the result of a defect that merely reduced the value of the silos. Instead, the collapse of the silos could certainly be characterized as a

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[12] See *Hilt Truck Line, supra* note 4.

[13] *Id*. at 67, 382 N.W.2d at 312.

> "sudden, violent event" that inflicted "physical harm to the product."[14]

The Court of Appeals accepted the reasoning in *Arabian Agri. Servs. Co*. and found that Dobrovolny's situation closely mirrored the collapse of the silos. Assuming that the allegations in Dobrovolny's complaint were true, his truck spontaneously caught fire and was completely destroyed. The Court of Appeals found that the spontaneous destruction could be considered a sudden, violent act and that Dobrovolny could recover under a theory of strict liability.

Ford, however, argues that the Eighth Circuit and the Court of Appeals were in error. Ford points out that we relied heavily on the Restatement (Second) of Torts in *National Crane Corp.*, and in its petition for further review, Ford quotes the Restatement (Third) of Torts:

> A strong majority of courts have taken the position that the key to whether products liability law or commercial law principles should govern depends on the nature of the loss suffered by the plaintiff. If the plaintiff has suffered loss because the defective product simply malfunctioned or self-destructed, the loss is deemed economic loss within the purview of the Uniform Commercial Code . . . .[15]

Ford also points to *East River S.S. Corp. v. Transamerica Delaval*[16] as a leading case addressing the line between contract and tort law as it concerns products liability. In *East River S.S. Corp.*, the U.S. Supreme Court applied products liability to a case in admiralty. It portrayed the problem as whether "a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation."[17] The Supreme Court characterized the majority of courts as holding that strict liability cannot be imposed for damage to the product alone, while

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[14] *Arabian Agri. Servs. Co., supra* note 5, 309 F.3d at 484.

[15] Restatement (Third) of Torts: Products Liability § 21, Reporter's Note comment *d*. (1998).

[16] *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

[17] *Id*., 476 U.S. at 866.

the minority imposed liability.[18] The Supreme Court went on to state, "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."[19]

The Wyoming Supreme Court, following the decision in *East River S.S. Corp.*, expanded upon that reasoning:

> This rule is founded on solid policy justifications. The concern of tort law in the area of products liability has focused on the need to protect the purchaser or consumer, who often is not in a position to withstand the financial impact if he, or his property, is damaged by a defective product. The social need to spread the resulting, and often catastrophic, losses across a spectrum of consumers thus increasing the cost of the product is, however, substantially lessened when the injury is only to the product itself. Furthermore, this kind of loss relates essentially to the purchaser's benefit of the bargain which has been made between himself and the seller. The authorities recognize that the law of contracts is far better suited to deal with the dissatisfaction on the part of a purchaser under such circumstances.[20]

We find this reasoning to be both persuasive and consistent with our prior decisions in *National Crane Corp.* and *Hilt Truck Line*. As other courts have noted, insurance may be purchased to cover damage or destruction of a product should a consumer wish additional protection outside breach of warranty claims.[21]

[3] Furthermore, we find that the usage of the term "sudden, violent event" is unnecessarily confusing. We adopt the rule that disallows recovery in tort when the damages are to the product alone, following both the Restatement (Third) of Torts and the U.S. Supreme Court's decision in *East River S.S. Corp*. As the Supreme Court noted in *East River S.S. Corp.*:

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[18] *East River S.S. Corp., supra* note 16.

[19] *Id.*, 476 U.S. at 871.

[20] *Continental Ins. v. Page Engineering Co.*, 783 P.2d 641, 647 (Wyo. 1989).

[21] See *id.*

> Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain—traditionally the core concern of contract law. . . .
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> . . . .
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> . . . The maintenance of product value and quality is precisely the purpose of express and implied warranties. . . .
>
> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements.[22]

In this case, the only damage done was to Dobrovolny's truck, and therefore, the economic loss doctrine bars recovery under products liability law.

CONCLUSION

We find that the economic loss doctrine prevents recovery under a products liability theory where the damage is solely to the product. We therefore reverse the decision of the Court of Appeals and remand the matter with directions to reinstate the decision of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

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[22] *East River S.S. Corp., supra* note 16, 476 U.S. at 870-73.

CARGILL MEAT SOLUTIONS CORPORATION, APPELLEE, V. COLFAX COUNTY BOARD OF EQUALIZATION, APPELLANT.

798 N.W.2d 823

Filed February 4, 2011. No. S-09-1252.

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. **Statutes.** Statutory interpretation is a question of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
4. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, the Supreme Court gives effect to the purpose and intent of the

Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

5. ____: ____: ____: ____. When possible, an appellate court determines the legislative intent from the language of the statute itself.
6. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.

Appeal from the Tax Equalization and Review Commission. Appeal dismissed.

Edmond E. Talbot III, of Talbot & Truhlsen Law Offices, L.L.P., for appellant.

Edward E. Embree II and Linda A. Terrill, of Neill, Terrill & Embree, for appellee.

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

CONNOLLY, J.

Colfax County Board of Equalization (the Board) appeals a decision of the Tax Equalization and Review Commission (TERC). TERC vacated and reversed the Board's valuation of a meatpacking facility owned by Cargill Meat Solutions Corporation (Cargill) and assigned a lower value to the facility. Unfortunately for the Board, the Legislature's 1997 amendment to the statute governing appeals from TERC created a jurisdictional trap that ensnared the Board. Because the Board did not comply with any statute which would confer jurisdiction upon this court, we conclude that we do not have jurisdiction over this appeal. The appeal is dismissed.

BACKGROUND

Because we ultimately decide this appeal on a jurisdictional issue, a lengthy recitation of the facts is unnecessary. We provide only a brief overview.

Cargill owns a facility that it uses to slaughter cattle and pack meat. Colfax County (the County) had an appraisal conducted to value the property as of January 1, 2000. Using a cost approach, the appraiser valued the property at $21,300,700. The County did not have a full appraisal done after the 2000 appraisal. Instead, the County just updated the 2000 appraisal.

To do this, it calculated the value of any improvements made to the property and simply added that number to the value of the property from the previous year. This approach did not account for any depreciation on the improvements from year to year.

The County repeated this process every year from 2001 to 2008. The value that the County arrived at for the year 2008 was $26,191,375. Cargill protested this value. The Board, after considering the protest, recommended that no change be made in the valuation. Cargill then appealed to TERC.

TERC ultimately vacated and reversed the Board's determination of value. TERC rejected the Board's valuation because there was "clear and convincing evidence that the . . . Board's determination of actual value [was] based on a use of the cost approach that did not consistently apply a method for determining either physical or functional depreciation." According to TERC, a value reached using such an approach was "unreasonable or arbitrary."

TERC also considered the methodologies used by Cargill's appraiser, who used both a cost approach and a sales comparison approach. TERC concluded that Cargill's appraisal based on the sales comparison approach was "not persuasive." It determined that the appraiser had not made adjustments based upon the use of the property, the location of the property, and the physical characteristics of the property other than refrigeration. But while Cargill's cost approach appraisal was less detailed than the Board's, TERC found that it still met professional standards. TERC ultimately concluded that the value of the land and the improvements together was $14,809,190.

After TERC vacated and reversed the Board's valuation, the Board appealed. The Board filed a "Petition for Judicial Review and Notice of Appeal" in the Nebraska Court of Appeals. The Court of Appeals then issued a summons to be served upon Cargill. The Court of Appeals instructed the Board to "serve the summons on the respondent and file a return of service directly with our office." But instead of serving the summons upon Cargill, the Board sent the summons to Cargill's attorney. We then moved the case to our docket under our statutory

authority to regulate the caseloads of the appellate courts of this state.[1]

Cargill moved to dismiss under Neb. Ct. R. App. P. § 2-107(B)(1) (rev. 2008). Cargill argued that the Board had not complied with Neb. Rev. Stat. § 77-5019(2)(a) (Reissue 2009). This statute provides the procedure for commencing a review of TERC decisions in the Court of Appeals. Cargill argues that because the Board did not comply with this statute, we do not have jurisdiction over the case.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] Statutory interpretation is also a question of law.[3]

ANALYSIS

[3] Before reaching the legal issues presented for review, we must determine whether we have jurisdiction.[4] That determination requires us to interpret § 77-5019(2)(a).

[4-6] In discerning the meaning of a statute, we give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[5] When possible, we determine the legislative intent from the language of the statute itself.[6] And we will not read into a statute a meaning that is not there.[7]

The statute governing appeals from TERC to the Court of Appeals, § 77-5019(2)(a), in relevant part, provides:

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

[2] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

[3] See, *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009); *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

[4] See, *Yos-Chiguil, supra* note 2; *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572, 772 N.W.2d 564 (2009).

[5] See, *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010); *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

[6] See *In re Adoption of Kailynn D., supra* note 5.

[7] See *id.*

> Proceedings for review shall be instituted by filing a petition and the appropriate docket fees in the Court of Appeals within thirty days after the date on which a final appealable order is entered by the commission. All parties of record shall be made parties to the proceedings for review. . . . Summons shall be served on all parties within thirty days after the filing of the petition in the manner provided for service of a summons in section 25-510.02.

Neb. Rev. Stat. § 25-510.02 (Reissue 2008) provides the manner for serving the state or a political subdivision. Obviously, Cargill, a private corporation, is not an entity covered by § 25-510.02. Cargill cannot possibly be served in accordance with § 77-5019(2)(a), so it cannot apply.

In an attempt to escape this procedural maze, the Board argues that the applicable rule is Neb. Ct. R. App. P. § 2-101(D) (rev. 2010), which is based on Neb. Rev. Stat. § 25-1937 (Reissue 2008). Section 2-101(D) states: "In an appeal from an order of [a] tribunal from which an appeal can be taken directly to this court, the procedure shall be that provided for in appeals from the district court, except as otherwise provided by statute." Because § 77-5019(2)(a) appears to provide the means for appeal only by parties other than the State or a political subdivision, this rule could conceivably apply. We thus consider the procedure for appeals to be taken from the district court, which is found at Neb. Rev. Stat. § 25-1912 (Reissue 2008).

To perfect an appeal under § 25-1912, a party must take two steps. First, the party wishing to appeal must file a notice of appeal with the district court clerk of the court where the judgment was rendered. Second, the party must deposit a docket fee with the district court clerk.

Although the Board urges us in this direction, it did not comply with the rule. The Board filed its notice of appeal in the Court of Appeals; it did not file its notice with TERC, as would be the procedure analogous to an appeal from district court. Thus, the Board's appeal was not properly perfected under § 2-101(D).

Because the Board failed to comply with any statute that would grant us jurisdiction, we conclude that we do not have jurisdiction.

Summing up, one thing has become abundantly clear—the Legislature has inadvertently created a procedural minefield. Section 77-5019(2)(a) does not make sense. The statute states "[s]ummons shall be served *on all parties* . . . in the manner provided for service of a summons in section 25-510.02." As mentioned, § 25-510.02 governs service of process on a state or political subdivision. But not all parties to a TERC hearing or a subsequent appeal are political subdivisions. It defies the language of § 25-510.02 to require a county board of equalization to serve a private party, such as Cargill, as if it were a political subdivision. In effect, the current version of § 77-5019(2)(a) leads to two different means for perfecting an appeal based upon the appellant's status. We can think of no sensible reason for doing this.

As Cargill points out in its brief, the previous version of § 77-5019(2)(a) required that summons be served "in the manner provided for service of a summons in a civil action."[8] This language was workable. It provided the flexibility to allow a corporation to be served as a corporation,[9] an individual to be served as an individual,[10] and a political subdivision to be served as a political subdivision.[11] Stating the obvious, the Legislature needs to correct this procedural trap.

CONCLUSION

Because the Board did not comply with any statute which would confer jurisdiction upon this court, we conclude that we lack jurisdiction. Accordingly, we dismiss this appeal.

APPEAL DISMISSED.

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[8] § 77-5019(2)(a) (Reissue 1996).

[9] Neb. Rev. Stat. § 25-509.01 (Reissue 2008).

[10] Neb. Rev. Stat. § 25-508.01 (Reissue 2008).

[11] § 25-510.02.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. CHAVEZ, APPELLANT.

793 N.W.2d 347

Filed February 4, 2011. No. S-10-270.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Rules of Evidence: 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. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
7. **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. But evidence of other crimes which is relevant for a purpose other than to show the actor's propensity is admissible under rule 404(2).
8. **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 its relevance does not depend upon its tendency to show propensity.
9. **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.

10. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury 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 trial was surely unattributable to the error.
11. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Richard L. DeForge, Deputy Scotts Bluff County Public Defender, for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

John J. Chavez (Chavez) appeals his conviction for intentional child abuse resulting in the death of his daughter. He claims that the district court for Scotts Bluff County erred when it allowed evidence of prior injuries to the victim into evidence and when it overruled his motion for new trial. He also claims that there was not sufficient evidence to support his conviction. Because we determine there was no reversible error, we affirm.

II. STATEMENT OF FACTS

Aubrey Chavez (Aubrey), born December 24, 2008, was the daughter of Chavez and Tammy Rood. Aubrey was born prematurely; she was not released from the hospital until January 14, 2009, but she was healthy and doing well when she was released. On the morning of April 20, Rood discovered that Aubrey was not breathing. Rood attempted to revive Aubrey and summoned an ambulance. Aubrey was taken to a hospital, where she was pronounced dead.

Later in the day on April 20, 2009, both Chavez and Rood were interviewed separately by Scottsbluff police detective

Robert Rader. Chavez initially told Rader that he had not done anything to harm Aubrey. Later, Chavez admitted that he had shaken Aubrey once and possibly twice in order to calm her down because she was crying, but stated that the shaking was gentle and that he had no intention of harming her and did not think the shaking had caused her any harm.

Chavez was arrested and charged with knowing and intentional child abuse resulting in death, a Class IB felony under Neb. Rev. Stat. § 28-707(6) (Reissue 2008). In the same information, Chavez was charged with possession of methamphetamine, possession of drug paraphernalia, and possession of marijuana, 1 ounce or less. The district court for Scotts Bluff County sustained Chavez' motion to sever the possession charges from the child abuse charge. Pursuant to a plea agreement, Chavez pled no contest to possession of methamphetamine in exchange for the State's dismissal of the other two possession charges and the State's agreement not to use the plea or evidence of drug possession for impeachment purposes in the child abuse trial.

Prior to trial on the child abuse charge, the State filed a motion and notice of its intent to present evidence pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), which relates generally to the admission of evidence of other crimes, wrongs, or acts. The State noted its intent to present evidence of injuries inflicted upon Aubrey prior to the date of her death. The State asserted that it would offer such evidence for the purpose of proving intent or the absence of mistake or accident. Following a hearing, the district court concluded that "[e]vidence that Aubrey was a battered child would be helpful to the jurors on the issues of intent and the absence of mistake or accident" and that the testimony of Drs. Peter Schilke and Timo Quickert would be relevant to such issues. The court further concluded that evidence that Chavez had caused a bruise to Aubrey's forehead in March 2009 was more probative than unfairly prejudicial or confusing. In the same order, the court sustained Chavez' motion in limine regarding evidence of his prior convictions or prior criminal investigations but overruled the portion of Chavez' motion in limine which sought to exclude evidence of Aubrey's autopsy

photographs and evidence of injuries she suffered prior to April 20, 2009.

Schilke performed an autopsy on Aubrey on April 21, 2009, and testified at trial. Various objections to the testimony were overruled. Schilke opined to a reasonable degree of medical certainty that the cause of Aubrey's death was a blunt force head injury consistent with shaking and impact occurring within a couple of hours of her being found not breathing. The autopsy also revealed numerous remote injuries, including rib fractures; a bruise to the scalp; hemorrhaging of the brain, optic nerve, and retina; a break of the left arm; and other remote injuries to the brain. Schilke opined that the remote injuries were consistent with inflicted injuries extending over a number of weeks.

Regarding the specifics of the autopsy, Schilke noted that, other than the obvious broken arm, there were not any other obvious external injuries to Aubrey's body. Aubrey's chest examination revealed 11 old rib fractures. Schilke stated that ribs three through nine on the right side were fractured. The old fractures were identifiable because fractured bone, in repairing itself, leaves a callus, while normal bone is smooth. There was also recent hemorrhaging in the chest wall on the right side near ribs four through seven and on the left side near rib seven. Hemorrhaging was present in the back near the spine.

Schilke testified that he observed a bruise on Aubrey's forehead. The bruise appeared to be recent. Schilke stated that Aubrey showed acute, or recent, subdural hemorrhaging on the top of her head on both the right and left sides of her brain. She also had acute as well as older hemorrhages in the subarachnoid layer covering her brain. In the brain itself, she displayed both acute and older injuries. Aubrey's eyes showed acute hemorrhaging of the retina and optic nerve.

Schilke explained that a shearing injury results from a type of force applied to the brain, as in shaking a baby, which tears the connective tissue in the brain and that other signs of this force are subdural and subarachnoid hemorrhaging. Schilke stated to a reasonable degree of medical certainty that Aubrey's cause of death was "blunt force head injuries." Schilke also opined to a reasonable degree of medical certainty that Aubrey

did not have skull fractures and that the injuries to her brain were caused by a sudden change in force which caused tearing in the brain. Aubrey's acute injuries were consistent with the timeframe of 6 to 8:45 a.m. on April 20, 2009, when she was found not breathing. The trial court instructed the jury as to the limited purpose of the evidence regarding Aubrey's prior injuries.

Quickert, a radiologist, reviewed x rays and CT scans taken of Aubrey and testified at trial. Quickert stated that he found evidence of rib fractures in differing stages of healing that were weeks to months old, additional rib fractures that were hours to days old, a right wrist fracture that was weeks to months old, a left thigh fracture, and shearing and other trauma injuries to the brain that were both recent and more remote in time. Quickert opined to a reasonable degree of medical certainty that the injuries to Aubrey's brain were consistent with "shaken baby syndrome" or a traumatic shearing injury and that her more remote injuries were consistent with recurring trauma and "battered child syndrome."

At trial, the court overruled Chavez' objections to the receipt of evidence regarding injuries inflicted on Aubrey prior to April 20, 2009, and objections related to the form and content of the findings and opinions of Schilke and Quickert. With regard to those doctors' testimony, the court gave limiting instructions to the effect that evidence of injuries to Aubrey prior to the date of her death was received for the limited purpose of helping the jury decide issues of intent and absence of mistake or accident and that the jury must consider the evidence for only those limited purposes and for no other. The court overruled Chavez' objections to certain of Schilke's opinions on the basis that the opinions were not stated with a sufficient degree of certainty or specificity to support an expert opinion.

The State presented testimony of other witnesses, including Rader, who testified regarding his investigation of Aubrey's death. In connection with Rader's testimony, the court admitted into evidence and played for the jury a video recording of Rader's interview with Chavez on April 20, 2009, in which Chavez admitted shaking Aubrey once or twice but asserted that the shaking was gentle.

Rood testified that Chavez was the father of two of her children—Aubrey and an older brother. Rood's oldest son had a different father. At the time of Aubrey's death, Rood and Chavez lived together with the three children. Aubrey was born prematurely on December 24, 2008, and stayed in the hospital for 3 weeks after her birth. Rood stayed at home to care for Aubrey at first but returned to work on February 10, 2009. Aubrey was generally cared for by Rood, Chavez, or Rood's mother.

Over Chavez' objection, Rood testified that one time prior to April 20, 2009, she returned home from working overnight and noticed a bruise on Aubrey's forehead and that when Rood asked Chavez about the bruise, he told her that Aubrey had fallen off a bed. Rood testified that at that time, Aubrey was at a stage of development where she was not able to roll over. The court gave a limiting instruction regarding use of evidence regarding this prior injury in which it instructed the jury that this evidence should be considered only for intent and absence of mistake or accident.

With respect to the events surrounding Aubrey's death, the testimony indicates that Rood and the family went to bed at about 11 p.m. on April 19, 2009. Aubrey slept well at first, but beginning around 1 a.m. on April 20, she woke up from time to time crying and upset. Rood attempted to keep Aubrey settled until approximately 5:30 a.m., when Rood started getting ready for work. While Rood was getting ready, Chavez was awake and Rood heard Chavez tell Aubrey, who was still crying, to "shut up." Rood noticed Chavez had put Aubrey into a chair Rood referred to as a "bouncer." When Rood left for work at approximately 5:45 a.m., Chavez was in bed with his head covered, wearing earphones and listening to an audio player. Aubrey was sitting in the bouncer and was calm and awake and looking at Rood.

Rood returned home from work at about 7:30 a.m. Chavez was getting ready for work. Aubrey was still in the bouncer and looked like she was asleep. Rood prepared breakfast for the two older children. Chavez left, shortly after Rood returned home, in order to go to work and to take Aubrey's oldest brother to school. Her other brother finished breakfast, and Rood and he went to a bedroom to watch cartoons while Aubrey was still

in the bouncer, appearing to be asleep. About a half hour later, Rood checked on Aubrey and realized that she was pale, which was a change from earlier. Rood pulled Aubrey out of the bouncer and noticed that she was limp and appeared "lifeless." Rood called the 911 emergency dispatch service and attempted to revive Aubrey. Rood denied that she had ever shaken Aubrey or done anything to injure her.

After the State rested its case, Chavez moved to dismiss, arguing that there was insufficient evidence that he intentionally abused Aubrey or that his actions caused her death. The court overruled the motion, stating that there was circumstantial evidence from which the jury could make a finding of guilt.

Chavez presented a defense that included testimony by his father, mother, and brother generally to the effect that Chavez was a loving and caring father. The theory of Chavez' defense was an absence of intent or that Aubrey's death was caused by accident or mistake. After he rested his case, Chavez renewed his motion to dismiss, and the court again overruled the motion.

The jury found Chavez guilty of intentional child abuse resulting in death, and the court entered judgment based on the jury's verdict. The court denied Chavez' motion for new trial, in which he asserted, inter alia, that the verdict was not supported by sufficient evidence and that the court erroneously admitted evidence of injuries Aubrey sustained prior to the date of her death. The court sentenced Chavez to imprisonment for 40 years to life on the conviction for intentional child abuse resulting in death and ordered that his sentence of imprisonment for 12 to 24 months for possession of methamphetamine be served concurrently with the child abuse sentence.

Chavez appeals his conviction.

III. ASSIGNMENTS OF ERROR

Chavez claims, summarized and restated, that the district court erred when it (1) admitted evidence of injuries Aubrey sustained prior to the date of her death and (2) overruled his motion for new trial, in which he had claimed that the evidence of Aubrey's injuries prior to her death had been wrongly admitted and that there was not sufficient evidence to support his conviction for intentional child abuse resulting in death.

IV. STANDARDS OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *Id.*

[3] 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, Neb. Rev. Stat. § 27-403 (Reissue 2008), and rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[5,6] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.*

V. ANALYSIS

1. Evidence of Prior Injuries

(a) Admission of Evidence of Prior Injuries Revealed Upon Autopsy Was Not Error

Chavez claims that the evidence related to prior injuries as seen in the autopsy was erroneously admitted. The district court allowed the evidence for the limited purpose of showing

intent and absence of mistake or accident under rule 404(2). We find no error in this ruling.

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.

[7-9] 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. But evidence of other crimes which is relevant for a purpose other than to show the actor's propensity is admissible under rule 404(2). See, *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity. *State v. Aguilar, supra*; *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

The portion of the evidence revealed upon autopsy to which Chavez refers on appeal concerns injuries to Aubrey prior to the incident surrounding her death. This evidence is not an integral part of the crime charged and, because it is extrinsic to the crime, is covered under rule 404(2). See *State v. McPherson, supra*.

This case involves a conviction for intentional child abuse resulting in death. The evidence in the case recited above

showed that Aubrey's caregivers included Chavez, Rood, and Rood's mother. The evidence showed extensive remote injuries to Aubrey which were characterized in the record as indicative of battered child syndrome.

In *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), the U.S. Supreme Court concluded that evidence that an infant victim suffered from battered child syndrome was admissible as relevant to establish intent or absence of accident. The Court stated:

> The demonstration of battered child syndrome "simply indicates that a child found with [serious, repeated injuries] has not suffered those injuries by accidental means." . . . Thus, evidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also tends to establish that the "other," whoever it may be, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries. . . . [Where the defendant is charged with intentional child abuse resulting in death, the prosecutor is] required to prove that [the victim's] death was caused by the defendant's intentional act. Proof of [the victim's] battered child status helped to do just that; although not linked by any direct evidence to [the defendant], the evidence [in *Estelle v. McGuire*] demonstrated that [the victim's] death was the result of an intentional act by *someone*, and not an accident. . . . We conclude that the evidence of prior injuries presented at [the defendant's] trial, whether it was directly linked to [the defendant] or not, was probative on the question of the intent with which the person who caused the injuries acted.

Estelle v. McGuire, 502 U.S. at 68-69 (citations omitted).

The district court admitted the evidence of Aubrey's prior injuries on the basis of *Estelle v. McGuire* and other authorities and at trial gave a limiting instruction regarding the testimony

pertaining to Aubrey's remote injuries and the battered child syndrome testimony.

Chavez was charged with an intentional crime. The evidence was admitted under the framework of rule 404(2); it was not excludable propensity evidence, but, instead, went to intent and absence of mistake or accident. We have considered the admission of this evidence under our abuse of discretion standard of review, *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010), and by reference to *Estelle v. McGuire, supra*. We determine that the district court did not abuse its discretion when it admitted for limited purposes evidence of Aubrey's prior injuries consistent with battered child syndrome.

(b) Admission of Evidence Regarding March 2009 Forehead Injury Was Harmless

Chavez specifically claims error with respect to the admission of evidence that Aubrey's forehead was injured in March 2009 while he was the sole caregiver. He argues that evidence of this incident was likely to be seen by the jury for the improper purpose of propensity evidence and thus cause the jury to see him as a bad person or that he acted in conformity with prior bad conduct and intentionally caused the death of Aubrey on April 20. Assuming without deciding that evidence of the March 2009 forehead injury was erroneously admitted, we conclude that its admission was harmless beyond a reasonable doubt. See *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008), *cert. denied* 555 U.S. 1109, 129 S. Ct. 914, 173 L. Ed. 2d 127 (2009).

[10] In a harmless error review, an appellate court looks at the evidence upon which the jury 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 trial was surely unattributable to the error. *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). We conclude that the jury would have reached the same verdict regardless of whether the

evidence of the injury to Aubrey's forehead in March 2009 was received into evidence.

The evidence described earlier in this opinion established that Aubrey's death was the result of shaken baby syndrome and that Chavez, as sole caregiver, had shaken her during the relevant timeframe. The evidence showing battered child syndrome tended to negate Chavez' defense of mistake or accident or lack of intent, to the extent that it showed that Aubrey's death "was the result of an intentional act by *someone*, and not an accident." See *Estelle v. McGuire,* 502 U.S. 62, 69, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Even if the evidence of the March 2009 injury to Aubrey by Chavez had not been admitted, the jury would have reached the same verdict of guilty. We determine that the admission of evidence regarding the March 2009 injury, if error, was harmless.

2. Denial of Motion for New Trial

In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

(a) The District Court Did Not Err When It Denied Chavez' Motion for New Trial Based on Admission of Prior Injuries

Chavez claims that the district court erred when it denied his motion for new trial based on his argument that admission of evidence of Aubrey's prior injuries was error. We reject this assignment of error.

We have considered above the admission of evidence related to injuries suffered by Aubrey prior to the incident of the crime charged. We have concluded that the district court did not abuse its discretion when it admitted testimony showing Aubrey was a victim of battered child syndrome and that if it erred when it admitted evidence that Chavez injured Aubrey's forehead in March 2009, such admission was harmless error. Thus, we conclude that the district court did not abuse its discretion when it denied Chavez' motion for new trial based on purported erroneous admission of prior injury evidence.

(b) The District Court Did Not Err When It Denied Chavez' Motion for New Trial Based on Insufficient Evidence

Chavez claims that the district court erred when it denied his motion for new trial based on a claim of insufficient evidence. We reject this assignment of 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. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.*

Chavez was convicted of intentional child abuse resulting in death, a Class IB felony under § 28-707(6). Under § 28-707(1), a person is guilty of child abuse "if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . [p]laced in a situation that endangers his or her life or physical or mental health [or to be d]eprived of necessary . . . care." Section 28-707(6) provides that child abuse is a Class IB felony "if the offense is committed knowingly and intentionally and results in the death of such child." In this case, the State charged in the information that Chavez committed the offense knowingly and intentionally and that the offense resulted in Aubrey's death.

Through the testimony of Rood, the State presented evidence that Chavez was the sole caregiver of Aubrey at the relevant time. Chavez told Rader he shook Aubrey. Through the testimony of medical experts, there was evidence that Aubrey's cause of death was shaken baby syndrome. Other properly admitted evidence tended to negate Chavez' defense of lack of intent or, alternatively, mistake or accident.

[11] We have stated that the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. Archie*,

273 Neb. 612, 733 N.W.2d 513 (2007). If the jury believed the testimony of Rood, Rader, and the doctors, such evidence supported Chavez' conviction. Although there was also evidence which might have called each witness' credibility into question, that assessment was for the jury. Viewing the evidence in the light most favorable to the State, it is clear that the jury believed the testimony of the foregoing witnesses and did not believe Chavez' testimony with regard to the incident and to matters where the witnesses' testimony conflicted with that of Chavez. When reviewing a criminal conviction for sufficiency of the evidence, we, as an appellate court, do not pass on the credibility of witnesses. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Considering the testimony of Rood, Rader, and the doctors, the jury, as the trier of fact, could reasonably have found the essential elements of knowing or intentional child abuse resulting in death beyond a reasonable doubt based on the evidence.

We conclude that the evidence was sufficient to support Chavez' conviction for intentional child abuse resulting in death. Therefore, the district court did not abuse its discretion when it denied Chavez' motion for new trial on this basis.

VI. CONCLUSION

We conclude that testimony of Aubrey's injuries prior to the crime charged, which injuries showed battered child syndrome, was properly admitted and that admission of evidence regarding the March 2009 forehead injury, if error, was harmless. We conclude the district court did not abuse its discretion when it denied Chavez' motion for new trial based on evidentiary rulings and purportedly insufficient evidence. The evidence was sufficient to support Chavez' conviction for intentional child abuse resulting in death. We therefore affirm Chavez' conviction.

AFFIRMED.

TRAVELERS INDEMNITY COMPANY, APPELLEE, V. GRIDIRON MANAGEMENT GROUP, APPELLANT.

794 N.W.2d 143

Filed February 11, 2011. No. S-10-068.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
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. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
6. **Statutes: Intent.** When construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
7. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
8. **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.
9. **Administrative Law: Due Process: Notice.** Generally, under due process principles, the notice of an administrative agency hearing should inform a party of the issues involved in order to prevent surprise at the hearing and allow that party an opportunity to prepare.

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

Michael J. Mullen, of Burns Law Firm, for appellant.

CeCelia C. Ibson, of Ibson Law Firm, for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This case involves the proper notice procedure to be used by the Nebraska Department of Insurance (Department) when setting a disputed experience rating to be applied to workers' compensation insurance. Following several lower level administrative proceedings, the Department set a hearing to determine what experience rating the football operation Gridiron Management Group (Gridiron), appellant, should be assigned in connection with the workers' compensation insurance it was to receive from Travelers Indemnity Company (Travelers), appellee. The hearing was sought by Gridiron. Although its interest had been represented below, Travelers was not formally notified of the Department hearing, the outcome of which was contained in a January 21, 2009, decision and was favorable to Gridiron and unfavorable to Travelers.

Travelers appealed the Department's decision to the district court for Lancaster County under Neb. Rev. Stat. § 84-917 (Cum. Supp. 2010) of the Administrative Procedure Act. Travelers claimed, inter alia, that because of lack of notice, the Department's decision should be set aside and the matter remanded to the Department with instructions to give proper statutory notice under Neb. Rev. Stat. § 44-7532 (Reissue 2004) to all interested parties, including Travelers, and to thereafter conduct a new hearing. The district court agreed with Travelers' assertion that it should have been notified. The district court set aside the Department's decision and remanded the matter to the Department with directions to hold a new hearing giving Travelers notice and an opportunity to be heard.

Gridiron appeals and claims that because Travelers had learned through informal communication of Gridiron's appeal, statutory notice was not required. We reject Gridiron's argument and agree with the district court's decision that proper notice was lacking. Accordingly, we affirm.

STATEMENT OF FACTS

Gridiron acquired the football operation assets of Omaha Beef, LLC, on January 1, 2008. In early 2008, Gridiron applied for workers' compensation insurance from Travelers. Gridiron had not previously obtained workers' compensation insurance and, therefore, had not previously been assigned an experience rating. A company's experience rating is used by Travelers to set premiums. In determining an insured's experience rating, Travelers uses the National Council of Compensation Insurance (Council). The Council is a rating organization licensed in, and authorized by, the State of Nebraska to make and file rules, rating values, classifications, and rating plans for workers' compensation insurance.

After applying for coverage, Gridiron was assigned an experience rating by the Council. In assigning Gridiron an experience rating, the Council noted that effective January 1, 2008, Gridiron had acquired the assets and business of Omaha Beef. The Council determined that the two entities were combinable for experience rating purposes and assigned Gridiron the experience rating previously held by Omaha Beef, 2.27, rather than the experience rating given to a new company, 1.0. The higher experience rating translates into higher premiums being paid by Gridiron.

Gridiron appealed the assignment first to the Council's appeal panel. Gridiron disputed the experience rating assignment for a variety of reasons, all to the effect that Gridiron ran the football operation in a manner that differed from Omaha Beef. After an August 22, 2008, telephone conference, the Council's appeal panel affirmed the decision.

Next, Gridiron appealed the decision of the Council's appeal panel to the Department. On October 30, 2008, at a prehearing conference, the Department ordered that Gridiron's appeal be heard commencing on November 12. Travelers was not a participant at the prehearing conference. The certificate of service of the prehearing conference order setting the hearing shows service on only counsel for Gridiron.

At the hearing on November 12, 2008, Gridiron was the only party to participate. The Council's participation in the hearing was limited to providing background information. At

the hearing, the Department determined that the only issue for determination by the Department was whether Gridiron was combinable with Omaha Beef for workers' compensation experience rating purposes. The Department concluded that Gridiron was not a successor entity to Omaha Beef and that Gridiron should have been assigned an experience modification rating of 1.0, as a new and independent company, rather than the 2.27 experience rating assigned by the Council. The Department's January 21, 2009, findings, conclusions, and 8-page written order were served on only Gridiron.

Travelers learned of the Department's ruling and appealed the Department's decision to the district court for Lancaster County pursuant to § 84-917 of the Administrative Procedure Act. Travelers claimed that under the procedural provisions of § 44-7532, it was entitled to notice of the hearing before the Department, and that it had not received proper notice. Travelers sought, inter alia, to set aside the Department's decision.

The district court held a hearing. At the hearing, Travelers acknowledged that it had learned informally that an appeal to the Department would take place in the future but indicated that it did not receive statutory notice of the appeal. It is undisputed that statutory notice under § 44-7532 was not given by the Department to Travelers. Gridiron took the position that because Travelers had been aware of the existence of Gridiron's appeal, Travelers had chosen not to attend, and that Travelers suffered no prejudice attributable to the lack of formal notice.

On December 17, 2009, the district court filed an order in which it noted that § 44-7532 provides that "notice of the hearing [shall] be given to all interested parties and state the time, place, and purpose of the hearing." (Emphasis in original.) The district court concluded that "[t]here can be no doubt that Travelers is an interested party." The district court further determined that the record showed that Travelers had not received notice of the hearing "as required by statute [§ 44-7532] and that the hearing was conducted without giving [Travelers] an opportunity to participate." Accordingly, the district court set aside the January 21 Department decision and remanded the

matter to the Department with directions to hold a new hearing giving Travelers notice and an opportunity to present evidence and be heard. Gridiron appeals.

For completeness, we note that elsewhere in the district court's order, it dismissed the Department, which had been named as a party to the district court action. No issue is before us on appeal with respect to this ruling.

ASSIGNMENT OF ERROR

Gridiron claims, summarized and restated, that the district court erred when it determined that Travelers was not given adequate notice of the hearing before the Department and thus erred when it set aside the decision of the Department and remanded the matter to the Department for a new hearing giving Travelers statutory notice and an opportunity to be heard.

STANDARDS OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Children's Hospital v. State*, 278 Neb. 187, 768 N.W.2d 442 (2009).

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

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

[4,5] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010).

On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Id.*

ANALYSIS

On appeal to this court, Gridiron challenges the district court's order setting aside the decision of the Department and remanding this matter to the Department with directions to hold a new hearing giving Travelers notice and an opportunity to present evidence and be heard. Gridiron argues that Travelers had adequate notice of the hearing. Gridiron specifically relies on the fact that Travelers knew of the existence of Gridiron's appeal as shown by Travelers' comments before the district court to the effect that it was aware that Gridiron had appealed the Department's order.

In response, Travelers argues that the Department failed to comply with the notice provisions of § 44-7532 and that as a result, Travelers did not participate in the hearing and was denied procedural due process. Accordingly, Travelers claims that the district court did not err when it set aside the Department's order and remanded the matter. We agree with Travelers.

In its order, the district court noted that the dispute concerned the premium to be paid for workers' compensation insurance and that there had been a series of administrative appeals. The case before the district court was an extension of those appeals, and the district court stated that "it is fair to say that Travelers and Gridiron are the only interested parties." The district court concluded that under § 44-7532, Travelers was an interested party to the proceedings before the Department and that the Department erred when it failed to give Travelers statutory notice of the hearing and an opportunity to be heard.

In addressing whether Travelers received sufficient notice, we must consider both the statutory notice of hearing requirements and the constitutional requirements for procedural due process. The statutes quoted below are relevant to our analysis. Neb. Rev. Stat. § 44-7508(5) (Reissue 2004) states: "An insurer may authorize the director to accept rating system filings and prospective loss cost filings made on its behalf by an advisory organization. The insurer shall file additional

information as is necessary to complete its rating systems on file with the director."

Neb. Rev. Stat. § 44-7517 (Reissue 2004) states:

> Within a reasonable time after receiving a written request and after receiving payment of such reasonable charge as it may require, every insurer and advisory organization shall furnish all pertinent information to any insured affected by a rate, premium, or prospective loss cost made by the insurer or advisory organization. Upon written request, every insurer and advisory organization shall provide within this state reasonable means by which the insured aggrieved by the application of the advisory organization's or insurer's rating system may be heard, in person or by an authorized representative, to review the manner in which such rating system has been applied in connection with the insurance afforded the insured. If the insurer or advisory organization fails to act upon such request within thirty days after it is made, the applicant may proceed in the same manner as if the application had been rejected. An insured affected by the action of the insurer or advisory organization on such request may appeal to the director within thirty days after written notice of such action. The director, after a hearing held in accordance with section 44-7532, may affirm the action of the insurer or advisory organization or order remedial action to be undertaken by the insurer or advisory organization.

Neb. Rev. Stat. § 44-7531 (Reissue 2004) states:

> Any insurer, joint underwriting pool, joint reinsurance pool, statistical agent, or advisory organization aggrieved by any order or decision of the director made without a hearing may, within thirty days after notice of the order, make written request to the director for a hearing thereon in accordance with section 44-7532. Pending such hearing and decision, the director may suspend the effective date of his or her action.

Section 44-7532 states in part:

> If a hearing is held at the request of a party other than the director, unless mutually agreed upon by the

> director and all interested parties, notice of hearing shall be provided within thirty days after the director's receipt of a written request for a hearing. Notice of hearing shall be given to all interested parties and shall state the time, place, and purpose of the hearing. Unless mutually agreed upon by the director and all interested parties, the hearing shall be held not less than ten days after notice is served.

[6-8] When construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008). It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *Id.* Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

In reviewing the structure and process established by these statutes taken together, it is clear that the Legislature contemplated that the insurer, its authorized agent, and the insured would all be involved in the process of establishing and, if necessary, challenging an insured's workers' compensation experience rating. The Legislature provided a process for each entity to address or challenge a decision by which it was aggrieved.

The process begins with § 44-7508, which allows the insurer to authorize the Council to determine the appropriate rate for an insured. Section 44-7517 provides that once the rate is set, the Council and the insurer must provide the insured a reasonable way to object to the rate and further provides that if the insured is not satisfied with this result, the insured can appeal to the Department. If the Department fails to hold a hearing

on a disputed matter brought by an insurer (or other entity), § 44-7531 provides for the manner in which an insurer may make a request for a Department hearing to be held in accordance with the notice provisions of § 44-7532 to challenge the decision. Where the Department holds a hearing at the request of a party other than the Department, as was the case in the present action, § 44-7532 requires that "[n]otice of hearing shall be given to all interested parties and shall state the time, place, and purpose of the hearing."

We note that under § 44-7517, an "aggrieved" insured may seek a Department hearing under the procedures set forth in §§ 44-7531 and 44-7532; an "aggrieved" insurer may similarly seek a hearing under § 44-7532. It is clear that the language in § 44-7532 referring to notice to "all interested parties" contemplates notice by the Department to both the insured and the insurer regarding the adversarial proceeding to come. It would not be a sensible reading of the statutes to require notice to only one of the parties, where both parties are active in the proceeding but seek different outcomes.

Based on the process established by the statutes, we conclude that the relevant statutory provisions, when read together, contemplate that the insured and insurer are interested in this process and, as such, are "interested parties" under § 44-7532, entitled to formal notice by the Department of the hearing, including "the time, place and purpose of the hearing." We read § 44-7532 in context and conclude that notice of the Department hearing should be of record and, contrary to Gridiron's suggestion, that casual or informal notice is not anticipated by § 44-7532 and is not sufficient.

[9] With respect to constitutional notice requirements, we have explained that generally, under due process principles, the notice of an administrative agency hearing should inform a party of the issues involved in order to prevent surprise at the hearing and allow that party an opportunity to prepare. See, generally, *Lariat Club v. Nebraska Liquor Control Comm.*, 267 Neb. 179, 673 N.W.2d 29 (2004). See, also, *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d (1970). We read § 44-7532 as contemplating these constitutional notice

requirements as well as an opportunity to the parties to be heard and present evidence. So read, the notice requirements of § 44-7532 are constitutionally satisfactory.

Under § 44-7532, it is the responsibility of the Department to provide all interested parties with formal notice of the time, place, and subject matter to be considered at the hearing, as well as a hearing which provides an opportunity to be heard. Contrary to Gridiron's suggestion, it was not incumbent on Travelers to seek out the details of an upcoming appeal which it may have learned about informally. The prehearing conference order setting the hearing date was not served on Travelers. The district court did not err when it determined that "Travelers did not receive notice as required by statute."

CONCLUSION

The Department failed to give Travelers, an interested party, formal notice of Gridiron's appeal as required by § 44-7532. Accordingly, we affirm the district court's order which vacated the decision of the Department and remanded the matter for a new hearing providing Travelers with notice and an opportunity to present evidence and be heard.

AFFIRMED.

IN RE ESTATE OF DARLEEN F. CRAVEN, DECEASED. COUNTY OF LANCASTER, NEBRASKA, APPELLANT, V. UNION BANK & TRUST COMPANY, TRUSTEE AND PERSONAL REPRESENTATIVE OF THE ESTATE OF DARLEEN F. CRAVEN, APPELLEE.

794 N.W.2d 406

Filed February 11, 2011. No. S-10-393.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Decedents' Estates: Taxation.** Under Neb. Rev. Stat. § 77-2004 (Reissue 2009), clear market value is measured by the fair market value of the property as of the date of the death of the grantor, less the consideration paid for the property.
4. **Real Estate: Taxation: Valuation: Words and Phrases.** For purposes of taxation, the terms "fair market value" and "actual value" mean exactly the same thing.
5. ____: ____: ____: ____. Real property sold in an arm's-length transaction at public auction is sold within the "ordinary course of trade" within the meaning of Neb. Rev. Stat. § 77-112 (Reissue 2009).
6. **Taxation: Valuation: Words and Phrases.** In determining the actual value of property under Neb. Rev. Stat. § 77-112 (Reissue 2009), a county court may consider a professionally accepted mass appraisal method, but is not required to adopt those appraisal values, and is free to weigh other competent evidence.

Appeal from the County Court for Lancaster County: GERALD E. ROUSE, Judge. Affirmed.

Gary E. Lacey, Lancaster County Attorney, and Michael E. Thew for appellant.

Andrew M. Loudon, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

GERRARD, J.

This appeal involves the valuation of a personal residence for inheritance tax purposes. After Darleen F. Craven's death, her personal representative and trustee sold Craven's residence at auction for $113,000 and listed that amount as the value of the property when it petitioned for a determination of inheritance tax. Lancaster County contested the valuation, and after hearing the matter, the county court found that the actual value of the property for inheritance tax purposes was the auction sale price, $113,000.

The issue on appeal is whether the county court committed reversible error when it determined that the decedent's real property should be valued, for inheritance tax purposes, at the auction sale price. Because the county court's judgment is supported by competent evidence, conforms to law, and is not arbitrary, capricious, or unreasonable, we affirm.

BACKGROUND

Craven died on July 17, 2008, leaving assets which included a single-family residence in Lincoln, Lancaster County, Nebraska. After Craven's death, her trustee and personal representative, Union Bank & Trust Company (Union Bank), sold the residence at auction for $113,000 and listed that amount as the value of the home when it petitioned for a determination of inheritance tax. Lancaster County contested the $113,000 valuation, and a hearing was held.

At the hearing, Union Bank vice president and senior trust officer Alice Skultety testified that after Craven's death, Union Bank sought to sell Craven's residence and began the process of determining how to best market the home. Skultety testified that she visited the residence on several occasions and that there was an overwhelming odor of animal feces present. Skultety said that there were feces on the carpet and that dogs had both defecated and urinated in the house. Skultety also noted a lack of cleanliness and a general state of deferred maintenance. Skultety made the decision to remove the stained carpets from the house, but upon doing so, discovered that the underlying floors had absorbed animal urine and were stained. Skultety found that the bathrooms were in a state of disrepair, that a basement wall displayed efflorescence and was cracked and bowed, and that water poured into the basement during heavy rains, soaking into the wallboards. Skultety opined that the condition of the interior of the home was "poor to fair."

Skultety testified that she discussed the prospect of selling the house with the sole residual beneficiary of the estate. Skultety stated that the beneficiary did not want to make repairs to the property and sought to sell it in "as is" condition. After discussing the various benefits and disadvantages of listing or auctioning the property, the decision was made to auction the house. Skultety explained that this decision was reached for several reasons, including the poor condition of the home, the large inventory of homes for sale in Lincoln, the slow real estate market, the expense to make the home attractive enough to list, the risk of additional home inspections that could potentially uncover expensive necessary repairs, the continuing cost

of paying taxes, and the cost of maintenance over the winter. Skultety testified that Union Bank hired an appraiser, who placed a $135,000 value on the property. Skultety noted that the $135,000 appraisal was lowered to $131,000 to reflect other damage discovered after the appraiser's inspection of the property.

Union Bank hired auctioneer Norman Ford to sell the property. Ford testified that he had auctioned over 750 residences in Lincoln, the majority of which were estate sales. Ford stated that he advertised the auction in the Lincoln Journal Star newspaper every week for 5 consecutive weeks before the auction and advertised the auction on his company Web site. Ford stated that he showed the property eight or nine times to prospective buyers. Ford noted that the smell of urine and feces in the house made it "difficult to stay in the house for five to ten minutes at a time." Ford testified to other various defects of the property, which were all consistent with Skultety's testimony regarding the home's deficiencies.

Ford stated that, in his opinion, the auction was well attended, with several bidders actively bidding on the house. Ford noted that the real estate market in Lincoln at the time of the auction was not strong and that he thought the $113,000 final bid for the property was the highest possible price that could have been obtained at the time of the sale.

The county's witnesses included professional appraisers Mickey Tuttle and Thomas Kubert, who were asked by the county to appraise the residence. Tuttle and Kubert testified that because the property had been substantially improved after the auction but before their appraisal, they were unable to assess the condition of the property at the time of Craven's death, so they relied on the condition information contained in the original $135,000 appraisal used by Union Bank. Tuttle and Kubert stated that their appraisal was partially based on comparable home sales in the area and that in their opinions, the fair market value of the property at the time of Craven's death was $140,000.

Tuttle further testified that auction sales of residential properties in Lincoln were not valid indicators of market value, because sellers are not typically motivated, there is some

degree of urgency associated with auction sales, and auctioned properties are not adequately exposed on the open market. Kubert estimated that less than 5 percent of the residential real property sold in Lincoln is sold at auction. Kubert stated that because of this, it was his opinion that homes sold at auction are not sold in the ordinary course of business.

The county also offered the testimony of appraiser Sally Webster, who stated that she did not consider auction sales to be valid indicators of fair market value, because auctions generally require higher earnest money deposits, lack warranties other than those regarding title, have shorter closing periods, and do not contain provisions for contingencies. Webster stated that these differences effectively eliminate a substantial portion of the pool of potential buyers.

The court made the determination, after weighing all of the evidence, that the actual value of the Craven residence for inheritance tax purposes was $113,000, equivalent to the price for which the property sold at auction. The county appeals.

ASSIGNMENTS OF ERROR

The county assigns, renumbered and restated, that (1) the county court erred in determining that the $113,000 public auction sales price was the property's value for inheritance tax purposes, and (2) the county court erred when it relied on Neb. Rev. Stat. § 77-2018.05 (Reissue 2009) to determine the value of the real property in decedent's estate for inheritance tax purposes.

STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.[1] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

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[1] *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

[2] *Id.*

ANALYSIS

Clear Market Value

[3] The rate of tax assessed on the inheritance of property by an immediate relative (in this case, Craven's brother) is governed by Neb. Rev. Stat. § 77-2004 (Reissue 2009), which states, in relevant part, that "the rate of tax shall be one percent of the *clear market value* of the property in excess of forty thousand dollars received." (Emphasis supplied.) Clear market value is not defined by statute, though our law is established that clear market value is measured by the fair market value of the property as of the date of the death of the grantor, less the consideration paid for the property.[3] There is no evidence in the record that Craven's beneficiary paid consideration for the estate which he inherited. Clear market value is thus equivalent to fair market value in this instance.

[4] Our law is also established that, for purposes of taxation, the terms "fair market value" and "actual value" mean exactly the same thing.[4] Actual value is defined by Neb. Rev. Stat. § 77-112 (Reissue 2009):

> Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.

[5] The county argues that real property sold at auction is not sold in the "ordinary course of trade" within the meaning

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[3] See *County of Keith v. Triska*, 168 Neb. 1, 95 N.W.2d 350 (1959).

[4] See *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984).

of § 77-112, so the county court erred when it determined that the auction sale price was the property's value for inheritance tax purposes. We disagree. Real property, particularly in estate proceedings, is routinely sold at auction. Though real estate appraisers may choose to disregard auction sales for valuation purposes, we have long recognized that the price for which real estate sells at public auction is admissible as evidence of the value of that property.[5] And though sale price is not necessarily synonymous with market value, the purchase price of real property may be taken into consideration in determining the actual value of the property for taxation purposes.[6]

Therefore, the auction sale price was competent evidence of the actual value of the property. Though the county presented expert opinion testimony that the value of the property was higher than the auction sale price, the county court weighed the evidence and found the auction sale price evidence more compelling as an indicator of this particular property's actual value. We addressed a similar issue in *Lincoln Joint Stock Land Bank v. Fuller*, noting:

> While opinion evidence is almost always necessary in fixing the market value of land, it is not always controlling. The trial court apparently gave it little weight in the case at bar when the results of three public auctions of the land were presented to it. In this we believe the trial court was justified. Opinion evidence must give way to facts, and, after three sales, none of which brought over $12,000, it would seem that the trial court was amply justified in finding that the market value did not exceed that amount.[7]

[6] Here, too, the court found that the auction sale price was the better measure of the actual value of the property than was the appraisal evidence. The county argues that the appraisals

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[5] See *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984), citing *Lincoln Joint Stock Land Bank v. Fuller*, 132 Neb. 677, 273 N.W. 14 (1937).

[6] See *Collier v. County of Logan*, 169 Neb. 1, 97 N.W.2d 879 (1959).

[7] *Fuller, supra* note 5, 132 Neb. at 682, 273 N.W. at 17.

were better indicators of the actual value of the property and notes that those appraisals utilized the methods expressly approved by § 77-112. However, though the county court *may* consider a professionally accepted mass appraisal method in determining the actual value of property under § 77-112, it is not required to adopt those values.[8] The court is free to weigh other competent evidence, such as the auction sale price, and determine the actual value of the property.

The appraisals cited by the county as evidence of actual value were estimates of the fair market value of the property, based upon sales of comparable properties and other factors. However, evidence in the record reflects that there were no truly comparable properties in the area because of the unique deficiencies of the home. Testimony indicated that those deficiencies made the property difficult to market and reduced its value. Testimony also indicated that auctioning the property was a reasonable alternative to listing with a real estate agent and that estate auctions were common practice in the industry. The record further reveals that the auction was conducted at arm's length, was well advertised, and was open to the public, and there was testimony that the auction sale price was the highest possible price that could have been obtained for the property.

There are no yardsticks by which actual value can be determined with complete accuracy.[9] Here, there is ample evidence in the record to support the county court's determination that the actual value of the property was equivalent to the auction sale price in this instance. That will not always be the case; these determinations are necessarily fact specific. But because competent evidence supports the county court's determination that the actual value of the property was $113,000, and because no error appears in the record, we will not disturb the court's factual determination on appeal.

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[8] See *JCB Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008) (when "may" is used in statute, permissive or discretionary action is presumed).

[9] *S.S. Kresge Co. v. Jensen*, 164 Neb. 833, 83 N.W.2d 569 (1957).

County Court's Reliance on "Neb. Rev. Stat. § 77-2018.5"

The county court cited a statute which does not exist, "Neb. Rev. Stat. § 77-2018.5," in support of its factual determination that the value of Craven's residence for inheritance taxation purposes was the auction sale price of the home. The county interprets the court's reference to "§ 77-2018.5" as one to § 77-2018.05 and argues that such reliance was misplaced. However, the record does not establish which statute the court meant when it cited § 77-2018.5, so we do not speculate as to whether the court intended to cite § 77-2018.05. Regardless, the county court's erroneous citation to a nonexistent statute was harmless error. The county court has jurisdiction, pursuant to chapter 77, article 20, to make estate valuation determinations for purposes of inheritance taxation. And as previously discussed, the court did not err when it determined that the value of this particular property, for inheritance taxation purposes, was $113,000.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the county court.

Affirmed.

Wright, J., not participating.

State of Nebraska, appellee, v. Rocky J. Sharp, appellant.

795 N.W.2d 638

Filed February 11, 2011. No. S-10-622.

1. **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.

Appeal from the District Court for Douglas County: Patricia A. Lamberty, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

STEPHAN, J.

Rocky J. Sharp appeals his conviction and sentence on one count of possession with intent to deliver a controlled substance. The primary issue on appeal is whether a search warrant for Sharp's residence and person authorized a search of his person which was conducted approximately 1½ blocks from the residence. We conclude that it did.

FACTS AND PROCEDURAL BACKGROUND

On March 1, 2010, Omaha police officer Kalon Fancher submitted an affidavit and application for issuance of a search warrant to the county court for Douglas County. The affidavit stated that Fancher had reasonable grounds to believe that

> [c]rack cocaine and its derivatives, . . . scales and packaging materials commonly used in the distribution of illicit drugs[,] monies and proceeds associated with the sales of illicit drugs[,] firearms and ammunition used to protect an illegal narcotics operation[, and] [r]ecords [of] illegal narcotics operation . . . .
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> . . . [were] concealed or kept in, on, or about the following described place or person to wit: [a particular residence on] N 28th Street, Omaha, Douglas County, Nebraska, . . . AND/OR SHARP, . . . a black male with the date of birth . . . AND/OR HICKS, Candice a black female with the date of birth . . . .

The affidavit stated that the premises expected to contain contraband also included all vehicles that were under the control of Sharp and Candice Hicks, and noted that Sharp drove a 1997 Mitsubishi Montero with a specific license plate number and that Hicks drove a 2005 Pontiac Grand Prix with a specific license plate number. The affidavit further stated a reliable

confidential informant had told Fancher within the previous 72 hours that crack cocaine was being sold from the North 28th Street residence noted in the affidavit and that a "black male and a black female" lived there. The informant told Fancher that within the previous 7 days, he had seen the black male carry a firearm inside the residence.

Fancher further averred that he had conducted a background check and found that Sharp was a convicted felon with prior arrests for possession with intent to deliver crack cocaine, possession of crack cocaine, felon in possession of a firearm, and delivery of a controlled substance; Sharp also had multiple prior arrests for possession of marijuana. Fancher also averred that Hicks was a convicted felon and had prior arrests for possession with intent to deliver crack cocaine and possession of a controlled substance. The affidavit requested authorization for a nighttime search and a no-knock warrant.

A search warrant based on Fancher's affidavit was issued on the same day. The warrant stated that based on the affidavit, there was

> probable cause to believe that concealed on the premises located at [the] N 28th Street [address], Omaha, Douglas County, Nebraska, . . . AND/OR SHARP, . . . a black male with the date of birth . . . AND/OR HICKS, . . . a black female with the date of birth . . . who resides or is in control of the afore described premises,

were the items described in Fancher's affidavit, including crack cocaine, firearms, and records of illegal narcotics operations. The warrant stated that the officers were therefore ordered "to search theafore [sic] described location and/or person, for the purpose of seizing the before described property." The warrant further authorized a nighttime, no-knock search of the premises.

On March 2, 2010, Fancher and another officer conducted surveillance on the North 28th Street residence prior to executing the search warrant. The officers noticed that the Mitsubishi vehicle identified in the affidavit in support of the search warrant was not parked at the premises. Because the officers knew there was only one street leading to the premises, they decided to wait at a nearby intersection to see whether the vehicle

would appear. When the Mitsubishi came through the intersection a short time later, the officers immediately stopped it. The stop occurred approximately 1½ blocks from the North 28th Street residence.

Fancher testified that he observed no traffic violation prior to the stop. He stopped the vehicle because he recognized Hicks, who was identified in the search warrant, as its driver, and he believed that the warrant authorized a search of the vehicle. The parties in this appeal agree that the affidavit requested authority to search the vehicle, but that the warrant did not authorize its search.

Once the vehicle was stopped, the officers asked both Hicks and her male passenger, Sharp, for identification. After Sharp's identification was confirmed, Fancher had Sharp step out of the vehicle, handcuffed him, and then patted him down for weapons. During the pat-down, Fancher felt an object which he believed to be a plastic bag containing a soft substance in one of Sharp's pockets. He removed the object, which proved to be a bag containing marijuana. After completing the pat-down, Fancher left Sharp with the other officer, who conducted a more extensive search and found crack cocaine in the inside pocket of Sharp's jacket.

Sharp was then placed in a police cruiser and transported to the police station. Fancher orally advised Sharp of his *Miranda* rights after he was placed in the cruiser. At the police station, a strip search was conducted and another small bag containing crack cocaine was found concealed in Sharp's underwear.

After Sharp dressed, Fancher questioned him. Sharp admitted during this questioning that he used crack cocaine and that he smoked it with marijuana. He also stated that he gave crack cocaine to family and friends and that he did not give it to them "out of the goodness of his heart." Fancher then left Sharp at the police station and executed the search of the premises, which yielded a scale, loose marijuana, and plastic baggies.

Sharp was subsequently charged with possession with intent to deliver a controlled substance. He filed a motion to suppress the evidence found on his person and the statements he made at the police station, alleging that the stop of the Mitsubishi

and the search of his person were illegal. After conducting an evidentiary hearing, the district court denied the motion to suppress. In its order, the court found that the officers had a good faith belief the search warrant authorized a search of the vehicle and that their conduct in stopping the vehicle was not sufficiently deliberate or culpable so as to trigger the exclusionary rule. The court also found that the officers had probable cause to stop the vehicle based upon the information in Fancher's affidavit and application for a search warrant. The court further found that Sharp was identified in the warrant as subject to search and that nothing in the warrant limited the search of his person to a search at the described premises. Finding both the stop of the vehicle and the search of Sharp's person to be lawful, the district court denied the motion to suppress.

Sharp waived his right to a jury trial and was tried to the court based on stipulated facts while preserving the issue raised by his motion to suppress. He was found guilty of possession with intent to deliver a controlled substance and sentenced to 3 to 5 years' incarceration. Sharp subsequently filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Sharp assigns that the district court erred in failing to suppress all evidence used against him resulting from the unlawful stop and search.

STANDARD OF REVIEW

[1] 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.[2] 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.[3]

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

[2] *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010); *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

[3] *Id.*

ANALYSIS

Sharp's broad assignment of error is narrowed by his argument, which challenges the legality of the vehicle stop and the subsequent search of his person. With regard to the vehicle stop, Sharp argues that the good faith exception articulated in *United States v. Leon*[4] is inapplicable because there was no error in the search warrant, only in the officers' belief that it authorized a search of the vehicle. Sharp argues that the search warrant did not authorize a search of his person conducted away from the premises identified in the warrant and that because of this, all evidence and statements obtained by police during the vehicle stop and subsequent search of his person must be suppressed under the Fourth Amendment exclusionary rule.

Officers Were Justified in Stopping Vehicle

The district court determined that the officers stopped the vehicle in the erroneous but good faith belief that it was specifically mentioned in the search warrant.[5] But the court also found that "based upon the totality of circumstance [sic] there is ample evidence in the affidavit and application to support a finding of probable cause to stop the vehicle that [Sharp] was riding in." Although Sharp argues that the district court erroneously applied the *Leon* good faith exception to this case, he does not challenge the court's alternative finding that the officers had probable cause to stop the vehicle.

We agree with the district court that based upon what Fancher knew about the activities of Sharp and Hicks, as set forth in the affidavit and application, he had probable cause to stop the vehicle.[6] Because we conclude that the officers had justification for stopping the vehicle independent of the search warrant, we need not reach the question of whether the *Leon* good faith exception applies.

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[4] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[5] See *id.*

[6] See *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

Search Warrant Authorized Search of Sharp's Person Away From Premises

In deciding whether the search of Sharp's person was valid, we first consider whether a search warrant may lawfully be issued with respect to a person as distinguished from a place. Sharp directs us to *Zurcher v. Stanford Daily*,[7] in which the U.S. Supreme Court held that a search warrant may properly be issued for premises notwithstanding the fact that the owner or possessor is not reasonably suspected of criminal conduct. In reaching its conclusion, the Court noted: "Search warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."[8] But *Zurcher* did not hold that search warrants cannot be directed at persons. To the contrary, state and federal courts, including the U.S. Supreme Court, have long recognized that a search warrant may be issued for a person as long as the requisite showing of probable cause is made.[9] One commentator has noted that "[t]here is no inherent defect in a single warrant which authorizes search of a place and also a person . . . ."[10] We agree.

Because much of Sharp's argument is premised on *Michigan v. Summers*,[11] the next step in our analysis is to determine the applicability of that case to the issue presented here. In *Summers*, police had a warrant authorizing the search of a

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[7] *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

[8] *Id.*, 436 U.S. at 555, quoting *United States v. Kahn*, 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974).

[9] See, *Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *United States v. Ward*, 682 F.2d 876 (10th Cir. 1982); *State v. Brown*, 245 Kan. 604, 783 P.2d 1278 (1989); *State v. Ballou*, 148 Vt. 427, 535 A.2d 1280 (1987); *People v. Sunday*, 109 Ill. App. 3d 960, 441 N.E.2d 374, 65 Ill. Dec. 461 (1982); *People v Sherman*, 68 Mich. App. 647, 244 N.W.2d 3 (1976).

[10] 2 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 4.9(a) at 703 (4th ed. 2004).

[11] *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).

house for narcotics. As police were about to execute the warrant, the defendant came out of the house and descended the front steps. The police detained him while they searched the premises and ultimately arrested him after discovering contraband. The defendant challenged his detention. In addressing its validity, the Court examined both the character of the intrusion on the defendant's Fourth Amendment rights and its justification. The Court reasoned that because the police had a warrant to search the premises, the rights' intrusion was minimal. It further reasoned that the minimal intrusion was justified because law enforcement had a legitimate interest in preventing the defendant's flight, in minimizing the risk of harm to officers, and in ensuring an orderly completion of the search. Ultimately, the Court held that a warrant to search premises for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is being conducted.

Sharp argues that *Summers* establishes a limited exception to a general rule that "authority to search stops at the threshold,"[12] and that unless the criteria of *Summers* are met, an individual may not be searched away from the premises identified in a search warrant. Sharp appears to contend that his general rule applies regardless of whether the person to be searched is specifically named in the search warrant.

In support of this argument, Sharp relies in part on *Parks v. Com.*,[13] in which the Supreme Court of Kentucky noted that "courts have applied the *Summers* exception even when the search warrant authorizes search of both the premises and the owner/occupant." But the Florida and Maryland appellate opinions cited by the *Parks* court for this proposition make no mention of any individual being specifically named in the search warrants at issue.[14] And other than *Parks*, the cases which Sharp cites in support of his argument that an off-premises detention and search of a person is prohibited unless it meets

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[12] Brief for appellant at 13.

[13] *Parks v. Com.*, 192 S.W.3d 318, 333 (Ky. 2006).

[14] See, *Fromm v. State*, 96 Md. App. 249, 624 A.2d 1296 (1993); *State v. Thomas*, 603 So. 2d 1382 (Fla. App. 1992).

the *Summers* criteria did not involve warrants which specifically authorized the search of a named person.[15] We conclude that *Summers* provides the criteria for permissible detention, during the execution of a search warrant, of persons who are either unnamed in the warrant or identified only generically as "residents" or "occupants" of the premises. *Summers* would therefore apply to this case only if the search warrant does not specifically authorize a search of Sharp's person.

We therefore turn our attention to the language of the search warrant itself and the affidavit and application upon which it was issued. The affidavit asserted the officer's belief that crack cocaine was being sold from the North 28th Street residence and that Sharp and Hicks, who resided there, had prior convictions and multiple arrests for drug-related offenses. The application alleged that crack cocaine and other items utilized in or associated with the distribution and sale of illicit drugs were kept or concealed on the "place or person" of the North 28th Street residence "AND/OR SHARP . . . AND/OR HICKS." Similarly, the search warrant found probable cause to believe that contraband was concealed on the premises "AND/OR SHARP . . . AND/OR HICKS" and specifically authorized law enforcement officers to search the "location and/or person."

Based upon this language, we conclude that the search warrant was not narrowly focused on Sharp's presence at the residence, but was more broadly applicable to the illicit drug activity which he was alleged to be conducting from that residence. The warrant identified three sources of concealed contraband: the residence, the person of Sharp, and the person of Hicks. The use of the phrase "and/or" connecting the place and persons to be searched authorized a search of the residence, both named persons, or any one of the three. And we agree with the district court that there is no language in the search warrant which required that the search of the named persons be conducted at the identified premises. The language of the warrant

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[15] See, *U.S. v. Sherrill*, 27 F.3d 344 (8th Cir. 1994); *U.S. v. Hogan*, 25 F.3d 690 (8th Cir. 1994); *United States v. Boyd,* 696 F.2d 63 (8th Cir. 1982); *State v. Ruoho*, 685 N.W.2d 451 (Minn. App. 2004).

distinguishes this case from *People v. Green*[16] and *People v Kerrigan*,[17] on which Sharp relies. It is closer to the language of search warrants which were held to authorize an off-premises search of named persons in *People v Carter*,[18] *People v. Velez*,[19] and *People v. Gonzalez*.[20] We conclude that the search warrant was personal to Sharp and authorized a search of his person on or off the premises identified in the warrant.

CONCLUSION

For the reasons discussed, the district court did not err in denying Sharp's motion to suppress. The evidence which was the subject of that motion was properly received and established Sharp's guilt of the offense charged. We affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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[16] *People v. Green*, 33 N.Y.2d 496, 310 N.E.2d 533, 354 N.Y.S.2d 933 (1974).

[17] *People v Kerrigan*, 49 A.D.2d 857, 374 N.Y.S.2d 22 (1975).

[18] *People v Carter*, 56 A.D.2d 948, 392 N.Y.S.2d 712 (1977).

[19] *People v. Velez*, 204 Ill. App. 3d 318, 562 N.E.2d 247, 149 Ill. Dec. 783 (1990).

[20] *People v. Gonzalez*, 316 Ill. App. 3d 354, 736 N.E.2d 157, 249 Ill. Dec. 315 (2000).

STATE OF NEBRASKA, APPELLEE, V.
MILLARD W. LANDIS, APPELLANT.
794 N.W.2d 151

Filed February 18, 2011. No. S-09-1313.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.

2. **Confessions.** It is a mixed question of law and fact whether a statement was voluntarily made and whether a custodial interrogation has occurred.
3. **Miranda Rights.** The safeguards provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
4. **Miranda Rights: Arrests: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
5. **Miranda Rights: Investigative Stops.** Persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
6. **Miranda Rights: Police Officers and Sheriffs: Investigative Stops.** When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings.
7. **Miranda Rights: Arrests.** It is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required.
8. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John S. Berry, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, Nathan A. Liss, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Millard W. Landis, appellant, was convicted in the district court for Lancaster County of possession of a controlled substance (marijuana) with intent to deliver. He appealed to the Nebraska Court of Appeals. The Court of Appeals determined that Landis was in custody during questioning by state troopers and that because the troopers failed to give Landis *Miranda*

warnings, the evidence of the statement and physical evidence obtained as a result of such questioning should have been suppressed. The Court of Appeals reversed. We granted the State's petition for further review. We reverse the decision of the Court of Appeals and remand the cause with directions to affirm the conviction.

STATEMENT OF FACTS

On the afternoon of November 18, 2008, a state trooper stopped Landis for speeding on Interstate 80. The trooper, Derek Kermoade, asked Landis to follow him to his cruiser where he would issue a warning. Landis followed Kermoade and sat in the front passenger seat. In response to questioning, Landis told Kermoade that he was traveling from New Mexico to Pittsburgh, Pennsylvania. Kermoade learned from a license plate check that the plates on Landis' car were issued for a different vehicle. Landis explained that he had recently traded cars and had been told by Pennsylvania motor vehicle officials that he could use the plates on the new car. Kermoade asked Landis whether he had ever been arrested, and Landis admitted he had been arrested for smoking marijuana in the 1970's.

Christopher Bigsby, another state trooper, had been monitoring traffic and conducting speed enforcement in a separate vehicle in the same area as Kermoade. Bigsby saw that Kermoade had stopped Landis, and Bigsby activated his scanner to listen in on the traffic stop. Bigsby learned that a criminal history check Kermoade had requested showed that Landis had a criminal history related to drugs. Bigsby made an additional inquiry and learned that Landis had been arrested for drug distribution in 2002. Knowing from listening in on the traffic stop that Landis was not being fully truthful about his criminal history, Bigsby approached Kermoade and told him that one of the tires on his cruiser was low on air as a ruse to get Kermoade out of the cruiser so that Bigsby could tell Kermoade about Landis' additional criminal history. After conveying the information to Kermoade outside Landis' hearing, Bigsby returned to his vehicle and continued to monitor the stop through his scanner.

Kermoade returned to his cruiser and asked Landis whether he had been arrested in 2002. Landis denied that he had been arrested in 2002. Kermoade gave Landis a warning for speeding and returned his registration and license to him approximately 20 minutes after the stop had been initiated. As Landis was starting to leave the cruiser, Kermoade asked whether he could ask a few more questions. Landis agreed to continue the conversation, sat back inside the cruiser, and shut the door. Kermoade asked Landis whether there was anything in his car that should not be there, such as large amounts of marijuana, methamphetamine, or heroin, or large amounts of cash or weapons. Landis denied that any of those things were in the car. Kermoade then asked whether he could search Landis' car. Landis said yes but immediately asked why Kermoade wanted to search the car. Kermoade said he had a feeling there was something in the car that should not be there.

Bigsby, who had been monitoring the conversation on his scanner, approached Kermoade's cruiser and stood outside the passenger door by Landis. Bigsby joined the conversation and told Landis that possession of "personal use" marijuana was just a citation and that after being cited, Landis could be on his way. Bigsby and Kermoade continued to ask Landis whether they could search his vehicle, and Bigsby repeated that possession of "personal use" marijuana would be only a citation. Shortly after Bigsby joined the conversation, Landis admitted to having marijuana on his person. Bigsby told Landis to take it out, and Landis took a cigarette holder containing five marijuana joints out of his pocket and handed it to Kermoade.

The troopers determined that Landis' statement that he possessed marijuana and his possession of the five marijuana joints, combined with other factors, gave them probable cause to search his vehicle. The troopers put Landis into the back seat of Kermoade's cruiser and went to search Landis' car. Upon opening the hatchback of the car, the troopers quickly found three bags containing bales of marijuana under the canvas cargo cover. The bags were later determined to contain approximately 125 pounds of marijuana. The troopers placed Landis under arrest for possession of marijuana with intent to

deliver. Landis was not given a *Miranda* warning at any time before the troopers searched his car.

Prior to trial, Landis moved to suppress evidence obtained as a result of the traffic stop, the troopers' questioning of Landis, and the search of his car. After a hearing that included testimony by Kermoade and Bigsby and the admission of video recordings of the stop from both troopers' cameras, the district court for Lancaster County denied the motion to suppress.

The court first concluded that Kermoade had probable cause to stop Landis for speeding. The court next considered whether Landis was illegally detained when Kermoade continued questioning him after giving him the warning for speeding. The court determined that Landis was not "in custody" during the questioning by Kermoade alone. The court noted that after Bigsby joined the questioning, "[t]here was a demonstrable difference in the tenor and intensity of the questioning" and "a palpable change in the circumstances." The court found, however, that the troopers "did not apply 'strong-arm' tactics" but that "deceptive stratagems were used during questioning." Although the court noted that such factors were "very persuasive that [Landis] was in custody," the court ultimately concluded that Landis "was not in custody at the time he produced the marijuana joints" and noted in particular "the brief time Bigsby was involved in the questioning." The court noted that Landis admitted to possessing marijuana "[w]ithin one and three-quarter minutes of Bigsby joining the questioning."

The court next considered whether the warrantless search of Landis' car was proper. The court concluded that the troopers had probable cause to search the car and cited factors including Landis' possession of five marijuana joints on his person and Landis' having lied about his criminal history, which included drug-related arrests.

The court also considered evidence from the suppression hearing for purposes of *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The court found that there was no "coercion or force of any nature used by the troopers during their contact during the stop" and concluded that Landis "freely, voluntarily, and knowingly made his statements" and that the statements should not be suppressed under *Denno*.

In a stipulated bench trial, the court received as evidence videos from Kermoade's and Bigsby's cruisers, Kermoade's written report, a forensic report on the testing of the marijuana found in Landis' car, and the transcript of the suppression hearing. Landis renewed, and the court overruled, his motion to suppress and objections made at the suppression hearing. The court found Landis guilty of possession of a controlled substance (marijuana) with intent to deliver. On December 17, 2009, the court overruled Landis' subsequent motion for new trial in which he asserted that the court erred when it overruled his motion to suppress and that there was not sufficient evidence to support the verdict. The court sentenced Landis to imprisonment for 2 to 4 years.

Landis appealed his conviction to the Court of Appeals and asserted, inter alia, that the district court erred when it overruled his motion to suppress. Landis did not complain of the initial stop or Kermoade's initial questioning. Instead, Landis asserted that an illegal stop and search began after Bigsby joined in the questioning and the troopers asked to search Landis' vehicle. Landis claimed that the district court erred when it found that *Miranda* warnings were not required based on its determination that he was not in custody.

In a memorandum opinion filed June 29, 2010, the Court of Appeals reviewed the circumstances of the questioning by the two troopers and concluded that Landis was in custody. The Court of Appeals stated that although Landis had been told that he was free to go, he was "'sandwiched'" between the two troopers and the only way he could have left was to ask Bigsby to step out of the way. The Court of Appeals further noted that although Landis voluntarily agreed to further questioning after Kermoade gave him the warning for speeding, the questioning in which both troopers participated was "assertive and police dominated, reaching such a level that a reasonable person would have felt pressured to admit guilt." Such questioning included assertions by both troopers that they believed Landis had something illegal in his car and repeated statements that if he admitted to possession of marijuana, he would just be given a citation and sent on his way. The Court of

Appeals characterized the questioning as "accusatory," though not threatening.

Considering these factors, the Court of Appeals concluded that "a reasonable person would not have felt free to terminate the interrogation and leave" and that therefore "Landis was 'in custody' during the questioning by Troopers Kermoade and Bigsby and *Miranda* warnings were required." Because *Miranda* warnings were not given, the Court of Appeals concluded that the district court should have granted Landis' motion to suppress his statement to the troopers that he had marijuana on his person. The Court of Appeals further concluded that without such statement, the troopers did not have probable cause to search Landis' vehicle, and that therefore the physical evidence obtained during and after the questioning, i.e., the five marijuana joints Landis took out of his pocket and the 125 pounds of marijuana found in the search of the car, should have been suppressed. The Court of Appeals therefore reversed Landis' conviction. After concluding that the evidence, including the erroneously admitted evidence, supported a guilty verdict, and relying on *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court of Appeals reversed, and remanded for a new trial.

The State filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

The State claims that the Court of Appeals erred when it (1) concluded that Landis was "in custody" during the questioning by the two troopers, (2) applied the exclusionary rule to suppress the physical evidence seized as a result of Landis' statements, and (3) reversed Landis' conviction. The State specifically asked this court to consider the application of *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) (generally holding that physical evidence need not necessarily be excluded following a *Miranda* violation), to this case in the event this court determined that Landis was in custody and his statements should be suppressed. Given our disposition of this case, we do not consider *Patane*.

STANDARDS OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination. *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

[2] It is a mixed question of law and fact whether a statement was voluntarily made and whether a custodial interrogation has occurred. These questions involve the application of the facts surrounding the statement to the constitutional rubric mandated by the U.S. Supreme Court, and are reviewed under the two-point standard of review set forth above. See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

ANALYSIS

The Court of Appeals Erred When It Determined That Landis Was in Custody When He Was Questioned by Two Troopers.

The State claims that the Court of Appeals erred when it concluded that Landis was "in custody" during the questioning by the two troopers. We agree, and we therefore conclude that the Court of Appeals erred when it concluded that because *Miranda* warnings were not given, the district court should have granted Landis' motion to suppress his statement to the troopers that he had marijuana on his person, and further erred when it concluded that the physical evidence obtained during and after the questioning should have been suppressed.

In his motion to suppress, Landis asserted, inter alia, that he was illegally detained during the questioning by Kermoade and Bigsby. The district court acknowledged that there was a "demonstrable difference in the tenor and intensity of the questioning when Bigsby joined the discussion." However, the court also noted that Landis had earlier been told that he was free to terminate the interview and to leave. The court further found that the duration of the interrogation by both troopers

was "quite short" and that Landis admitted he possessed marijuana "[w]ithin one and three-quarter minutes of Bigsby joining the questioning."

The Court of Appeals disagreed with the district court's ruling and concluded that Landis was in custody during the questioning by both troopers. The Court of Appeals acknowledged that the time of questioning by both troopers was short, but determined that "the questioning was aggressive and dominated by the presence of two officers," one of whom stood outside the door by which Landis was sitting. The Court of Appeals found that a reasonable person would not have felt free to terminate the interrogation and leave, and concluded that Landis was in custody.

[3,4] The safeguards provided by *Miranda* come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010). *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one "in custody." *Id.* A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest. *Id.*

[5] With regard to the "in custody" determination, the State notes that the U.S. Supreme Court and this court have held that persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). The State argues that such precedent is more applicable to the present case than *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009), upon which the Court of Appeals relied in its memorandum opinion. The State notes that *Rogers* involved a "classic police station interrogation" wherein the defendant experienced "2 hours of isolation in a police-dominated atmosphere, physically blocked from the exit, and subjected to aggressive accusatorial interrogation in which [the defendant] was confronted with substantial evidence to prove her guilty of a crime." 277 Neb. at 63, 760 N.W.2d at 57. The State argues that the circumstances of *Rogers* are significantly different

from the present case involving a vehicle stop in which Landis was subjected to a few minutes of questioning to which he voluntarily consented. Thus, the State suggests that the Court of Appeals' application of the *Rogers* analysis was misguided and that this case is controlled by the cases holding that a defendant is not "in custody" during an investigatory traffic stop. The State also takes issue with the Court of Appeals' characterization of the second trooper "blocking" Landis' exit when the trooper was standing at the door in order to participate in the questioning.

[6,7] As the State notes, we have held that an individual temporarily detained pursuant to an investigatory traffic stop is not in custody for purposes of *Miranda*. *State v. Casillas, supra*; *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Further, *Miranda* warnings are not required for general on-the-scene questioning as to facts surrounding a crime. *Dallman, supra*. When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings. *Id*. We stated in *Dallmann* that although courts have indicated that *Miranda* warnings may be required under some circumstances before a suspect is actually arrested, where police officers use no coercion or threat of force and any continued detention is at the consent of the suspect, *Miranda* warnings are not required. We concluded that it is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required. *Id*.

In this respect, we have noted that neither a brief, voluntary pat-down search nor detaining an individual during the consensual search of his or her vehicle generally constitutes custody for purposes of *Miranda*. See *Dallmann, supra*. We have further held that temporarily detaining a driver to submit to routine field sobriety tests does not ordinarily rise to the level of custody so as to implicate *Miranda*. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

With these standards in mind, and given the district court's factual findings which are not clearly erroneous, we conclude that in the present case, Landis was not "in custody" when he was questioned by the troopers. Landis' interaction with

Kermoade could be characterized as being temporarily detained pursuant to an investigatory traffic stop. Before Landis could be considered to be in custody, some further action or treatment by the troopers that would raise Landis' detention to an extent analogous to an arrest was required.

We note two factors that distinguish the questioning in this case from a routine traffic stop—Landis was seated in the trooper's cruiser, and Landis was questioned by two troopers while he was physically located between the two. Landis' presence in the trooper's cruiser did not raise the interaction to the extent analogous to an arrest, because there is no indication that Kermoade used force or threats to get Landis to enter the cruiser or to remain there. After the initial purpose of the stop was completed, Landis voluntarily stayed in the cruiser for further questioning at Kermoade's request.

The presence of the second officer also did not raise the interaction to the level of an arrest. In concluding that the defendant in *Dallmann* was not in custody, we noted that although there were multiple police officers present, the officers used no threats of force or coercion to obtain the defendant's consent to a search, and that nothing in the record indicated that the defendant believed he was under arrest or that he was not free to leave. The presence of the second officer does not require the conclusion that Landis was under arrest or that he was not free to leave.

Landis voluntarily stayed with Kermoade for additional questioning. When Bigsby joined the conversation, the questioning became more assertive but did not rise to the level of threats of force or coercion. Although Landis was physically located between the two officers and it would have been difficult for him to leave without asking Bigsby to move, there is no indication that he attempted to leave or that the officers resisted any effort to leave. Furthermore, Landis was located between the two officers for less than 2 minutes when he made the statements he sought to suppress. Given the short duration of the questioning and other factors, we do not find this to be a situation where a reasonable person in Landis' circumstances would have concluded that he was not free to leave or was forced or threatened into confessing that he possessed marijuana.

We conclude the Court of Appeals erred when it concluded that Landis was "in custody" and that his statement that he possessed marijuana should have been suppressed due to a lack of *Miranda* warnings. The Court of Appeals further erred when it concluded that the physical evidence should have been suppressed because it was obtained as a result of such statement.

The Court of Appeals Erred When It Reversed Landis' Conviction.

The State also claims on further review that the Court of Appeals erred when it reversed Landis' conviction. Before concluding that the Court of Appeals erred when it reversed Landis' conviction, we consider Landis' other assignments of error which the Court of Appeals did not reach because it disposed of the appeal based on its determination that Landis was "in custody" and that therefore his statement and the evidence obtained as a result of his statement should have been suppressed.

In addition to the assignment of error upon which the Court of Appeals resolved the appeal, Landis asserted the district court erred when it determined that his statement was voluntary and that the troopers had probable cause to search Landis' vehicle. Landis also claimed that there was not sufficient evidence to support his conviction.

[8] The district court found that Landis' statement that he possessed marijuana was voluntary and need not be suppressed under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The court found that the record did not "reveal any coercion or force of any nature used by the troopers." We have noted that "'coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.'" *State v. Bormann*, 279 Neb. 320, 332-33, 777 N.W.2d 829, 839 (2010) (quoting *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). Based on factors similar to those in our analysis of whether Landis was "in custody," we conclude that the district court did not err when it concluded that Landis' statement that he possessed marijuana was voluntary.

Landis' assignments of error regarding probable cause to search his vehicle and sufficiency of the evidence both hinged on his being successful in his assertion that his statement that he possessed marijuana should be suppressed. Landis argued that without the statement, the troopers did not have probable cause to search his vehicle, and that without the evidence obtained from the search of his vehicle, there was not sufficient evidence to sustain his conviction. Because we have concluded that the statement need not be suppressed, it logically follows, and we further conclude, that the statement that he possessed marijuana and other factors combined to give the troopers probable cause to search Landis' vehicle and that the evidence obtained as a result of the troopers' questioning and the search of the vehicle was sufficient to support Landis' conviction.

Landis' additional assignments of error are without merit. We therefore conclude that the Court of Appeals erred when it reversed Landis' conviction.

CONCLUSION

We conclude that Landis was not in custody during the questioning by the troopers and that therefore the Court of Appeals erred when it determined that Landis' statement during the questioning should have been suppressed for lack of *Miranda* warnings. We further conclude that Landis' other assignments of error were without merit and that the Court of Appeals erred when it reversed Landis' conviction. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to affirm Landis' conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

SCHROPP INDUSTRIES, INC., DOING BUSINESS AS PK MANUFACTURING CORP. AND R & C PROPERTIES, A NEBRASKA L.L.C., APPELLEE, V. WASHINGTON COUNTY ATTORNEY'S OFFICE, APPELLANT.

STATE OF NEBRASKA EX REL. WASHINGTON COUNTY ATTORNEY'S OFFICE, RELATOR, V. HONORABLE MARY C. GILBRIDE, JUDGE, DISTRICT COURT FOR WASHINGTON COUNTY, NEBRASKA, AND SCHROPP INDUSTRIES, INC., DOING BUSINESS AS PK MANUFACTURING CORP. AND R & C PROPERTIES, A NEBRASKA L.L.C., RESPONDENTS.

794 N.W.2d 685

Filed February 25, 2011. Nos. S-10-361, S-10-831.

1. **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.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Mandamus: Appeal and Error.** While the Nebraska Supreme Court will issue a writ of mandamus upon a proper showing by a relator, mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
4. **Pretrial Procedure: Final Orders: Attorney and Client: Appeal and Error.** An interlocutory discovery order compelling the production of documents for which a claim of privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is appealable neither as a final order nor under the collateral order doctrine.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. ____: ____. A substantial right is not affected during a special proceeding, for purposes of appeal, when that right can be effectively vindicated in an appeal from the final judgment.
7. **Pretrial Procedure: Final Orders: Appeal and Error.** An order granting discovery from a nonparty in an ancillary proceeding is not a final, appealable order.
8. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
9. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled

to the particular thing the relator asks and that the respondent is legally obligated to act.

10. **Mandamus: Pretrial Procedure: Appeal and Error.** In determining whether mandamus applies to a discovery issue, the Nebraska Supreme Court considers whether the trial court clearly abused its discretion in not limiting the scope of the discovery.
11. **Pretrial Procedure: Attorney and Client: Affidavits: Proof.** In response to a motion to compel production, the asserting party must make out a prima facie claim that the privilege or doctrine applies. In order to fulfill this burden, the asserting party must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege or doctrine. The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.
12. **Mandamus.** A party requesting allegedly privileged material must be given a full and fair opportunity to respond to a motion for protective order. Then, if the district court determines that the party asserting the privilege or doctrine has failed to make out a prima facie claim, it shall order the asserting party to produce the documents. Conversely, if the district court determines that the asserting party has made out a prima facie claim, then it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review.
13. **Mandamus: Appeal and Error.** In considering whether to grant a writ of mandamus, the Nebraska Supreme Court considers whether the duty to be enforced was one which existed at the time the petition was filed.
14. **Mandamus: Courts.** A request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.

Petition for further review in No. S-10-361 from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the District Court for Washington County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals affirmed. Original action in No. S-10-831. Peremptory writ denied.

Shurie R. Graeve, Washington County Attorney, and Edmond E. Talbott III for appellant-relator.

Michael F. Coyle, Paul M. Shotkoski, and Elizabeth A. Culhane, of Fraser Stryker, P.C., L.L.O., for appellee-respondent Schropp Industries, Inc.

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

GERRARD, J.

In these consolidated cases, the Washington County Attorney's office challenges an order of the Washington County District Court entered in an ancillary discovery proceeding enforcing compliance with a subpoena issued on behalf of a Douglas County court. The county attorney claims that the documents sought by the subpoena are privileged and that the court erred in ordering their production. But the threshold question presented here is what procedure should be followed to secure appellate review of an order granting ancillary discovery—entered by the district court in the county in which the subpoena was served, but issued on behalf of a court in a different county.

I. BACKGROUND

Schropp Industries, Inc. (Schropp), owns a facility in Washington County that was damaged in a fire. Schropp's insurer, Sentry Insurance Company (Sentry), denied coverage, based largely on its conclusion that the fire had been caused by a criminal act of the insured. So, Schropp sued Sentry in Douglas County.

The Washington County Sheriff's Department and the county attorney had conducted an investigation into the fire, and Schropp believed that the county attorney had received information from Sentry as part of the investigation. Schropp wanted access to that information, so, in the Douglas County case, Schropp subpoenaed the records of the Washington County investigation.[1] The county attorney objected and refused to produce the documents, asserting (at least in part) that the information was privileged by Nebraska's Arson Reporting Immunity Act.[2] So, Schropp filed a motion to enforce the subpoena in

[1] See Neb. Rev. Stat. § 25-1273 (Reissue 2008).

[2] See Neb. Rev. Stat. §§ 81-5,115 to 81-5,131 (Reissue 2008).

the district court for Washington County.[3] The county attorney argued that it was improper to bring the enforcement action in Washington County, that the documents were privileged under the Arson Reporting Immunity Act, and that Schropp had no authority to compel production of investigative reports in an ongoing criminal investigation.

Following a hearing, the district court stayed the enforcement proceeding to permit the county attorney to apply for intervention in the Douglas County case. But the motion to intervene in the Douglas County case was apparently denied, so the district court lifted the stay, and conducted an in camera review of the documents. The district court found that there was "no generic privilege which attaches to these documents" under the provisions of the Arson Reporting Immunity Act. The district court rejected the county attorney's claim that the records were privileged and ordered her to produce the documents.

The county attorney appealed to the Nebraska Court of Appeals. The Court of Appeals summarily dismissed the appeal, based upon previous cases in which a party had tried to appeal from a discovery order.[4] The county attorney filed a petition for further review and petitioned this court for a writ of mandamus ordering the district court to vacate the order.[5] We issued an alternative writ of mandamus, and after receiving the district court's answer, we granted the petition for further review and consolidated the appeal, case No. S-10-361, with the mandamus case, No. S-10-831, for briefing and oral argument.

II. ASSIGNMENTS OF ERROR

In her petition for further review, the county attorney assigns that the Court of Appeals erred (1) in concluding that the decision of the trial court was not a final order for purposes of appeal and finding that her remedy was a mandamus action in this court. In her consolidated brief, the county attorney also

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[3] See Neb. Ct. R. Disc. § 6-334(A)(c)(2)(B).

[4] See, e.g., *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

[5] See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

assigns that the district court erred in failing to (2) provide her with procedural due process and (3) find that the subpoenaed information was not protected from discovery.

III. STANDARD OF REVIEW

[1-3] 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.[6] But a jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[7] And while this court will issue a writ of mandamus upon a proper showing by a relator, mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.[8]

IV. ANALYSIS

In each of these consolidated cases, the county attorney is seeking appellate review of an order entered in an ancillary discovery proceeding, undertaken in one court to aid litigation pending in another court.[9] Ancillary discovery is commonly undertaken in other jurisdictions,[10] and is authorized in Nebraska by § 6-334(A)(c)(2)(B), which provides that if a person served with a subpoena objects, "the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena." The first question we consider is whether an order granting discovery in an ancillary proceeding is appealable.

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[6] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[7] *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

[8] See, *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009); *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000).

[9] See, generally, 15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.24 (1992 & Supp. 2010).

[10] See *id.*

1. Appeal: Case No. S-10-361

[4] It is not disputed that, had this discovery dispute been litigated in Douglas County, the district court's order would be neither final nor appealable. We have held that an interlocutory discovery order compelling the production of documents for which a claim of privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is appealable neither as a final order nor under the collateral order doctrine.[11] Postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the privilege.[12] And any harm resulting from the occasional discovery order that might have been corrected, if interlocutory appeals had been available, is outweighed by the delay and disruption that would occur in the litigation process if we were to allow appeals from every discovery order claimed to implicate privilege.[13]

And, as the U.S. Supreme Court has explained in endorsing that view, "were attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review."[14] In particular, "in extraordinary circumstances—*i.e.,* when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus."[15] And

> [a]nother long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions. . . . Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that

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[11] See, *Hallie Mgmt. Co., supra* note 4; *Brozovsky, supra* note 4.

[12] See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009).

[13] *Hallie Mgmt. Co., supra* note 4.

[14] *Mohawk Industries, Inc., supra* note 12, 558 U.S. at 110.

[15] *Id.*, 558 U.S. at 111.

> ruling, at least when the contempt citation can be characterized as a criminal punishment.[16]

These established mechanisms, the Court explained, facilitate immediate review of more consequential privilege rulings.[17]

But the county attorney contends that the order at issue in this case is appealable, because it occurred in an ancillary proceeding. Because nothing remains pending before the district court for Washington County, the county attorney contends that the order entered by *that* court is final and appealable. But that would create a rule under which the appealability of an interlocutory discovery order would depend upon whether the documents sought are in the same county as the underlying litigation. It would be highly peculiar if the availability of appellate review was different based solely on where the relevant evidence is located. That is one of the reasons why, as a general rule, an order granting discovery against a third party in an ancillary proceeding is not considered appealable.[18]

[5,6] And we agree. Neither the collateral order doctrine nor our final order statute provides a basis for appellate jurisdiction here. Whether a privilege claim can be adequately reviewed on appeal from a final judgment does not depend on whether or not the discovery proceeding is ancillary. And under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[19] An order granting ancillary discovery does not determine the action and prevent the judgment, nor, obviously, is it made after judgment is rendered. And even if we assume that an ancillary discovery proceeding

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[16] *Id.*

[17] See *Mohawk Industries, Inc., supra* note 12.

[18] See, e.g., *Nicholas v. Wyndham Intern., Inc.*, 373 F.3d 537 (4th Cir. 2004); *A-Mark Auction Galleries v. American Numismatic*, 233 F.3d 895 (5th Cir. 2000); *F.T.C. v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985).

[19] *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

is a special proceeding—a matter we do not decide—we have explained that a substantial right is not affected during a special proceeding, for purposes of appeal, when that right can be effectively vindicated in an appeal from the final judgment.[20] An order granting discovery of allegedly privileged information is not a final order under § 25-1902 for the same reason it is not appealable under the collateral order doctrine.

The fact that nothing remains pending in the ancillary court, following its resolution of the issues, does not change the fact that an ancillary discovery proceeding is merely undertaken to aid the underlying litigation that remains pending in another court. Such an appeal would be equally interlocutory. As the Fourth Circuit has explained, "While the district court's order compelling discovery may seem a self-contained piece of litigation when viewed in isolation, that view fails to capture the full scope of these proceedings."[21] The discovery request at issue is but one of several in this case, and must be examined in the larger context which includes the underlying litigation.[22] When viewed in that context, there is no reason to deviate from the general rule just because the discovery order was ancillary.[23] The same policy concerns that generally militate against interlocutory appeals, even where privilege is asserted,[24] counsel against permitting an interlocutory appeal from an order granting ancillary discovery.

Instead, we conclude that other established mechanisms provide potential avenues of review for a potentially injurious or novel discovery ruling.[25] We have regularly considered discovery orders in the context of mandamus.[26] And we recently

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

[21] *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994). Accord *A-Mark Auction Galleries, supra* note 18.

[22] See *A-Mark Auction Galleries, supra* note 18.

[23] See *id.*

[24] See *Hallie Mgmt. Co., supra* note 4.

[25] See *Mohawk Industries, Inc., supra* note 12.

[26] See, e.g., *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009); *Buckley, supra* note 8; *Likes, supra* note 5.

endorsed the rules applied in federal courts regarding the appealability of contempt judgments, which permit nonparties to appeal from interlocutory civil contempt orders.[27] Those mechanisms "serve as useful 'safety valve[s]' for promptly correcting serious errors."[28]

[7] We note that some federal courts have recognized a limited exception to these general principles and permitted appeal by a party under the collateral order doctrine from an order *denying* discovery from a nonparty in an ancillary proceeding.[29] But we need not decide the applicability of that principle here. Instead, we hold that an order granting discovery from a nonparty in an ancillary proceeding is not a final, appealable order. Accordingly, the Court of Appeals acted correctly in dismissing the county attorney's appeal in case No. S-10-361.

2. Mandamus Action: Case No. S-10-831

Although we lack jurisdiction over the county attorney's appeal from the district court's order, as suggested above, the county attorney's petition for writ of mandamus provides an alternative path to obtaining review by an appellate court. So, it is in that context that we consider the county attorney's arguments on the merits of the district court's order.

[8-10] In doing so, we are mindful of the fact that a court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.[30] The party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.[31] And in determining whether

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[27] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[28] *Mohawk Industries, Inc., supra* note 12, 558 U.S. at 111.

[29] See, e.g., *Nicholas, supra* note 18; *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

[30] *Stetson, supra* note 26.

[31] *Council of City of Omaha, supra* note 8.

mandamus applies to a discovery issue, we consider whether the trial court clearly abused its discretion in not limiting the scope of the discovery.[32]

It is important to note, from the outset, that the county attorney does not argue to this court that the disputed documents are actually privileged. In other words, she does not ask this court to find that the documents are actually privileged by the Arson Reporting Immunity Act, or any other privilege. Nor could we evaluate such an argument, given that the disputed materials are not in this court's record. Rather, the county attorney's challenge is directed at the procedure followed by the district court in deciding to order disclosure. The county attorney's arguments, generally speaking, are that the district court failed to give her proper notice that it was preparing to decide the privilege issue and that the court failed to decide all of the privilege issues that were presented to it. We find no merit to either argument, but explaining why will require that we begin by examining the procedural history of the district court proceedings in greater detail.

(a) Procedural History

As noted above, Schropp subpoenaed the disputed materials from the county attorney on September 2, 2009. The county attorney replied with a letter to Schropp dated October 4, 2009, in which the county attorney made an "assertion of and preservation of any all [sic] privileges and objections to disclosure or discovery of information obtained by and on behalf of Sentry Insurance Company pursuant to Nebraska's Arson Reporting Immunity Act . . . not specifically approved by and consented to by the Washington County Attorney."

Schropp filed its motion for an order to compel compliance with the subpoena in the district court on October 19, 2009. A hearing was held in the district court on December 14. At that hearing, the county attorney framed the issue as Schropp's "authority . . . to bring this action to compel a prosecutor to turnover [sic] criminal investigative documents for use in a civil proceeding that is pending in another county." The county

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[32] *Stetson, supra* note 26.

attorney argued, first, that Schropp did not have "standing" to bring its enforcement action in Washington County when there was pending litigation in Douglas County. And the county attorney explained that she had not limited her objection to the Arson Reporting Immunity Act, but was also "not aware of any authority . . . to compel a county attorney's office to turnover [sic] investigative reports in an ongoing criminal investigation to use in a civil proceeding."

The court discussed a briefing schedule with the parties. The county attorney asked if there were particular issues the court wanted the briefs to address, and the court replied:

> Well, for one, I would like you to address the standing issue.
>
> I would also like you to address the issue of why I should have jurisdiction over the enforcement of a subpoena that was issued by a judge in Douglas County[.]
>
> What is the privilege that relates to ongoing criminal investigations is another issue that occurs to me.

The district court made a journal entry that provided Schropp 10 days for further briefing and gave the county attorney 28 days to provide a responsive brief.

On January 13, 2010 (30 days later), the county attorney filed a "Complaint and Motion to Stay Proceedings," a "Complaint and Motion to Quash, for Summary Judgment and Dismissal," and a brief that both supported the motion to quash and responded to Schropp's brief. In the motion to stay, the county attorney argued that complying with Schropp's subpoena "undermines public safety and welfare" and moved to stay the proceedings to permit the county attorney to intervene in the Douglas County case to litigate the privilege issue. The county attorney asserted that a stay was necessary to afford her "due process and fundamental fairness under the laws to seek protection of State secrets, and promote the public interest, and safety." In the motion to quash, the county attorney asserted that Schropp's subpoena sought privileged files, but had "failed to establish standing or legal justification" because Schropp's motion was "prohibited by the doctrine of sub judice." The county attorney's brief accused Schropp of "forum shopping," and continued to assert that Schropp lacked

"standing" and that its subpoena was "prohibited by the doctrine of sub judice."

On February 17, 2010, the district court granted the county attorney's request for a stay. The court explained that it was "unaware whether a timely motion to address the issue of privilege" had been made in Douglas County, so the court stayed the proceedings for 30 days to allow the county attorney "to intervene or otherwise file an application in the Douglas County case seeking a court review of its claim of privilege." But the court stated that the county attorney was to provide the district court with a file-stamped copy of its Douglas County pleading, and if such pleading was not on file within 30 days, the court would reinstate the matter and set it for further hearing on the county attorney's claim of privilege.

On the same day, the county attorney's motion to intervene in the Douglas County case was apparently denied. So, on February 26, 2010, the district court lifted the stay of the Washington County proceedings. The court stated that the county attorney's privilege claim remained to be determined but that no privilege log had been produced by the county attorney. So, the court concluded, "[i]t would appear from the record that the Washington county attorney takes the position that all materials in its file are privileged under the act." The court ordered the county attorney to provide the court, within 7 days, with all the materials in its files that were responsive to Schropp's subpoena, so that the court could conduct an in camera review of the documents.

The court ruled on the privilege issue in a journal entry filed on March 24, 2010. The court noted that the county attorney "has claimed a privilege but has not filed a privilege log as required." So, the court reasoned, the county attorney seemed to be claiming only a generic privilege under the provisions of the Arson Reporting Immunity Act. After examining the procedure for evaluating a privilege claim that was established by this court in *Greenwalt v. Wal-Mart Stores*,[33] which requires the party asserting privilege to state the claimed privileges with specificity, the court explained that it had ordered an in camera

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[33] *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

review "despite the lack of specific claims of privilege." The court said that it had reviewed the 43 compact discs that had been provided by the county attorney, despite the lack of a privilege log or listing of the included documents, and concluded that there was no generic privilege which attached to the documents under the provisions of the Arson Reporting Immunity Act. So, the court overruled the county attorney's claim of privilege and ordered production of the documents.

(b) District Court Procedures

The county attorney claims that the district court failed to provide her with procedural due process. In the context of this argument, she contends that the district court erred in deciding the issue of privilege when, at least according to the county attorney, the issue was not "ripe." Stated generally, the county attorney complains that the district court decided the privilege issue without notifying her it was going to do so.

(i) Procedural Due Process

To begin with, the county attorney's constitutional argument is without merit. The county attorney is a party to this case in her official capacity, representing the interests of Washington County, and while U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law, a county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.[34] In other words, Washington County has no constitutional right to due process that the court could have violated.

(ii) Failure to Give Hearing

Beyond that, the county attorney contends that she was not provided with notice that the court was going to decide the privilege issue; therefore, the county attorney contends, she was not given the opportunity to brief the merits of her privilege claim. The county attorney asserts that her brief was solely dedicated to the issue of "standing" and that "the Court never

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[34] *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

requested or indicated that the issue of privilege should have been addressed."[35]

But as described above, the county attorney's argument is inconsistent with the record. When the county attorney asked what her brief should address, she was specifically told by the court to address "the privilege that relates to ongoing criminal investigations." It may have been the county attorney's preference to address the issue of "standing" before arguing and submitting the privilege issue, but at no point in the record did the court endorse that view—and, in fact, the court expressly directed otherwise.

The district court's order of February 26, 2010, made it apparent that the court was going to address the privilege issue, and the county attorney did not object. If the county attorney believed that further briefing or argument was necessary on the privilege issue, the court's February 26 order was her opportunity to provide it, or seek leave to provide it, or object to the court's proceeding. But the record does not reflect that the county attorney did any of those things. And we have often said that one cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.[36]

(iii) Failure to Order Privilege Log

[11,12] The county attorney also claims that the district court failed to follow the procedure established by this court in *Greenwalt*. In *Greenwalt*, we explained:

> In response to a motion to compel production, the asserting party must make out a prima facie claim that the privilege or doctrine applies. In order to fulfill this burden, the asserting party must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege or doctrine.[37] The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the

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[35] Brief for appellant-relator at 9.

[36] *Pierce v. Drobny*, 279 Neb. 251, 777 N.W.2d 322 (2010).

[37] See Neb. Ct. R. Disc. § 6-326(c).

> type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.
>
> The party requesting the material must be given a full and fair opportunity to respond to the motion for protective order. Then, if the district court determines that the party asserting the privilege or doctrine has failed to make out a prima facie claim, it shall order the asserting party to produce the documents. Conversely, if the district court determines that the asserting party has made out a prima facie claim, then it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review.[38]

The county attorney claims that she never provided the court with a privilege log because she was never ordered, pursuant to the second step of *Greenwalt*, to "submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material."[39] She argues that because the district court ordered an in camera review, the court "had concluded that [the county attorney] had made a prima facie claim."[40]

This, again, is unsupported by the record. The court first noted the county attorney's failure to provide a privilege log, not *after* the court's in camera review, but when the court first

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[38] *Greenwalt, supra* note 33, 253 Neb. at 40, 567 N.W.2d at 566-67.

[39] *Id.* at 40, 567 N.W.2d at 567.

[40] Brief for appellant-relator at 11.

ordered the in camera review. In other words, the "privilege log" at issue was the list and summary of the documents, and specific assertions of privilege, that the county attorney should have initially provided in response to Schropp's motion to compel production.

Greenwalt clearly provides that in response to a motion to compel production, it is the party asserting the privilege—in this case, the county attorney—who has the burden of moving for a protective order and establishing the basis for the privilege claim. But here, the county attorney never moved for a protective order, nor did she file any of the documentation that *Greenwalt* requires in support of such a claim. The county attorney did not make out a prima facie claim for any privilege. The district court explained that "[i]n order to expedite determination of this matter," it was nonetheless conducting an in camera review. But the county attorney cannot be heard to complain about the district court's procedure when the court provided the county attorney's argument with more consideration than it was due. In other words, it was not the district court that failed to follow *Greenwalt*—it was the county attorney.

If the county attorney was dissatisfied with the court's intent to proceed on the privilege issue, the court's February 26, 2010, order gave the county attorney an opportunity to object. And when the court's order noted the lack of a privilege log, the county attorney had the opportunity to provide the materials that she should have filed in the first place.

In short, the county attorney neither filed the motion and documentation required to initiate the *Greenwalt* process nor objected when the court said that it was nonetheless willing to consider her claim. The party asserting privilege has the burden of proving that the documents sought are protected, and it was not the district court's responsibility to order the county attorney to remedy her failure of proof. We find no error in the district court's compliance with *Greenwalt*.

(iv) Ripeness

Finally, the county attorney argues in passing that "the filing of a protective order was not ripe" because there was apparently a protective order entered in Douglas County, by

stipulation of Schropp and Sentry, to maintain confidentiality of the documents.[41] We have said that a claim is not "ripe" for adjudication when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.[42] That doctrine, however, does not apply here. The existence of a protective order stipulated to by Schropp and Sentry would not preclude the county attorney from pursuing a protective order to protect Washington County's interests.

The county attorney further asserts that it was a "judicial abuse of discretion to rule on the issue of privilege without allowing the [county attorney] an opportunity to present the basis for asserting privilege in response to [Schropp's] Motion to Compel."[43] But Schropp served its subpoena on September 2, 2009, and filed its motion to compel on October 19. The district court decided the privilege issue over 5 months later. Contrary to the county attorney's claim, our review of the record establishes that the county attorney had numerous opportunities to present her privilege claim to the district court. She neither initiated that claim properly, pursuant to *Greenwalt*, nor remedied that deficiency when it became apparent that the district court intended to proceed to the merits of the privilege issue. Nor did the county attorney object to the court's procedure, despite the fact that the court explained its intentions clearly. Therefore, we find no merit to the county attorney's first assignment of error.

(c) Ruling on Privileges

The county attorney's second assignment of error is that the court erred in failing to find that her records were not protected from discovery. But, as noted above, the county attorney does not specifically argue that the materials fall within any particular privilege, nor would the record permit us to evaluate such an argument. Instead, the gravamen of the county attorney's argument is that the district court erred by only addressing the Arson Reporting Immunity Act, and not addressing any other

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[41] Brief for appellant-relator at 11.

[42] *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

[43] Brief for appellant-relator at 12.

basis for finding the documents privileged. The county attorney asserts that she

> consistently maintained that the investigatory file of a County Attorney is barred from discovery based numerous [sic] privileges. General and specific privileges were asserted. Specifically:
>
> a. A general privilege based on the language of the Arson Reporting Immunity Act . . . .
>
> b. A general privilege based on [Neb. Rev. Stat.] § 84-712.05 [(Cum. Supp. 2010)]; and,
>
> c. Evidentiary privileges based on [Neb. Rev. Stat.] §§ 27-509 . . . (State secrets), 27-503 (lawyer/client), and 27-510 (informer) [(Reissue 2008)].[44]

But the record does not support the county attorney's assertions. Our review of the record has found no point at which the county attorney cited to any of the specific privileges she now asserts, other than the Arson Reporting Immunity Act, nor do the county attorney's citations to the record support her argument.

As support in the record for her assertion that she "consistently maintained" each of these privileges, the county attorney specifically directs us to where she questioned Schropp's "authority" to compel production. This is, obviously, far short of asserting a specific privilege—and far short of meeting her burden of stating, "with specificity," how an asserted privilege is met.[45] Nor does the county attorney find support in her original objection to disclosure, based upon "any all [sic] privileges and objections . . . pursuant to Nebraska's Arson Reporting Immunity Act." Even if we read this as referring to privileges beyond the Arson Reporting Immunity Act, the county attorney's letter did not identify any other privilege with the specificity required to effectively assert it.

[13,14] Because this is a mandamus action, the burden lies on the county attorney to show clearly and conclusively that she is entitled to the relief sought.[46] In considering whether

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[44] Brief for appellant-relator at 12-13.

[45] See *Greenwalt, supra* note 33, 253 Neb. at 40, 567 N.W.2d at 567.

[46] See *Council of City of Omaha, supra* note 8.

to grant a writ of mandamus, an appellate court considers whether the duty to be enforced was one which existed at the time the petition was filed.[47] And a request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.[48] Simply put, it is the county attorney's burden to demonstrate that the district court had a ministerial duty to resolve the different privilege claims that she now asserts. And she has not done this, because the record does not show that the claims she is asserting were ever presented to the district court. The district court had no ministerial duty to resolve arguments that were not submitted to it for disposition.

In this context, the county attorney reasserts her claim that the district court failed to follow *Greenwalt*, because the court did not ask the county attorney to specify what part of the disputed documents were privileged; the county attorney argues that by not "requesting a supplemental brief from [the county attorney] addressing the privileges asserted, the Court failed to have sufficient evidence before it to make a ruling to order disclosure of [the county attorney's] investigatory file."[49] However, the district court *did* ask the county attorney to brief the question of what privilege applied. But more fundamentally, the burden of proof was on the county attorney as the party asserting a privilege. It was the county attorney's burden to specifically assert the privileges she was claiming and present a record showing that those privileges applied.[50]

The district court did not err in deciding the privilege issue; we again note that given the county attorney's failure to make a prima facie case under *Greenwalt*, the district court actually did more than it was obliged to do to resolve the issue. Nor did the court err by not addressing privileges that had not

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[47] *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

[48] *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

[49] Brief for appellant-relator at 13.

[50] See *Greenwalt, supra* note 33.

been raised before it. We find no merit to the county attorney's assignment of error.

(d) Failure to Show Cause

The county attorney also argues, generally, Schropp and the district court have not shown cause that the court's discovery orders should not be set aside. But this argument is not encompassed by the county attorney's assignments of error, and errors argued but not assigned will not be considered on appeal.[51]

V. CONCLUSION

For these reasons, we conclude that the county attorney's appeal was not taken from a final, appealable order, and we affirm the decision of the Court of Appeals dismissing her appeal in case No. S-10-361. We also conclude that the county attorney has failed to meet her burden of showing clearly and convincingly that she is entitled to have the district court's orders vacated, and we deny her request for a peremptory writ of mandamus in case No. S-10-831.

JUDGMENT IN NO. S-10-361 AFFIRMED.
PEREMPTORY WRIT IN NO. S-10-831 DENIED.

WRIGHT, J., not participating.

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[51] See *Shepherd v. Chambers, ante* p. 57, 794 N.W.2d 678 (2011).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PETER T. THEW, RESPONDENT.

794 N.W.2d 412

Filed March 4, 2011. Nos. S-09-567, S-09-820, S-10-380.

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 under the circumstances.
3. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.

4. ____. To determine whether and to what extent discipline should be imposed in 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 in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
6. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original actions. Judgment of disbarment.

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

Robert Wm. Chapin, Jr., of Chapin Law Office, for respondent in Nos. S-09-567 and S-09-820.

Peter T. Thew, pro se.

CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and IRWIN, Judge.

PER CURIAM.

I. NATURE OF CASE

This case involves attorney disciplinary charges brought against Peter T. Thew in three separate cases. Amended formal charges were filed against Thew in case No. S-09-567 on June 16, 2009, in case No. S-09-820 on December 23, 2009, and in case No. S-10-380 on May 18, 2010. We consolidated these three cases. Because Thew has admitted to all of the charges, the only issue now addressed by this court is the appropriate sanction.

II. BACKGROUND

Thew graduated from the University of Nebraska College of Law in May 2002. Thew worked for a University of Nebraska office of research until June 2004, when he went into solo private practice. Beyond one semester of civil clinic during law school, Thew had no experience working in a law office. He was a solo practitioner until September 16, 2009, when he was temporarily suspended.

1. Cases Nos. S-09-567 and S-09-820

Amended formal charges were filed against Thew in case No. S-09-567 on June 16, 2009, and Thew responded to the charges on August 13. The application for temporary suspension was filed on August 18 and was assigned case No. S-09-820. Thew filed an objection to the temporary suspension and requested a hearing. On August 27, this court consolidated the two cases for review and appointed a referee. On September 16, this court entered an order temporarily suspending Thew from the practice of law. The hearing on the amended formal charges in the consolidated cases was held on January 12, 2010.

Thew and the relator entered into a stipulation where Thew admitted all the charges against him. During the hearing, Thew was asked why he made the decisions that he did, and he responded:

> I mean, I don't really know for sure why I did it, but the best I can explain is the fact that upon all these events happening, I've realized that I have some issues as far as some health issues with depression and that I've had these issues for some time and just haven't dealt with them and have pushed them aside and put on a good facade as far as passing off that, you know, things were fine.

Thew was asked, "And so after neglecting the cases and procrastinating on the cases, your — when confronted by your clients, you just told them untrue statements to cover yourself; is that right?" Thew responded, "I wouldn't — I wouldn't — putting it in those terms, no. . . . I think at times I did make statements that were untrue, but I don't think that, you know, when I fell behind I would just tell them things that weren't true."

Although Thew claimed that his depression ought to be considered as a mitigating factor, the referee found that Thew had not established that his depression was a factor in his misconduct, or that treatment would substantially reduce the risk of further misconduct. Even though Thew stipulated to the fact that he knowingly made false statements to his clients, he continued to claim that he had not lied. The referee found that his clients had not suffered lasting harm but did note that Thew's pattern of dishonesty was troubling. Nevertheless, the

referee recommended a suspension of 120 days, retroactive to the date of Thew's temporary suspension, as well as 2 years of probation. The relator objected, arguing that the sanction was too lenient.

The following recitation of facts is taken from the referee's report in cases Nos. S-09-567 and S-09-820.

(a) Lorin Wiederstein

Thew represented Lorin Wiederstein in a divorce case and was paid an advance fee of $2,500. The divorce trial was held on August 7, 2007, and a decree was entered. Thew filed a notice of appeal on Wiederstein's behalf on October 5. At no point in time did Thew provide Wiederstein with a billing statement, nor did he request further payment. Wiederstein retained new counsel, who requested the case file several times. Thew did not respond to the requests until March 6, 2008, when he stated that he would not release the file until his outstanding bill for legal fees was paid. However, Thew still did not provide a billing statement.

Wiederstein filed a grievance against Thew with the Counsel for Discipline on May 22, 2008. Notice of the grievance was sent to Thew the same day, with directions to file a written response. Thew admitted that he received the notice, but he did not respond. A second notice was sent June 24, and once again, Thew failed to respond. On July 15, the Counsel for Discipline upgraded Wiederstein's grievance to a formal grievance and directed Thew to file an appropriate written response within 15 working days. Notice was sent to Thew by certified mail, and his secretary signed for the letter on July 16.

Thew called the Counsel for Discipline on July 17, 2008, and stated that he had sent his response the previous week. Thew's response to the Counsel for Discipline was dated July 11, 2008, but there was not a postmark from the U.S. Postal Service. The letter was instead metered by a private postage meter which did not record a date. In the letter, Thew did not address his failure to respond to requests for the case file. Instead, Thew claimed to have sent billing statements on October 16 and November 27, 2007, showing that Wiederstein owed additional fees. Thew enclosed the billing statements that

he claimed to have sent to Wiederstein, claiming a balance owed of $4,437.16. Wiederstein claimed that he never received a billing statement.

The Counsel for Discipline sent a letter to Thew's attorney on December 30, 2008, requesting a complete accounting for Thew's trust account from September 14, 2006, to the present. Thew failed to provide the requested information. The referee found by clear and convincing evidence that Thew had violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.4 (communications), 3-501.5 (fees), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

(b) Luana Gray Conservatorship

Thew was appointed successor guardian and conservator for Luana Gray on December 20, 2005. Between Thew's appointment and his removal on April 29, 2008, the county court issued several orders to show cause why Thew should not be removed as guardian and conservator due to his failure to file appropriate documents. During this time, Thew also failed to pay a medical bill and failed to reimburse Medicare for its subrogation claim. Although Thew claimed that he sent a check in payment to Medicare, the check was never cashed. Thew did not make additional inquiry as to why the check had not been cashed.

Following the issuance of a second order to show cause after Thew failed to appear at a hearing on March 11, 2008, Thew again failed to file the required documents, and he failed to appear in court. The county court removed him as guardian and conservator. Although his authority to act was revoked on April 29, Thew did not file an accounting with the court to determine who should receive the funds held in Gray's guardianship account. Thew finally closed Gray's guardianship account on September 2, and a successor guardian and conservator was appointed.

The referee found by clear and convincing evidence that Thew violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct),

and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence) and 3-501.3 (diligence).

(c) Marilyn Hawley Conservatorship

Thew was appointed temporary guardian and conservator for Marilyn Hawley after two of her children requested a guardian and conservator. The appointment was made permanent on January 31, 2006. Hawley maintained a checking account with Wells Fargo Bank, and monthly bank statements were mailed to Hawley's former residence. Hawley's Social Security benefits were directly deposited into her checking account.

By April 2006, Thew had made arrangements for Hawley's Social Security benefits to be sent directly to the assisted living center where she resided. However, Thew did not notify Wells Fargo Bank to change the mailing address of the bank statements, nor did he notify the bank of his position as guardian and conservator until July 2006. On April 4, 2006, the county court authorized Thew to pay $1,066.25 for attorney fees related to the guardian and conservatorship proceedings. Although there was more than enough money in Hawley's bank account, Thew did not pay the claim until September 14.

On May 9, 2006, the court issued an order to show cause to Thew because he had not timely filed an inventory of Hawley's assets. Thew filed an inventory on June 6, but he failed to list the account number, and he inaccurately stated the account balance, indicating there was $31.09 in the account, when there was actually $3,202.37. Thew also failed to timely pay Hawley's bills for the assisted living center. On June 13, the administrator of the center sent a letter to Thew demanding payment of Hawley's bill. Thew did not pay the bill, and Hawley's daughter sent a letter to the court stating that Thew had been neglecting to pay Hawley's bills. The court issued an order to show cause on July 17 directing Thew to appear on August 8. Thew requested a continuance on July 26, which the court granted.

Thew paid the bill at the assisted living center on July 27, 2006. After that payment was made, Hawley's daughter sent a letter to the court stating that she was now satisfied. On

August 22, the court made a journal entry stating that Thew was to continue as guardian.

Thew received a check from the buyer of Hawley's car in November 2006, but he did not deposit the check until February 2007. Thew did not reimburse Hawley's son for expenses he incurred selling the car, even though he promised to do so. Hawley's son asked Thew to set aside money in a prepaid funeral account, but Thew never opened such an account. Hawley passed away on February 1, 2007, and a statement for the funeral expenses was faxed to Thew the next day. Although there were sufficient funds in Hawley's account, Thew did not pay the funeral expenses, he failed to notify the court of Hawley's death, and he failed to timely file an annual accounting.

The court issued an order to show cause directing Thew to file the required reports regarding Hawley and scheduled a hearing, which was continued three times. Thew filed an annual account and statement of assets on September 28, 2007. On April 2, 2008, the court issued an order to show cause directing Thew to appear in court on May 6, and Thew failed to appear. On May 12, the court issued a second notice of the order to show cause and set a hearing date for June 17. The second notice was sent by certified mail to Thew's business address, but Thew failed to claim the letter, and it was returned to the court.

The court issued a final order to show cause directing Thew to personally appear in court on July 1, 2008, to show cause why he should not be held in contempt. The final order was served on Thew by the Lancaster County sheriff's office on June 10. On July 1, the hearing was continued to August 5. On July 24, Thew filed a motion to allow him to pay Hawley's remaining funds into the court. Thew stated that he was unable to contact Hawley's heirs, but he had the addresses of all four of Hawley's adult children. Thew did not send a copy of the motion to any of her children.

On July 29, 2008, the court issued an order directing Thew to pay Hawley's funds into the court. Thew did not pay those funds into the court until December 31, after he was informed that he was under investigation regarding his neglect

of Hawley's case. The referee found by clear and convincing evidence that Thew had violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.15 (safekeeping property), and 3-508.4 (misconduct), and Neb. Ct. R. of Prof. Cond. § 3-503.3 (candor toward the tribunal).

(d) Curt Olson

Curt Olson hired Thew in March 2008 to file suit to recover on a bill for architectural services in the amount of $12,115.81. Thew failed to timely file suit, despite assuring Olson that the case was proceeding in a timely manner. Thew also stated to Olson that suit had been filed, and he stated that a judgment had been entered for $12,115.81. Thew knew these statements were false at the time he made them.

Olson asked for a copy of the judgment, and Thew assured Olson that he would provide him with a copy. On or about January 26, 2009, Olson went to Thew's office to request a copy in person. Thew stated that the file was at his home. The next day, Thew gave Olson a document that Thew claimed was a copy of the order for judgment. Thew knew that suit had not been filed and that no judgment had been entered when he delivered the document.

Thew finally filed suit on Olson's behalf on January 29, 2009, and the case was eventually settled to Olson's satisfaction. The referee found by clear and convincing evidence that Thew had violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct).

(e) Laura Swoboda

Laura Swoboda hired Thew in March 2008 to recover on a loan she had made in the amount of $12,500 plus interest. On April 8, 2008, Thew filed a complaint, and a default judgment was entered in Swoboda's favor in the amount of $17,620.86, plus costs, on September 19. Thew advised Swoboda to wait 30

days after the judgment to attempt to collect it by garnishment or other means.

Beginning in late October 2008, Thew led Swoboda to believe that garnishment proceedings in the county court were being pursued in an attempt to recover on the judgment. In fact, Thew had not begun garnishment proceedings. Swoboda contacted the clerk of the Lancaster County Court on March 17, 2009, and learned that no garnishment proceedings had been commenced. Swoboda called Thew, who falsely stated that he had filed the garnishment proceedings in district court. Thew knew the statement was false when he made it. Thew filed garnishment proceedings on March 18. Swoboda terminated Thew as her lawyer and filed a grievance against him with the Counsel for Discipline on March 20.

The referee found by clear and convincing evidence that Thew violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct).

(f) Allan Brock

Allan Brock and his adult son were injured in a motor vehicle collision on August 19, 2005, in Johnson County, Nebraska. In June 2006, Brock retained Thew to represent him in his personal injury claim against the other driver and his own insurance carrier. Thew also agreed to represent Brock's son. Thew agreed to a contingency fee agreement, but he did not present a written contingency fee agreement as required by § 3-501.5(c).

On September 21, 2006, Thew sent Brock a draft complaint he had prepared, which Brock approved. Thew did not file the complaint until May 16, 2007. In the spring of 2008, Thew told Brock and his wife that a trial was scheduled for May 28, 2008. In anticipation of the trial, Brock, his wife, and his son met with Thew. A few days before the scheduled trial date, Thew called Brock's wife and told her that the trial was continued, and had been rescheduled for December 10. Thew knew no trial had been scheduled.

Thew failed to perfect service on the defendants in the case, so on November 26, 2008, the case was dismissed by the county court. Thew failed to inform Brock that the case had been dismissed. Instead, he stated that the trial would be continued to January 7, 2009. Thew knew this statement was false when he made it. On January 6, Thew called Brock's wife and informed her that the case was dismissed because the parties had not been properly notified. In February 2009, Thew told Brock that he had refiled the case, but that statement was false, and Thew knew as much when he made it. Thew did not refile the case until June 16.

In April, May, and June 2009, Brock, his wife, and his son attempted to contact Thew about the status of the case, but Thew failed to return their calls. The referee found by clear and convincing evidence that Thew violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.5 (fees), and 3-508.4 (misconduct).

2. Case No. S-10-380

While cases Nos. S-09-567 and S-09-820 were pending before this court, amended formal charges were filed against Thew on May 18, 2010, and we eventually consolidated the three cases. Thew did not respond to the charges, and the relator moved for a judgment on the pleadings. In his answer filed on January 3, 2011, Thew requested that we consider the same mitigating factors in case No. S-10-380 as we did in cases Nos. S-09-567 and S-09-820. Thew also admitted the charges against him, stated that he was not seeking reinstatement, and stated that he was not currently fit to practice law. The following recitation of facts is taken from the amended formal charges.

(a) Patrick Doyle

On May 14, 2008, Patrick Doyle hired Thew to represent him on several criminal and civil matters. Thew and Doyle executed a written fee agreement which provided that Doyle would pay Thew $185 per hour for his services, as well as $40,000 as a "'non refundable deposit.'" Thew received the

deposit, but he never provided Doyle with a periodic billing statement, nor did he respond to relator's requests for a billing statement. The record is unclear as to when or why Doyle's relationship with Thew ended.

The relator charged Thew with violating §§ 3-501.5 (fees), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

(b) Kristan Yoder

On or about February 23, 2006, Kristan Yoder hired Thew to represent him on a breach of settlement agreement. Thew filed suit on May 9, but then failed to prosecute the case. The district court issued a progression order on December 10, 2007, stating that the case would be dismissed unless cause was shown by January 10, 2008. On January 2, Thew filed a motion to set the case for trial. No trial notice was ever filed, however, and on December 3, the court issued another progression order directing that the case would be dismissed unless cause was shown by January 5, 2009. On January 5, Thew filed a motion to set the case for trial, stating that all discovery had been completed. The defendant in the case objected and served several interrogatories and requests for production of documents on Thew. Thew failed to submit responses, and on July 22, opposing counsel filed a motion to compel on the discovery requests.

During this time, Thew failed to keep Yoder apprised of the status of his case. On more than one occasion, Thew falsely claimed that the case had been set for trial, only to claim later that the trial had been continued at the request of opposing counsel. Yoder made repeated requests for a billing statement, but Thew never provided one. Yoder paid Thew $3,850, but Thew never accounted for the time spent on Yoder's case.

Thew's license to practice law was suspended on September 17, 2009, but Thew failed to notify Yoder of such, and Thew did not turn over the file so that Yoder could seek other counsel. Yoder filed a grievance on October 13, and Thew responded, admitting that he had lied when he told Yoder the case had been set for trial. The Counsel for Discipline requested that Thew produce a complete copy of the file, a complete accounting of the time he had put into the case, and a

complete accounting of all payments received. The record does not indicate that Thew ever provided the information.

The relator charged Thew with violating §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.5 (fees), and 3-508.4 (misconduct), and Neb. Ct. R. of Prof. Cond. § 3-501.16 (declining or terminating representation).

(c) Cory Althouse

Cory Althouse hired Thew in February 2006 to file an eviction notice. Thew filed suit in Lancaster County Court on February 27. A default judgment for restitution was entered on March 13, and a monetary judgment for rent and damages in the amount of $2,705 was entered on April 10. On April 25, Thew initiated garnishment proceedings to collect the judgment, and he received $1,407.02 from the garnishee's employer between May 16, 2006, and March 30, 2007. Thew failed to provide Althouse with an accounting of all funds received through the garnishment action, and he failed to remit all of the funds that Althouse was entitled to receive.

In March 2009, Althouse provided Thew with the name of the garnishee's current employer. Thew filed a praecipe and garnishment affidavit on March 18, 2009. Thew chose to serve the papers by certified mail, but he failed to follow up with the garnishment. Thew did not do any more work on the case, but he did not take steps to terminate the relationship. Thew failed to notify Althouse when his license was suspended, and he failed to turn over the case file so that Althouse could retain other counsel. Althouse filed a grievance against Thew on November 16. Notice of the grievance was mailed to Thew on November 17 by certified mail, and Thew signed the receipt on December 2. Thew was directed to file an appropriate response to the grievance within 15 working days, which he failed to do. On January 20, 2010, the Counsel for Discipline sent a followup letter directing him to file a response, but Thew failed to respond.

The relator charged Thew with violating §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.15 (safekeeping property), 3-501.16 (declining or terminating representation), and 3-508.4 (misconduct).

(d) Melissa Anderson

In 2006, Thew represented Melissa Anderson in a personal injury case after her son was bitten by a dog. Thew filed suit in Lancaster County Court, and on or about January 12, 2009, the case was settled with the defendant's insurance company. Anderson was appointed conservator for her son so that she could receive the settlement from the insurance company.

The insurance company mailed Thew a check for over $18,000, as well as a check payable to Anderson and Thew for $24,323.94. Anderson was to deposit the insurance settlement check into a certificate of deposit and file notice thereof with the county court. Thew failed to notify Anderson that he had received the settlement check, and he failed to take any other steps to confirm that the settlement proceeds were deposited into a certificate of deposit for the son's benefit. The county court issued an order to show cause to Anderson for failure to file a certificate of proof of possession of a certificate of deposit for her son's benefit. Anderson was unable to contact or locate Thew to find out why the insurance company had not delivered the settlement funds. Anderson appeared at the show cause hearing on March 16, 2010, and was informed that Thew's license had been suspended and that it was her responsibility to locate and deposit the settlement funds.

Upon investigation, Anderson learned that the check for $24,323.94, made payable to her and Thew, had been sent to Thew shortly after the settlement had been reached. The check had never been deposited, although the check for Thew's fee had been. The insurance company reissued the settlement check to Anderson.

The relator charged Thew with violating §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.15 (safekeeping property), 3-501.16 (declining or terminating representation), and 3-508.4 (misconduct).

(e) Marvel Nevels

In 2006, Marvel Nevels contacted Thew about representing her on an intellectual property case. Her initial consultation with Thew took place on January 12, 2006, at which time she paid Thew $50. Thew agreed to prepare and file all documents

necessary to secure trademark protection for Nevels' ideas, but he requested an advance payment first. Nevels gave Thew a check for $1,900 on August 11, and the check cleared Nevels' account on September 14.

Thew informed Nevels that it would take between 6 months and 2 years to complete the registration for her ideas. Nevels had not heard from Thew by August 2007, and she called his office to speak with him. Thew stated that he was still working on her case, but that he had not heard from the trademark office.

Nevels waited another year and heard nothing from Thew, so in August 2008, she made an unannounced visit to Thew's office. At that meeting, Thew stated that he still had not heard from the trademark office regarding her application for trademark protection. Thew did tell Nevels that she could begin marketing her ideas while she waited to hear from the trademark office. Nevels heard that Thew's law license had been suspended, although Thew never notified her of that fact. Since giving Thew an advance payment, Nevels did not receive any written correspondence from Thew, she was not notified by Thew of his suspension, and she had not received her file from Thew.

The relator charged Thew with violating §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.15 (safekeeping property), 3-501.16 (declining or terminating representation), and 3-508.4 (misconduct).

Given the new charges, the relator recommends disbarment.

III. ANALYSIS

As an initial matter, we note that Thew's conduct took place after September 1, 2005, and therefore is governed by the Nebraska Rules of Professional Conduct.[1]

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[2] The basic issues in a disciplinary proceeding

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[1] *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[2] *State ex rel. Counsel for Dis. v. Tarvin*, 279 Neb. 399, 777 N.W.2d 841 (2010).

against a lawyer are whether discipline should be imposed and, if so, the type of discipline under the circumstances.[3] 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.

[3] 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.[4]

After the first two cases were heard, the referee had recommended a suspension of 120 days, and probation for 2 years after Thew is reinstated. However, in light of the most recent allegations, the recommendation is disbarment.

[4,5] 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.[5] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.[6]

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *State ex rel. Counsel for Dis. v. Wright*, 277 Neb. 709, 764 N.W.2d 874 (2009).

[6] Between these three cases, we find by clear and convincing evidence that Thew violated seven different disciplinary rules. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[7] Thew's behavior demonstrates a pattern of neglect and deceit that we find troubling.

While Thew's responses to his clients were negligent and lax, he also lied numerous times, and he also created false documents to hide the fact that he had procrastinated. Thew admits that he failed to notify his clients of his temporary suspension and that he failed to provide his clients with their files so that they could seek other counsel. Although there are letters in the record from other attorneys attesting to Thew's competence, the record reflects that Thew's problems were due in part to poor management of his private legal practice. The record also demonstrates that he did not have sufficient experience to handle some of his cases and that he did not seek assistance when he realized he did not have the necessary information or skills.

In Thew's answer to the most recent charges, he states that "he is not seeking reinstatement at this time and does not contend he is fit to practice law at this time." The Counsel for Discipline recommends that Thew be disbarred. We recently disbarred an attorney for neglecting his clients, failing to properly terminate representation, and failing to cooperate with the Counsel for Discipline.[8] Ordinarily, cumulative acts of misconduct and repeated disregard for requests for information from the Counsel for Discipline will lead to disbarment.[9] Given Thew's repeated acts of neglect and deceit, we find that Thew should be disbarred, effective immediately.

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[7] *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[8] *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[9] *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

IV. CONCLUSION

Thew committed a series of ethical breaches over several years, affecting a number of clients. Thew failed to provide competent counsel, and made false and misleading statements to hide the fact that he procrastinated. Thew also failed to notify his clients of his suspension and failed to safeguard his clients' interests. Thew's misconduct continued during the investigation by the Counsel for Discipline, and Thew ignored the letters sent by the Counsel for Discipline. Accordingly, we find that Thew should be disbarred and hereby order him disbarred from the practice of law in the State of Nebraska, effective immediately. Thew shall forthwith comply with all terms of Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, Thew 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 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

HEAVICAN, C.J., and WRIGHT and MILLER-LERMAN, JJ., not participating.

In re Margaret Mastny Revocable Trust. Lynnette Schellpeper et al., appellants and cross-appellees, v. Ernie Mastny, appellee and cross-appellant, and Elkhorn Valley Bank & Trust, Trustee, appellee.

In re Emil Mastny Revocable Trust. Lynnette Schellpeper et al., appellants and cross-appellees, v. Ernie Mastny, appellee and cross-appellant, and Elkhorn Valley Bank & Trust, Trustee, appellee.

794 N.W.2d 700

Filed March 4, 2011. Nos. S-10-431, S-10-432.

1. **Judgments: Collateral Estoppel.** The applicability of the doctrine of collateral estoppel is a question of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
4. **Trusts: Equity: Debtors and Creditors.** A trustee's right of retainer lies in equity.
5. **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.
6. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.
7. ____: ____. Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
8. **Trusts: Equity: Debtors and Creditors.** The equitable remedy of retainer in the context of trust administration is based upon the principle that if 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.
9. **Actions: Equity: Unjust Enrichment.** An action in assumpsit for money had and received may be brought where a party has received money which in equity

and good conscience should be repaid to another. In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.

10. **Actions: Proof.** In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.
11. **Limitations of Actions: Pleadings.** The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it.
12. **Limitations of Actions: Waiver.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.

Appeals from the County Court for Madison County: RICHARD W. KREPELA, Judge. Affirmed in part, and in part reversed and remanded with directions.

David A. Domina and Anneliese M. Wright, of Domina Law Group, P.C., L.L.O., for appellants.

Cassidy V. Chapman for appellee Ernie Mastny.

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

STEPHAN, J.

These consolidated appeals involve a dispute between three sisters and their brother regarding assets held by trusts created by their now-deceased parents. The sisters alleged that their brother was indebted to their parents at the time of the parents' deaths and that the trustee should be required to retain the amount of the debt from the trust assets to be distributed to their brother. The brother, who farmed with his parents, denied that he was indebted to them. The county court for Madison County concluded that there was insufficient evidence of a debt and ordered the trustee to distribute the trust assets in accordance with the terms of the trust instruments. The sisters appeal.

FACTS AND PROCEDURAL BACKGROUND

In 1993, Emil Mastny and Margaret Mastny, husband and wife, created separate inter vivos revocable trusts. Emil was

the settlor and original trustee of the Emil Mastny Revocable Trust, and Margaret was the settlor and original trustee of the Margaret Mastny Revocable Trust. The actual trust instruments are not included in our record. Elkhorn Valley Bank & Trust is the successor trustee for both trusts and commenced the trust administration proceedings which are the subject of these appeals. Ernie Mastny, Lynnette Schellpeper, Merrily Van Buren, and Lori Suchan are the adult children of Emil and Margaret and the beneficiaries of the trusts. For most of his adult life, Ernie participated with Emil in a farming operation on approximately 700 acres of land owned by his parents and located in Stanton County.

Margaret died testate on March 20, 2007. At the time of her death, she was domiciled in Stanton County. Ernie and Schellpeper were originally appointed as copersonal representatives of Margaret's estate. Upon their resignations, Elkhorn Valley Bank & Trust became the personal representative. An inventory filed in the estate proceedings in the county court for Stanton County on March 13, 2008, showed that at the time of her death, Margaret owned certain personal property and an undivided one-half interest in several parcels of real property in Stanton County totaling approximately 700 acres.

On June 19, 2008, the county court entered an order formally settling Margaret's estate. In its order, the court noted that the personal representative had sought instructions on how to treat certain "'notebooks'" that contained financial records kept by Emil and Margaret. Specifically, the notebooks contained entries stating that "loan[s]" had been made to their son, Ernie, or noting that "Ernie owe[d]" them certain sums of money on various dates. The court found that there was insufficient evidence to proceed against Ernie for any alleged indebtedness and therefore instructed the personal representative to take no further action with respect to the notebooks.

In June 2007, the trustee filed a "Petition for Trust Administration" with respect to Margaret's trust in the county court for Madison County. The petition alleged that the trust assets included the undivided one-half interest in real property listed on the inventory previously filed in Margaret's estate. The trustee requested instruction from the court with regard

to certain disputes with Ernie regarding farming operations on the land during the 2007 crop year. Subsequently, the trustee requested instructions regarding similar disputes involving the 2008 crop year. Most of these issues were resolved, and they are not directly involved in these appeals.

In June 2008, the trustee filed a "Petition for Trust Administration" with respect to Emil's trust. The petition was filed in the county court for Madison County and requested instruction from the court on several issues, including whether Ernie was indebted to his parents based upon the notebooks referred to above. The petition alleged that Ernie had denied any indebtedness. The petition refers to an accounting filed by the trustee, but the accounting does not appear in the record of the trust administration proceeding involving Emil's trust. On July 2, the three sisters filed an "Objection to Trustee's Accounting" in which they alleged that the accounting was incomplete because it did not include Ernie's indebtedness to his parents as reflected in the notebooks.

On July 18, 2008, the court entered an order in the trust administration proceeding involving Emil's trust in which it resolved some of the issues on which the trustee sought instruction and set a hearing as to another of the issues. The order specifically left open the question of whether Ernie was indebted to his parents. A similar order was entered on August 6 in the trust administration proceedings involving Margaret's trust.

Emil died on September 20, 2008. As we have noted, the trust instruments are not included in the record, but the parties generally agree that the assets in Margaret's trust included one-half of the approximately 700 acres of real estate and that the assets in Emil's trust included one-half of the same real estate. According to a summary of trust terms which is included in the record, each of the beneficiaries is to receive one tract of the land in his or her own name and another tract is to be conveyed jointly to Ernie, Schellpeper, and Van Buren. Ernie was given a right of first refusal in the event that any of the sisters wished to sell their interests during his lifetime, and he was also given a right to force a sale of any of the property subject to certain conditions.

The two trust administration proceedings were apparently consolidated by the county court sometime between September and November 2008. On November 7, the court conducted an evidentiary hearing in both cases at which it considered several pending matters. The court first considered a motion for partial summary judgment filed by Ernie on November 4 in the case involving the administration of Margaret's trust. In this motion, Ernie sought to establish the preclusive effect of the order entered in the probate proceedings for Margaret's estate in which the court found that the notebooks were insufficient to establish a debt owed by Ernie to his parents. The court overruled the motion.

Next, the sisters testified and presented documentary evidence with regard to their claim that Ernie owed a debt to his parents which should be deducted from his trust distribution. The documentary evidence consisted primarily of the notebooks containing the parents' handwritten financial records of the farming operation. Generally, the notebooks show that Emil and Margaret documented every expense paid in the farming operation and allocated 50 percent of those expenses to themselves and 50 percent to Ernie. The notebooks also document amounts Emil and Margaret paid for Ernie's personal expenses and allocate 100 percent of those amounts to Ernie. In addition, the notebooks contain a number of entries indicating that Emil and Margaret made a "loan" to Ernie and that they allocated 100 percent of that amount to Ernie. The notebooks credit Ernie with 50 percent of the profit generated by the farming operation and for any payments made on the farm's behalf. Generally, the notebooks treat Emil and Margaret's dealings with Ernie as a continuous account and carry forward from year to year the overall running balance. According to the sisters' interpretation of the notebooks, Ernie received $570,427.77 from his parents from 1998 through March 20, 2007, and was indebted to them in that amount. The sisters testified that they had found no documents indicating that Emil and Margaret had forgiven any debt and had had no discussions with Emil and Margaret to that effect.

In a jointly captioned order entered on December 3, 2008, and filed in each trust administration proceeding, the county

court found that the evidence had "raised [a] question about whether or not there is a debt due from Ernie to Emil's trust." The court further found that the trustee had not been provided with "the necessary information to research" the claim, and it therefore instructed the trustee to conduct an investigation. The court reserved ruling on the issue of Ernie's alleged indebtedness to the trust until a later date. The court ruled, however, that any payments to Ernie in 2005 and 2006 listed in the notebooks as a farm expense were not a loan and could not be considered a trust asset.

After conducting further investigation as ordered by the court, the trustee issued a jointly captioned report signed by a trust officer and filed in each trust administration proceeding on September 24, 2009. The report included a detailed examination of the notebooks and available financial records maintained by Emil and Margaret during their lifetimes. The trust officer stated that she was "advised" and "believe[d]" that Emil, Margaret, and Ernie had an "oral partnership," whereby Emil and Margaret had provided all the funds necessary for the farming operations on the real estate held by the trusts while Ernie had provided the labor, and that Emil and Margaret received 50 percent of the net income and Ernie received the remaining 50 percent. The trust officer further noted that apparently, "no written partnership agreement exists, and no partnership income tax returns were filed." The report summarizes entries in the notebooks designated as "loans" to Ernie, but notes that the trustee was unable to find any promissory notes evidencing debt owed by Ernie to either of his parents. The trustee further reported that it was unable to find any documents showing the terms of payment or due date of any of the loans referred to in the notebooks and that any such loans may be subject to defenses based upon the statute of limitations or the statute of frauds.

The county court conducted a second evidentiary hearing in the consolidated cases on December 18, 2009. The parties stipulated that if called to testify, the trust officer who prepared the report would testify as to its content, and that the court could take judicial notice of the report. The testimony and exhibits received at the prior hearing were reoffered and received. The

court also received additional documentary evidence and the transcript of Ernie's deposition taken on May 21.

In his deposition, Ernie explained that he had farmed with his parents since approximately 1975. During that time period, the parties had a general agreement whereby Ernie provided farm labor and his parents paid the bills. At the end of the year, the parties split the net profit. Ernie admitted that the entries in the notebooks were consistent with the parties' farming operations, but stated that his parents never said a word to him about his owing them money, and that he understood that the parties just "settled up" after each farming year and went on. He understood that his share of the farming expenses was covered by his labor, although he admitted that Emil also worked full time on the farm until about 5 years prior to his death. Ernie stated that he did not know the notebooks existed until after his parents' deaths and that he did not believe he owed his parents any money. Ernie stated that he believed that any amounts listed as "loans" to him in the notebooks were simply loans against the "wages" he was earning for his labor.

Ernie admitted that during the time he was farming with his parents, he had been convicted of three felonies and incarcerated on three occasions. The record does not disclose the nature of his offenses, other than Ernie's testimony that they did not involve victimization of his parents.

In its final order, the county court determined that while the evidence supported the conclusion that Ernie and his parents farmed pursuant to an oral partnership, it was not clear how the partnership actually worked. Noting the conflict between the sisters' testimony about Emil and Margaret's meticulous recordkeeping and Ernie's testimony that at the end of each year, he and his parents "basically settled up and moved on to the next year," the court concluded:

> The evidence presented would generally show that although ledgers or accountings of what Emil and Margaret . . . thought Ernie . . . owed to them may have been kept there is no evidence that Ernie . . . was ever told that he owed Emil and Margaret . . . money or was confronted with the fact that he owed them money as based on the ledgers. Additionally, although there would appear

> to be substantial amounts of money given to him and called "loans", there is insufficient evidence to show that they were in fact loans or that they were not reimbursed by labor or other means or that he was ever expected to pay the money back. Furthermore, there were no terms of payment or any sort of agreement to pay supported by the evidence.

The court further noted that Emil and Margaret were astute and intelligent people who could have documented any debt owed them by Ernie through the use of promissory notes but did not do so. And the court specifically found that there was no evidence that Ernie had threatened, intimidated, or exerted undue influence on his parents. Based upon these findings, the court overruled the sisters' objection to the trustee's accounting, concluded that Ernie owed no debt to the trusts, and ordered the trustee to administer the trusts as directed by the trust documents.

ASSIGNMENTS OF ERROR

The sisters assign, restated and summarized, that the court erred (1) in finding that there was insufficient evidence to prove that Ernie owed a debt, to the trusts, that was a trust asset; (2) if it found that the statute of limitations barred recovery; (3) in finding that a partnership existed; and (4) in failing to tax to Ernie costs and fees for their lawyer and the trustee's lawyer.

In a cross-appeal, Ernie asserts, restated, that the court erred in failing to find that his sisters' arguments were barred by the doctrine of collateral estoppel.

STANDARD OF REVIEW

[1,2] Ernie's cross-appeal raises an issue of collateral estoppel. The applicability of the doctrine of collateral estoppel is a question of law.[1] An appellate court reviews questions of law independently of the lower court's conclusion.[2]

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[1] See, *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010); *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

The standard of review for the appeal, however, is less clear. As recently noted by the Court of Appeals,[3] there is some inconsistency in our case law regarding the appropriate standard of review in appeals involving the administration of a trust. We find that clarification of this issue is in order.

The Nebraska Uniform Trust Code, enacted in 2003, applies to "all trusts created before, on, or after January 1, 2005,"[4] and to "all judicial proceedings concerning trusts commenced on or after January 1, 2005."[5] According to Neb. Rev. Stat. § 30-3821 (Reissue 2008), appellate review under the Nebraska Uniform Trust Code is governed by Neb. Rev. Stat. § 30-1601 (Reissue 2008). Section 30-1601, which is a part of the Nebraska Probate Code, states general procedures for appealing cases arising under the Nebraska Probate Code and the Nebraska Uniform Trust Code and for superseding judgments during the pendency of an appeal. But it does not specify a standard of review.

Instead, that standard has been developed in our case law. With respect to review of probate cases, our case law provides two slightly different but consistent articulations of the standard to be applied. In some cases, we have stated very generally that "[a]ppeals of matters arising under the Nebraska Probate Code . . . are reviewed for error on the record."[6] And in other cases, we have stated more specifically that "absent an equity question, we review probate matters for error appearing on the record."[7] Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.[8]

Our articulation of the standard of review of appeals involving trusts has been much less consistent. Beginning with *In*

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[3] *In re Trust Created by Socha*, 18 Neb. App. 471, 783 N.W.2d 800 (2010).

[4] See Neb. Rev. Stat. § 30-38,110(a)(1) (Reissue 2008).

[5] See § 30-38,110(a)(2).

[6] See, e.g., *In re Estate of Failla*, 278 Neb. 770, 771, 773 N.W.2d 793, 794 (2009). Accord *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

[7] *In re Estate of Hedke*, 278 Neb. 727, 742, 775 N.W.2d 13, 27 (2009). See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[8] See *In re Estate of Everhart*, 18 Neb. App. 413, 783 N.W.2d 1 (2010).

re Zoellner Trust,[9] decided in 1982, we have stated, rather broadly, that all "[a]ppeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record." *In re Zoellner Trust* was an appeal from an order removing a trustee. But in arriving at the standard of review, we relied on *Scully v. Scully*,[10] which involved a beneficiary's attempt to compel a trustee to deliver trust property. In that case, this court stated: "It is elementary that appeal to this court in an equity action such as that at bar is heard de novo upon the record."[11]

We have since applied the de novo on the record standard in appeals involving various issues of trust administration, including whether payment for a trustee's service was proper,[12] whether a trustee improperly transferred trust funds to himself,[13] whether a settlor had revoked a trust prior to her death,[14] the manner in which trust assets were to be distributed to beneficiaries,[15] and whether a trustee of a discretionary support trust could pay the beneficiary's last-illness expenses after her death.[16]

But in at least two other appeals involving trust administration, we applied the error on the record standard applicable to probate appeals. In *In re Loyal W. Sheen Family Trust*,[17] a case involving removal of trustees which was decided before the enactment of the Nebraska Uniform Trust Code, we reviewed the order for error on the record, based upon the former provision of the Nebraska Probate Code which gave

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[9] *In re Zoellner Trust*, 212 Neb. 674, 678, 325 N.W.2d 138, 141 (1982).

[10] *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956).

[11] *Id.* at 373, 76 N.W.2d at 244.

[12] *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[13] *In re Estate of Hedke, supra* note 7.

[14] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

[15] *In re Family Trust Created Under Akerlund Trust*, 280 Neb. 89, 784 N.W.2d 110 (2010).

[16] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

[17] *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002).

probate courts jurisdiction over trust administration proceedings.[18] And in *In re Trust of Hrnicek*,[19] we cited an error on the record standard in a trust administration appeal in which we recognized that retainer was a valid, equitable remedy which could be utilized by a trustee to recover a beneficiary's indebtedness to a trust.

[3] In *In re R.B. Plummer Memorial Loan Fund Trust*,[20] we recognized both the error on the record standard generally applied to probate cases and the de novo on the record standard which we had applied to trust administration appeals. In determining which of these standards to apply in that case, we focused on the specific issue presented, which was whether the doctrines of cy pres or deviation could be applied to use trust income in a manner which was different from the testators' intent. We determined that because cy pres and deviation were equitable doctrines, our review was de novo on the record. We now conclude that this issue-specific approach is preferable and more consistent with our standard for appellate review under the Nebraska Probate Code than simply labeling all trust administration cases as equitable in nature and subject to a de novo on the record standard of review. Accordingly, we hold that absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.

[4,5] In this case, all of the sisters' assignments of error relate to the general question of whether the county court erred in determining that the trustee should not exercise the remedy of retainer with respect to Ernie's alleged indebtedness to the trusts. In *In re Trust of Hrnicek*, we reaffirmed that a trustee's "right of retainer lies in equity."[21] Accordingly,

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[18] See Neb. Rev. Stat. § 30-2806 (Reissue 1995) (repealed by 2003 Neb. Laws, L.B. 130, § 143).

[19] *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010).

[20] *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[21] *In re Trust of Hrnicek, supra* note 19, 280 Neb. at 902, 792 N.W.2d at 146, citing *Fischer v. Wilhelm*, 139 Neb. 583, 298 N.W. 126 (1941).

because an equity issue is presented, our review is de novo on the record. 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.[22]

ANALYSIS

Collateral Estoppel Does Not Apply

In his cross-appeal, Ernie contends that the issue of whether the notebooks establish that he is indebted to his parents is barred by the doctrine of collateral estoppel because it was decided in Margaret's estate proceedings that the notebooks were insufficient evidence of his debt.

[6,7] Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.[23] Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[24]

Ernie argues that the issue of whether the notebooks established his indebtedness to his parents was presented during Margaret's estate proceedings and that because his sisters were given notice in those proceedings, they had an opportunity to fully litigate the issue, but they chose not to. He asserts that the issue was finally decided because the probate judge ordered that the notebooks were insufficient to establish an indebtedness to the estate and told the personal representative to take no action on them.

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[22] *In re Family Trust Created Under Akerlund Trust, supra* note 15; *In re Estate of Hedke, supra* note 7.

[23] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008); *Metcalf v. Metcalf*, 17 Neb. App. 138, 757 N.W.2d 124 (2008).

[24] *Amanda C. v. Case, supra* note 23.

We conclude that Ernie is incorrect. Collateral estoppel does not apply here because the issue presented is not identical. Whether the notebooks established an asset of Margaret's estate is a different issue from whether the notebooks established an asset of her trust (or Emil's trust). We further note that according to the record, the issue of Ernie's indebtedness was not litigated in the estate proceedings because "the parties had agreed that the notebook issues would be most properly litigated" in the trust proceedings. Having once agreed to litigate the issues in the trust proceedings, Ernie cannot now contend that it was error for the court to allow him to do so.

Ernie's Debt to Trusts

[8] The equitable remedy of retainer in the context of trust administration is based upon the principle 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.[25]

As noted, we first recognized this remedy in our recent decision in *In re Trust of Hrnicek*.[26] In that case, the indebtedness consisted of a loan made by the settlor to one of his children who was a cobeneficiary of his trust. The terms of the loan were set forth in a promissory note, and after the settlor's death, the beneficiary acknowledged the debt in a settlement agreement which was approved by the county court. When the beneficiary subsequently defaulted on the debt, the trustee exercised the remedy of retainer by applying for a contempt citation with an alternative purge plan whereby either the beneficiary would pay the amount due or the trustee would withhold that amount from the beneficiary's trust distribution. The county court

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[25] Restatement (Second) of Trusts § 251A at 634 (1959). See *In re Trust of Hrnicek, supra* note 19.

[26] *In re Trust of Hrnicek, supra* note 19.

granted the application and authorized the trustee to withhold funds to satisfy the indebtedness. We affirmed, concluding that "the retainer of a distribution is a valid, equitable remedy available to trustees in situations such as this."[27]

[9,10] Here, the trustee did not actively assert the remedy of retainer, but, instead, requested instruction from the county court regarding the existence of any indebtedness to which the remedy could apply and indicated that it would abide by the court's determination. The sisters, as interested parties, have taken the laboring oar in proving the existence of Ernie's debt to the trusts. They do so under a theory of assumpsit, which we have characterized as an action for money had and received. An action in assumpsit for money had and received may be brought where a party has received money which in equity and good conscience should be repaid to another.[28] In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.[29] In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.[30] In the context of these appeals, the question is whether Ernie would have been liable to his parents under this theory prior to their deaths.

Resolution of this question necessarily involves an examination of the relationship between Ernie and his parents during their lifetimes. That relationship had both business and personal aspects which were deeply intertwined within the fabric of a family farming operation. Whether or not it was accurately characterized by the trustee and the county court as an "oral partnership," the business relationship consisted of Emil and Margaret providing land and operating capital for the farming

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[27] *Id.* at 902, 792 N.W.2d at 146.

[28] *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[29] *Id.*

[30] *Id.*

operation, Ernie providing labor, and the parties dividing the net profits annually. Ernie lived on a parcel of land owned by Emil, but each day, he went to his parents' nearby home to do chores, and he regularly ate at least one daily meal which was prepared by Margaret. He assisted his parents with various tasks, including caring for their house and yard and butchering chickens. Ernie testified that his parents wanted him to continue the family farming operation after their deaths, and this testimony is generally consistent with the trustee's summary of the provisions of the trust dealing with the distribution of real property.

But it is also clear from the record that over the years, Emil and Margaret transferred substantial sums of money directly to Ernie through checks written by either Emil or Margaret on their joint bank account. The canceled checks in the record show that the memorandum line on these checks noted that the transfer was either for "[f]arm [e]xpenses" or for a "loan." Entries in the notebooks generally correspond with the check records. In addition, the record shows that Emil and Margaret regularly made other payments to third parties, such as utility companies, on Ernie's behalf.

There is no evidence or contention that Ernie reimbursed his parents for any of these payments during their lifetimes. Thus, the first and second elements of assumpsit are established, and we focus our de novo review of the record on the third element: whether in justice and fairness Ernie was obligated to repay the money he received from his parents.

We cannot conclude from this record that Ernie in justice and fairness had an implied legal obligation to repay his parents either for payments they designated as "farm expenses" or for payments they made on Ernie's behalf to third parties. These payments all appear to be related to the family farming operation in which Ernie and his parents were engaged, and there is no basis in the record to support a finding that both Ernie and his parents expected Ernie to repay these amounts. The evidence, viewed as a whole, is insufficient for us to conclude that Ernie was unjustly enriched by these payments so as to create an implied promise of repayment under principles of assumpsit.

Nor do we find Ernie to be liable for the "farm expense" or third-party payments under the sisters' alternative theory of "account stated." Where parties have ongoing business dealings, failure of one party to object to an account rendered can be evidence of the correctness of the amount shown as due, and proof of an express promise to pay is not required.[31] But here, the existence of such an account cannot fairly be presumed, as there was no evidence that Emil and Margaret ever presented Ernie with the notebooks which are alleged to constitute the account stated.

We reach a different conclusion with respect to the payments designated in the notebooks and on the canceled checks as "loans." The district court reasoned that the payments could not be considered loans because of the absence of a promissory note or other contractual obligation to repay. But we have recognized that in limited factual circumstances, this need not be outcome determinative. In *Cartney v. Olsen*,[32] the executor of an estate sought to recover amounts which he claimed his decedent had loaned to the defendants. The evidence included a ledger sheet on which the decedent maker had written "'loan for car.'"[33] There was conflicting evidence as to whether the payment was intended as a loan or as a gift, and, as in this case, there was no promissory note or other express contractual obligation for repayment. Citing the principle that a "'"loan of money is the delivery by one party and the receipt by the other party of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest,"'" we held that the evidence was sufficient to establish an implied agreement to repay the sums advanced.[34]

Under the sisters' assumpsit theory, the inquiry is whether the payments to Ernie which were designated as "loans" by his parents were made under circumstances where the law would

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[31] See *John Deere Co. of Moline v. Ramacciotti Equip. Co.*, 181 Neb. 273, 147 N.W.2d 765 (1967).

[32] *Cartney v. Olson*, 154 Neb. 546, 48 N.W.2d 653 (1951).

[33] *Id.* at 548, 48 N.W.2d at 655.

[34] *Id.* at 549, 48 N.W.2d at 655, quoting 38 C.J. *Loan* § 2 (1925).

imply a promise to repay in order to prevent Ernie's unjust enrichment at the expense of his parents and their trusts. On our de novo review, we conclude that they were. By entering the payments in their records as "loans," Emil and Margaret clearly expressed their expectation of repayment. While Ernie contends that his parents never communicated their expectation of repayment to him, the record shows otherwise. The evidence includes the originals or photocopies of 101 canceled checks written by Emil or Margaret on their joint checking account from 1998 through 2005, each payable to "Ernie Mastny." The checks were written for whole dollar amounts ranging from $120 to $30,000. The total amount of these checks is $287,570. The word "loan" is written on the face of each check, and there is a corresponding "loan" entry in the notebooks for almost all of the checks. In light of the notation "loan" on the face of each check, Ernie's endorsement and negotiation of these checks establishes that he knew or should have known the payments were intended as loans. The record does not include gift tax returns or other evidence that Emil and Margaret ever intended the payments as gifts, either when they were made or at any subsequent time. Nor does the record include income tax returns or other evidence to establish that the payments constituted wages, as Ernie suggests. There simply is no persuasive evidence that Emil and Margaret ever forgave any of these loans or that the loans were paid. Ernie's vague testimony that he and his parents "settled up" after each year and somehow wiped the slate clean is refuted by the fact that the loan amounts were carried forward on Emil and Margaret's records from year to year and by Schellpeper's testimony that from discussions with Emil and Margaret, she understood that Ernie's debt to them would be resolved through their trusts. We conclude that Ernie is indebted to the trusts for the $287,570 he received from his parents as "loans" from 1998 to 2005.

Statute of Limitations

The sisters assign that the trial court erred "when, and if, it thought the statute of limitations bars recovery." Neither the 2008 nor the 2009 order of the county court addressed whether

the statute of limitations barred recovery of Ernie's debt. Ernie does not argue any statute of limitations issue in his appellate brief or brief on cross-appeal.

[11,12] The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it.[35] The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.[36] We find no pleadings filed by Ernie in the trust administration proceedings which include an affirmative allegation that any debt owed to his parents was barred by the statute of limitations. Although he included an argument to this effect in a brief filed in the county court, a brief is not a pleading.[37] We conclude that Ernie has waived any defense based upon the statute of limitations.

CONCLUSION

For the reasons discussed, we conclude on de novo review that the evidence is insufficient to establish that Ernie is indebted to the trusts either for payments designated by his parents as "farm expenses" or for payments made by his parents to third parties on his behalf. But we conclude under principles of assumpsit that Ernie is indebted to the trusts for payments his parents made to him for which the record shows a canceled check bearing the designation "loan." Justice and good conscience require that Ernie repay $287,570, the amount of these loans, and equity authorizes the trustee to exercise the remedy of retainer in order to recover the debt. We therefore affirm the judgment of the county court in part, and in part reverse. We further direct the county court on remand to enter an order requiring the trustee to retain $143,785 from any distribution to Ernie under Margaret's trust and to retain the same amount from any distribution to Ernie under Emil's

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[35] *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001). See *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954).

[36] *In re Estate of Reading, supra* note 35; *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984).

[37] See 4 C.J.S. *Appeal and Error* § 747 (2007).

trust. Upon remand, the court may also consider an award of costs and attorney fees under Neb. Rev. Stat. § 30-3893 (Reissue 2008).

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

WRIGHT, J., not participating.

ALICE TOLBERT ET AL., APPELLANTS, V. MR. JAMISON AND MRS. JAMISON, DOING BUSINESS AS JAMISON REALTY, APPELLEES.

794 N.W.2d 877

Filed March 11, 2011. No. S-09-687.

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 question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. ____. Whether a duty exists is a policy determination. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
6. **Landlord and Tenant: Statutes: Ordinances.** A statute or ordinance may impose a duty on a landlord.
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
8. ____: ____. 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.
9. **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.

10. **Appeal and Error.** Appellate courts do not consider arguments and theories raised for the first time on appeal.
11. **Landlord and Tenant: Liability.** As a general rule, in the absence of statute, covenant, fraud, or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.
12. ____: ____. To hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover.
13. **Landlord and Tenant: Contracts.** In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Sheri E. Long Cotton for appellants.

Daniel P. Chesire, Cathy S. Trent-Vilim, and Maria T. Lighthall, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

The plaintiffs-appellants in this case are Alice Tolbert and Chaz Tolbert, individually and as personal representatives of the estates of Victoria Lynn Tolbert Burgess (Victoria) and Tisha Cassandra Tolbert (Tisha), and John Tolbert, as guardian ad litem on behalf of Rictavianna Tolbert, a minor child who is the daughter of Tisha. They are referred to collectively as "the Tolberts" herein. The Tolberts were all related to Victoria and Tisha, a mother and daughter who were both killed in a house fire. Clarence and Phyllis Jamison, doing business as Jamison Realty (the Jamisons), owned the house in which Victoria and Tisha were tenants.

The Tolberts filed an action against the Jamisons and the Omaha Housing Authority (OHA), asserting, inter alia, that

the Jamisons were negligent for failing to provide adequate fire safety features, including adequate escape routes from the rental house in the event of a fire. The district court for Douglas County granted summary judgment in favor of the Jamisons and dismissed the action after determining that because the Jamisons did not violate any regulations or codes, they met their duty, and that, even if the Jamisons were negligent, the actions of an arsonist who started the fire were not foreseeable and were an intervening cause of the fire and of Victoria's and Tisha's deaths. The Tolberts appealed, claiming that the district court erred when it failed to apply "notice pleading" principles and the law regarding premises liability. They also complained of certain evidentiary rulings. The Nebraska Court of Appeals affirmed the decision of the district court, based on the intervening cause aspect of the ruling. We granted the Tolberts' petition for further review. Albeit for reasons other than those articulated by the Court of Appeals, we affirm.

STATEMENT OF FACTS

Victoria and Tisha lived in "Section 8" federally subsidized housing owned by the Jamisons. The property at issue is a two-story, single-family dwelling. Victoria and Tisha died in April 2003 as the result of a house fire that was intentionally set by Decabooter Williams. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005). Another occupant of the house escaped through a window. See *id.*

The Tolberts filed this negligence action against the Jamisons, alleging that they were negligent in failing to provide appropriate ingress and egress, working fire alarms, and fire extinguishers or other extinguishing equipment "as required by the laws of the State of Nebraska, the U.S. Department of Housing governing participants in the Section 8 program and the City of Omaha Minimum Dwelling Codes." The Tolberts alleged, inter alia, that the house had one door for ingress and egress and that the fire started by Williams blocked access to the one door.

The Tolberts also named OHA as a defendant. In 2006, the district court sustained OHA's motion to dismiss the suit against OHA. The court found two reasons to dismiss the suit against

OHA: (1) Federal law bars a private right of action against a public housing authority administering Section 8 housing for failure to enforce housing quality standards, and (2) the actions of the arsonist, Williams, were an efficient intervening cause which precluded a finding that any negligence on the part of OHA proximately caused Victoria's and Tisha's deaths. The court certified the order sustaining OHA's motion to dismiss as a final judgment as to all claims against OHA, pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008). The Tolberts appealed the dismissal of OHA to the Court of Appeals. The Court of Appeals affirmed the dismissal on the basis that federal law barred the action. Because such conclusion resolved the appeal, the Court of Appeals did not consider other rationale upon which dismissal of OHA had been based. *Tolbert v. Omaha Housing Authority*, 16 Neb. App. 618, 747 N.W.2d 452 (2008). We denied the Tolberts' petition for further review.

After the cause resumed in the district court, the Jamisons moved for summary judgment. The district court conducted an evidentiary hearing. The Jamisons contended they were not negligent. The Jamisons relied in part on various regulations and codes regarding fire safety requirements with which they had complied and which they asserted demonstrated they had met their duty and the standard of care. The district court made certain evidentiary rulings not relevant to our resolution of this case.

In an order filed on April 15, 2009, the court found that there was no evidence that the Jamisons failed to comply with federal Section 8 housing requirements, state law, or city of Omaha building codes with regard to ingress and egress and other fire safety issues. The court further found that Williams' actions in starting the fire "were not foreseeable to the Jamisons and presented an intervening cause which breaks the causal chain of any negligence which may be attributable to the Jamisons" and that Williams' actions were "the proximate cause of the injuries to the Tolberts." The law generally defines "efficient intervening cause" as new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the casual connection between the original conduct and the injury. *Wilke v. Woodhouse Ford*, 278 Neb.

800, 774 N.W.2d 370 (2009). The court sustained the Jamisons' motion for summary judgment.

The Tolberts appealed to the Court of Appeals. In a memorandum opinion filed March 30, 2010, the Court of Appeals summarized the Tolberts' assignments of error as follows: The trial court erred in (1) determining that Williams' actions constituted an efficient intervening cause, cutting off the Jamisons' liability for any negligence; (2) failing to apply notice pleading principles to the Tolberts' complaint and failing to consider premises liability theory; and (3) sustaining the Jamisons' objections to the Tolberts' exhibits and in overruling the Tolberts' objections to the Jamisons' exhibits. In their brief filed in the Court of Appeals, the Tolberts claimed for the first time that the essence of their negligence action was that the Jamisons were liable under the common law regarding premises liability and specifically as such law applied to conditions on the land. The focus of the Tolberts' claim on appeal is that the Jamisons violated their duty to the Tolberts when the Jamisons failed to provide a second door for egress in the event of a fire.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of the Jamisons. The Court of Appeals concluded that "the trial court did not err in finding that Williams' actions were an efficient, intervening cause, and that Williams' actions were not foreseeable to the Jamisons." Given its resolution of such issue, the Court of Appeals determined that it did not need to address the Tolberts' other assignments of error.

We granted the Tolberts' petition for further review.

ASSIGNMENTS OF ERROR

The Tolberts assert that the Court of Appeals erred by failing to properly analyze their claim under Nebraska law as a premises liability claim regarding "conditions on the land." The Tolberts make other assignments of error which we need not discuss, because this assignment of error resolves the appeal.

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. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). 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. *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

ANALYSIS

In this negligence action as pleaded, the Tolberts alleged that the Jamisons were liable because, as owners of a single-family dwelling with only one door, they failed to comport with various regulations and codes relevant to Section 8 housing. The evidence at the summary judgment hearing was designed to meet these allegations. Because none of the regulations and codes required a second door, the Jamisons met their duty in this regard. The district court granted summary judgment in favor of the Jamisons based on their demonstrated compliance with such regulations and codes. This basis for the grant of summary judgment was correct.

The Jamisons established that they met their duty and that they were not negligent. As explained below, as the case was pleaded and tried, there was no negligence, and therefore, there was no basis for application of a theory of intervening causal negligence. The intervening cause rationale explained by the district court and endorsed by the Court of Appeals was not a correct application of the law and does not support entry of the summary judgment. Nevertheless, because summary judgment was properly entered based on the Jamisons' compliance with regulations and codes, we affirm the decision of the Court of Appeals which affirmed the district court's grant of summary judgment in favor of the Jamisons.

On further review, the Tolberts contend that the proper analysis of their negligence action is under premises liability theory, specifically as it relates to conditions on the land, and that their complaint put the Jamisons on notice that this theory

was at issue. They contend that the Court of Appeals erred by not reviewing the appeal as a "conditions on the land" case. The Jamisons respond that the complaint as pleaded was a claim of negligence based on purported violations of duties established by regulations and codes, that premises liability was not pleaded or argued at the trial level, and that the entry and affirmance of summary judgment in their favor was proper. We agree with the Jamisons in each regard.

In their complaint, the Tolberts alleged that the Jamisons were negligent because they failed to provide safety features in violation of various regulations and codes. Throughout the proceedings, the Tolberts have focused on the fact that the single-family dwelling of which they were tenants had one door, although there is no dispute that there were windows capable of being used for egress and that one occupant of the house exited through a window. See *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005).

[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. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* Whether a duty exists is a policy determination. See *id.* Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases. *Id.* Courts have recognized that a statute or ordinance may impose a duty on a landlord. See *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157 (Ind. App. 1988) (in apartment house fire, city ordinance requiring second means of egress imposed duty on landlord).

In view of the allegations in the complaint, the Jamisons moved for summary judgment on the basis that they had met their duty by complying with relevant housing regulations and codes. The record supported the Jamisons' position. The district court concluded they were entitled to judgment as a matter of law on this basis. We determine that the district court did not err in this regard.

[7-9] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008). 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. *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). 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 reviewing a summary judgment, we give the party against whom the judgment was entered all reasonable inferences deducible from the evidence. See *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

The Tolberts do not dispute that the Jamisons met relevant regulations and codes. They contend, however, that their reference to "the laws of the State of Nebraska" in the complaint encompasses the common law of Nebraska and, in particular, concepts of premises liability which the Tolberts assert imposed additional duties on the Jamisons. The Tolberts suggest that they attempted to meet the Jamisons' summary judgment case by proffering various affidavits from witnesses in the inspection and construction fields which would have shown that it is customary to have more than one door in a single-family dwelling and, therefore, that conditions on the land failed to meet common standards, thus giving rise to premises liability. However, because premises liability theory imposes duties on possessors of land and the Jamisons were not possessors of the land, the Tolberts' reliance on their affiants and the premises liability theory they support is misplaced.

On further review, the Tolberts refer us to *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004), in which we set forth the framework for premises liability under Nebraska

law which we apply to this case. In *Meeske*, we stated that there are generally three categories of duties that a possessor of land owes to those lawfully on the premises. We described those duties as follows:

> First, the possessor must take reasonable steps to protect the lawful entrant from conditions on the land. . . . Second, the possessor must take reasonable steps to protect the lawful entrant from the possessor's dangerous activities. . . . Finally, the possessor must take reasonable steps to protect the lawful entrant from accidental, negligent, and intentional harmful acts of third parties if those acts are foreseeable.

Id. at 907, 689 N.W.2d 343 (citations omitted).

The duties of a possessor of land described in *Meeske* are taken from the Restatement (Second) of Torts § 341A (1965). The term "possessor" is defined by the Restatement, *supra*, § 328E at 170, as

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

This Restatement definition of "possessor" is applicable to premises liability, and referring to this definition of "possessor," there is nothing in the record from which we can infer that the Jamisons are "possessors" of the land at issue. Because the Jamisons are not possessors of the land, they are not bound by the premises liability duties described in *Meeske*. Thus, neither the first duty in *Meeske* regarding conditions on the land, upon which the Tolberts rely in general, nor the third duty in *Meeske* regarding protecting against intentional harmful acts of third parties, upon which the lower courts relied in their intervening cause analysis, is relevant to establishing the Jamisons' duties.

[10] On further review, the Tolberts seem to suggest that there are other sources of law from which additional duties

may be placed on the Jamisons. In response, the Jamisons correctly note that appellate courts do not consider arguments and theories raised for the first time on appeal. See *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). The Tolberts did not advance alternative theories which would create additional duties on the Jamisons in the lower courts, and their general reference to "the laws of the State of Nebraska" does not suggest a compelling alternative source of duty.

In their brief in support of their petition for further review, the Tolberts suggest that the Jamisons, as landlords, had a common-law duty to reasonably guard against the risk of fire. The cases upon which the Tolberts rely, such as *Collins v. Scenic Homes, Inc.*, 38 So. 3d 28 (Ala. 2009), and *Mozer v. Semenza*, 177 So. 2d 880 (Fla. App. 1965), are distinguishable because they involved apartment buildings or hotels where the owner retained control over the premises or common areas. In contrast to the cases referred to by the Tolberts, this case involves owners of a single-family dwelling who were sued by occupants.

[11,12] With reference to a single-family unit, the law may be summarized as follows: "'As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.'" *Olds v. Noel*, 857 N.E.2d 1041, 1044 (Ind. App. 2006). It is well settled in Nebraska common law that to hold an owner of leased premises liable for injuries suffered as a result of the condition of the leased premises, it must appear that the landlord had a right to present possession or present control or dominion thereover. *Tighe v. Cedar Lawn, Inc.*, 11 Neb. App. 250, 649 N.W.2d 520 (2002). See, *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986); *Hiatt v. Tallmage*, 219 Neb. 635, 365 N.W.2d 448 (1985). See, also, 52A C.J.S. *Landlord & Tenant* § 893 (2003).

[13] We recognize that a landlord may be bound to use reasonable care in the maintenance of common areas of which he or she retains control and have not been demised to the

tenants. See *Tighe, supra.* However, we cannot infer from the record that there was a "common area" in this single-family dwelling. See *Olds v. Noel, supra* (common area more likely to be found in apartment complex or other multi-unit properties rather than single-family dwelling). See, generally, 52A C.J.S., *supra*. In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them. *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966); *Tighe, supra*. In this case, the Tolberts did not rely on a lease or plead a contractual basis for the Jamisons' alleged duty. Finally, the Uniform Residential Landlord and Tenant Act, as adopted in Nebraska, did not change the common law. Neb. Rev. Stat. § 76-1419(1)(f) (Reissue 2009) (providing that obligations imposed by this section are not intended to change existing tort law in this state). We reject the Tolberts' idea that other sources of duty giving rise to negligence by the Jamisons can be inferred from the complaint.

CONCLUSION

The Jamisons overcame the allegations in the complaint to the effect that they had violated various regulations and codes and demonstrated that they were entitled to judgment as a matter of law. They were not obligated to advance alternative theories upon which duty and liability could be potentially based. The Tolberts did not produce evidence which showed a material fact in dispute that would prevent judgment as a matter of law. The Tolberts' appellate arguments on further review and references to excluded evidence all grounded in conditions on the land under the theory of premises liability are not persuasive; because the Jamisons were not possessors of the land, they had no duty under premises liability theory. Albeit for reasons which differ from those of the Court of Appeals, we affirm the decision of the Court of Appeals which affirmed the district court's entry of summary judgment in favor of the Jamisons.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAY V. BORST, APPELLANT.

795 N.W.2d 262

Filed March 18, 2011. No. S-09-1084.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
3. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
4. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
5. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
6. **Warrants: Affidavits: Evidence.** Ordinarily, evidence from which the court can determine that an arrest warrant was legally valid will consist of the arrest warrant and supporting affidavit; however, the affidavit requirement will be forgiven where the record establishes the "personal knowledge exception."
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Mandy M. Gruhlkey, Senior Certified Law Student, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Jay V. Borst appealed his convictions in the district court for Sarpy County for manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine) to the Nebraska Court of Appeals. The Court of Appeals determined that although the actual arrest warrants were not in evidence, the testimony of law enforcement officers that they had outstanding arrest warrants was sufficient to establish that the officers had valid arrest warrants and therefore a lawful right to be in Borst's home when they saw the controlled substances in plain view. The Court of Appeals, in a memorandum opinion filed June 21, 2010, concluded that the district court did not err when it overruled parts of Borst's motion to suppress, and the Court of Appeals therefore affirmed Borst's convictions.

We granted Borst's petition for further review. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to reverse Borst's convictions and to remand the cause to the district court for a new trial on both charges.

STATEMENT OF FACTS

On July 2, 2008, three officers from the Sarpy County sheriff's office came to Borst's home to serve outstanding misdemeanor arrest warrants on Borst. While at the home, the officers observed, in plain view, a growing marijuana plant and a syringe containing methamphetamine. Borst told the officers that both items belonged to him. Later, after he had been taken to a holding cell and given *Miranda* warnings, Borst stated

that he had started growing the marijuana plant from seeds and that he had purchased the methamphetamine earlier in the day. Borst was charged with manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine).

Prior to trial, Borst moved to suppress the physical evidence seized from his home and the statements he made to the officers. He asserted in his motion to suppress that there were no exigent circumstances permitting the officers to enter his home without a search warrant, that the officers did not have a valid arrest warrant for him, and that the officers began an exploratory search after they illegally entered his home to arrest him without a valid warrant.

Following a suppression hearing, the district court found that the officers had a lawful right to be in Borst's home, that they had an active warrant for Borst's arrest, and that they were serving the warrant in a proper manner. The court's findings were based on the officers' testimony that they had outstanding traffic-related arrest warrants for Borst. The State did not offer the actual arrest warrants into evidence. The court overruled Borst's motion to suppress the physical evidence—specifically, the marijuana plant and the syringe—seized from the home. The court sustained the motion to suppress the statements Borst made in the home, because he was in custody and had not been given *Miranda* warnings. However, the court ruled that the statements Borst made at the jail regarding controlled substances after receiving *Miranda* warnings were admissible.

Following a bench trial, Borst was found guilty of the charged offenses, and the court sentenced him to 20 months' to 4 years' imprisonment for each offense and ordered the sentences to be served concurrently. Borst appealed his convictions to the Court of Appeals and claimed, inter alia, that the district court erred when it overruled parts of his motion to suppress. Borst argued that the court's findings were erroneous, because the State did not offer the arrest warrants as evidence at the suppression hearing or at trial, the court never examined the warrants, and thus the State failed to establish the validity of the arrest warrants, which, in turn, would have

justified the warrantless search. The Court of Appeals rejected Borst's arguments. The Court of Appeals noted that although the arrest warrants were not offered or received into evidence, testimony by the officers was sufficient to establish that "there were three valid outstanding warrants for Borst." The Court of Appeals rejected Borst's other arguments and affirmed his convictions.

Borst filed a petition for further review. We granted the petition.

ASSIGNMENT OF ERROR

Borst asserts on further review that the Court of Appeals erred when "it affirmed the trial court's overruling of the Motion to Suppress because the [S]tate never offered the arrest warrants it used to justify [Borst's] arrest."

STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Garcia, ante* p. 1, 792 N.W.2d 882 (2011).

ANALYSIS

The State Was Required to Offer the Arrest Warrants and Affidavits Into Evidence in Order for the District Court to Determine Whether the Officers Had Valid Arrest Warrants and Therefore Had a Legal Right to Be in Borst's Home.

Borst claims that the Court of Appeals erred when it affirmed the district court's order that overruled his motion to suppress both the physical evidence that was seized from his home and the statements he made in the holding cell. Borst asserts that because the State relied on the officers' testimony that they had outstanding warrants rather than offering the actual warrants into evidence, the State failed to prove an exception justifying a warrantless search of his home. We agree that in order

to determine whether the officers had a legal right to be in Borst's home, it was necessary for the State to offer the arrest warrants and supporting affidavits into evidence. Without the arrest warrants and affidavits in evidence, the court could not determine their validity. We conclude therefore that the district court erred when it overruled Borst's motion to suppress the physical evidence seized from his home and the statements he made in the holding cell and that the Court of Appeals erred when it affirmed the ruling.

[2-4] There is no dispute in this case that the officers did not have a search warrant to search Borst's home. Therefore, this case must be analyzed as a warrantless search and seizure case. We have stated that warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010). The warrantless search exceptions recognized by this court include: (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id*. In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[5] The district court in this case found the warrantless search to have been justified as a search of evidence in plain view. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). The court overruled Borst's motion to suppress the seized physical evidence after it found that when the officers saw the evidence, they "had a lawful right to be where they were [and] they had an active warrant for [Borst]."

The sole evidence admitted at the suppression hearing to support the finding that the officers had an active arrest warrant and therefore had a lawful right to be in Borst's home was the testimony of one of the three officers, who testified that they had outstanding warrants for Borst's arrest. At trial, that officer and the other two officers each testified that they had arrest warrants when they went to Borst's home. The State did not offer the actual arrest warrants or supporting affidavits into evidence at either the suppression hearing or the trial.

Borst argues that the State did not meet its burden to show the applicability of the plain view exception to the warrant requirement, because it did not offer the arrest warrant or warrants into evidence. Without the arrest warrants, Borst argues, the court could not determine that the warrants were valid and that therefore the officers had a legal right to be in his home, where the evidence they seized could be plainly viewed. We agree with Borst's argument.

In support of his argument, Borst cites *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008), which involved a warrantless search sought to be justified as a search incident to an arrest based on an arrest warrant. The present case involves a warrantless search asserted to be justified based on the plain view exception. Although this case and *Wenke* involve different exceptions justifying a warrantless search and seizure, in both cases, the existence of a valid arrest warrant was at issue and was necessary to establish the exception. In order to establish the requirement of the plain view doctrine that the officers had a legal right to be in the place in which the evidence was in plain view, the State in this case asserted that the officers had a legal right to be in Borst's home because they were there to serve valid arrest warrants. To succeed on this theory, the State needed to establish that the arrest warrants were valid.

In *Wenke*, we concluded that the warrantless search of the defendant's person was constitutionally permissible as a search incident to a lawful arrest because the warrant/order of commitment issued by the county court served as a valid arrest warrant. As Borst notes, it is apparent that both this court and the trial court in *Wenke* examined the actual warrant to determine whether it was a valid arrest warrant. Courts in other

jurisdictions have stated in cases involving suppression that in order to establish that an arrest warrant is valid, the actual warrant and supporting affidavit must ordinarily be offered into evidence. The Supreme Court of Rhode Island has stated in part that

> [i]t is well-settled law that when a state intends to justify an arrest on the basis of a warrant, the burden is on the state to produce the warrant and supporting affidavit in order that the trial court can determine whether the warrant was properly issued and constitutionally sufficient.

State v. Taylor, 621 A.2d 1252, 1254 (R.I. 1993) (cases collected). The Court of Criminal Appeals of Texas has held that

> when an accused objects to admission of evidence on the ground that it is tainted by a warrantless arrest and the State relies on an arrest warrant, in the absence of waiver, reviewable error will result unless the record reflects that the arrest warrant was exhibited to the trial judge for a ruling.

Gant v. State, 649 S.W.2d 30, 33 (Tex. Crim. App. 1983).

In the present case, Borst asserted in his motion to suppress that the officers "did not have a valid arrest warrant for him." The issue of the validity of the arrest warrant was therefore before the court, and Borst did not waive the issue. The State had the burden to prove the justification for the warrantless search, and part of the State's asserted justification was that the officers had a legal right to be in Borst's home because they were serving valid arrest warrants. In order to establish such legal right, the State needed to prove that the arrest warrants were valid, and the officers' testimony was not competent to establish that the arrest warrants were legally valid. Whether the warrants were valid was a question of law that needed to be determined by the court, and the court could not decide the issue based only on the officers' testimony. In *State v. Davidson*, 9 Neb. App. 9, 607 N.W.2d 221 (2000), a case involving a warrantless search incident to an arrest, the defendant challenged the validity of the arrest warrant, and the Court of Appeals concluded that the defendant's motion to suppress should have been granted. The Court of Appeals reasoned that although the arrest warrant was in evidence, the State failed to establish that

the search was the result of a valid, legally issued arrest warrant, because the State failed to present the supporting affidavit or other evidence from which it could be determined that the warrant was valid and the arrest was justified.

On further review, we stated in *State v. Davidson*, 260 Neb. 417, 422, 618 N.W.2d 418, 424 (2000), that

> [i]n most instances, the lack of a sufficient affidavit or other supporting document establishing probable cause means that the warrant is invalid. See, generally, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

However, in *Davidson*, we adopted the "personal knowledge exception" to the customary necessity of requiring an affidavit in recognition of "the commonsense notion that there is no point in a judge executing an affidavit when that judge has personal knowledge of facts establishing probable cause." 260 Neb. at 424, 618 N.W.2d at 425. In this context, personal knowledge includes not only events witnessed by the issuing judge but also records of the court which the issuing judge has reviewed. In *Davidson*, notwithstanding the State's urging, the evidence did not meet the requirements of the personal knowledge exception.

On further review in *Davidson*, although we agreed with the Court of Appeals' analysis with respect to certain weaknesses in the evidence, we reversed the Court of Appeals' decision. After considering the content of the warrant and the testimony of an arresting officer who was an investigator, we concluded that although the evidence did not establish the arrest warrant was valid, the arresting officers relied in good faith on the arrest warrant, and that therefore evidence obtained as a result of the search incident to the arrest did not need to be excluded. *Davidson, supra* (citing *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), setting forth the good faith exception to the exclusionary rule).

[6] Our cases indicate that in order to prove a justification for a warrantless search when the justification is based on a valid arrest warrant, there must be evidence in the record from which the court can determine that the arrest warrant

was legally valid. Ordinarily, this evidence will consist of the arrest warrant and supporting affidavit; however, the affidavit requirement will be forgiven where the record establishes the "personal knowledge exception."

In *Davidson*, we concluded that the evidence did not need to be excluded, because the State's justification for the warrantless search was based on the officers' good faith reliance on the arrest warrant and the record established this justification was warranted. In contrast, in the present case, the State did not assert a good faith exception. Instead, the State in the instant case based its justification for the warrantless search on the existence of active valid arrest warrants. Given the fact that Borst challenged the validity of the arrest warrants in his motion to suppress, the burden fell on the State to establish the existence of a valid arrest warrant, and the State failed to do so.

The State sought to establish its justification for the warrantless search in this case on the basis that the officers testified that they were executing valid arrest warrants and in so doing observed the challenged evidence in plain view. The record does not contain the arrest warrants or supporting affidavits. On the record presented, the State did not establish the validity of the warrant or warrants and it did not establish justification of the warrantless search. Thus, the district court erred when it overruled Borst's motion to suppress the physical evidence seized from Borst's home. The Court of Appeals similarly erred when it affirmed this ruling.

Borst's Statements in the Holding Cell Were Further Fruit of the Warrantless Search and Similarly Should Have Been Suppressed.

The Court of Appeals affirmed the district court's ruling that overruled the portion of Borst's motion to suppress which sought to suppress statements he made in jail regarding his ownership of the marijuana and methamphetamine. Borst challenged this affirmance on further review. The State responds that the jailhouse statements should not be suppressed, because Borst had been given *Miranda* warnings by then. We agree with Borst that the jail statements should have been suppressed.

We have stated that *Miranda* warnings, standing alone, are "an insufficient intervening circumstance to separate a subsequent confession from the taint of an illegal search." *State v. Gorup*, 279 Neb. 841, 861, 782 N.W.2d 16, 32 (2010) (citing *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989)). In *Abdouch*, we stated that

> the *Miranda* warning, by itself, does not preclude exclusion of a defendant's custodial statement induced by confrontation with evidence obtained through a constitutionally invalid search because the *Miranda* warning does not break the cause-and-effect relationship between an illegal search and a defendant's subsequent incriminating statement, confession, or admission.

230 Neb. at 948, 434 N.W.2d at 329.

In both *Gorup* and *Abdouch*, we quoted Professor LaFave's treatise with respect to evaluating the effect of the *Miranda* warnings following a Fourth Amendment violation: "'"[I]t is crystal clear that giving the defendant the *Miranda* warnings will not break the causal chain between an illegal search and a subsequent confession. . . ."'" *Gorup*, 279 Neb. at 856, 782 N.W.2d at 29 (quoting 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 11.4(c) (2d ed. 1987)). Accord *Abdouch, supra*.

In *Abdouch*, we noted that being confronted with the illegally seized evidence, the defendant who was being interrogated at the county corrections facility "undoubtedly recognized the futility of remaining silent and admitted her participation in production of the contraband marijuana." 230 Neb. at 949, 434 N.W.2d at 329. We therefore concluded that the defendant's "custodial statements were obtained as an exploitation of the constitutionally invalid search and seizure of evidence at [her] residence and, as such, were the 'fruit of the poisonous tree'" and should be suppressed. *Id.*

In the present case, Borst made his statements at issue in the holding cell after being given *Miranda* warnings. At this point, the search had been fruitful and Borst knew it. He knew that the officers had seized the marijuana plant and the syringe from his home, which knowledge likely prompted him to admit his involvement with the controlled substances. We conclude

that Borst's statements in the holding cell were the fruit of the search and seizure that occurred in his home. Because, as we have determined above, the State failed to justify the warrantless search and seizure of physical evidence from Borst's home, the subsequent statements in jail were tainted, and these statements should also have been suppressed. The Court of Appeals erred when it affirmed the district court's ruling denying this portion of the motion to suppress.

The Evidence Presented at Trial Was Sufficient to Support Borst's Convictions, and Therefore the Cause Should Be Remanded for a New Trial.

[7] Denial of those portions of Borst's motion to suppress seeking suppression of the physical evidence in his home and his statements in jail was error, and the Court of Appeals erred when it affirmed these rulings. These errors are reversible error. Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Borst's convictions. If it was not, then concepts of double jeopardy would not allow a remand for a new trial. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.*

The record shows that the evidence presented in this case, including the physical evidence of the marijuana plant and the syringe seized from Borst's home and the statements Borst made in jail, was sufficient to sustain convictions for manufacture of a controlled substance (marijuana) and possession of a controlled substance (methamphetamine). The cause therefore should be remanded for a new trial on both charges.

CONCLUSION

The record does not establish an exception to the prohibition against warrantless searches. The State failed to offer the actual arrest warrants and supporting affidavits into evidence and therefore did not establish that the arrest warrants were valid. The district court erred when it determined that the officers

had a legal right to be in Borst's home and when it overruled Borst's motion to suppress both the physical evidence seized from Borst's home and the subsequent tainted statements he made in the holding cell. Consequently, the Court of Appeals erred when it affirmed the district court's ruling on the motion to suppress. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to reverse Borst's convictions and to remand the cause to the district court for a new trial on both charges.

REVERSED AND REMANDED WITH DIRECTIONS.

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.

796 N.W.2d 579

Filed March 18, 2011. No. S-10-342.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

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.

PER CURIAM.

Case No. S-10-342 is before this court on the motion for rehearing filed by the appellees regarding our opinion reported at *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010). We overrule the motion but for purposes of clarification, modify the opinion as follows:

In the section of the opinion designated "PROCEDURAL HISTORY," we withdraw the third paragraph, *id*. at 988, 792 N.W.2d at 163, and substitute the following:

> 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 "simultaneously maintain this action while asserting Fifth Amendment rights." In support of this motion, the defendants stated only that "Behrens has asserted his Fifth Amendment rights, has refused to answer various discovery propounded by Defendants, and has refused to sit for a deposition in this matter."

Further, we withdraw the last paragraph in the section of the opinion designated "ANALYSIS," *id*. at 996, 792 N.W.2d at 168, and substitute the following:

> Because the court's findings were insufficient to support an order of dismissal, we reverse the order and remand the cause for further proceedings. The defendants' cross-appeal does not alter our conclusion. They moved for summary judgment solely because of Behrens' invocation of his Fifth Amendment rights. Because this was not a proper ground for summary judgment, the court did not err in overruling their motion.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

CITY OF FALLS CITY, NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA MUNICIPAL POWER POOL, A NEBRASKA NONPROFIT CORPORATION, APPELLANT, J. GARY STAUFFER ET AL., APPELLEES AND CROSS-APPELLANTS, CENTRAL PLAINS ENERGY PROJECT, APPELLEE, AND AMERICAN PUBLIC ENERGY AGENCY, INTERVENOR-APPELLEE.

795 N.W.2d 256

Filed March 18, 2011. No. S-10-458.

1. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
2. **Costs.** Litigation costs are not recoverable by a party unless authorized by statute or a uniform course of procedure.
3. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Daniel E. Klaus and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellant.

James P. Fitzgerald and James G. Powers, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees J. Gary Stauffer et al.

Robert W. Mullin and David S. Houghton, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., and Douglas E. Merz, of Weaver & Merz, for appellee City of Falls City.

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

STEPHAN, J.

This case is before us for the second time.[1] In this appeal, we are asked to examine what costs a district court may tax and how they should be apportioned in a case involving multiple claims with differing resolutions.

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[1] See *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

FACTS AND PROCEDURAL BACKGROUND

In October 2006, the City of Falls City (Falls City) filed a complaint against the Nebraska Municipal Power Pool (NMPP), five individuals who were officers or employees of NMPP or its related entities, and Central Plains Energy Project (CPEP).[2] A detailed summary of the factual basis for the suit is included in our previous opinion. Falls City alleged, summarized, that NMPP breached a contract with an interlocal agency created in order to secure natural gas for participating municipalities, including Falls City, and that the individual defendants violated fiduciary duties to individual members of the agency, including Falls City, by their involvement in the formation of CPEP. Prior to trial, CPEP's motion for summary judgment was sustained, but it thereafter remained a party to the action because of Falls City's request for equitable relief against the other parties, which might have entailed CPEP's participation. CPEP is not a party to this appeal.

In February 2007, the American Public Energy Agency (APEA) was granted leave to intervene as a plaintiff in order to file a complaint against J. Gary Stauffer and Evan Ward, two of the individual defendants. An 11-day trial occurred in May 2008. At the conclusion of the trial, the district court dismissed all claims against two of the individual defendants, Ron Haase and Chris Dibbern, but awarded a money judgment of approximately $477,000 in favor of Falls City against NMPP, Stauffer, Ward, and John Harms. The court awarded another judgment of approximately $150,000 in favor of Falls City against NMPP. APEA was awarded a judgment of approximately $3.2 million against Stauffer and Ward. And, although APEA had not asserted a claim against NMPP, the judgment ordered NMPP to disgorge approximately $220,000 received from CPEP by paying this amount to APEA. The court also awarded other equitable relief.

During the pendency of an appeal, NMPP, Stauffer, and Ward entered into a settlement with APEA. Pursuant to the settlement, APEA received $2.25 million and in return released

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[2] *Id.*

all claims against NMPP, Stauffer, Ward, Harms, and others. Each party agreed to pay its own costs and attorney fees.

After the settlement with APEA, the appeal proceeded to this court with NMPP and the individual defendants challenging the judgment in favor of Falls City.[3] We determined that Falls City lacked standing to assert its claims against NMPP and the individual defendants and therefore reversed, and remanded to the district court with directions to dismiss.[4] Upon receipt of our mandate, the district court entered an order stating that the matter was "dismissed with costs assessed to [Falls City]."

NMPP and the five originally named individual defendants then filed motions for taxation of costs. Included in NMPP's motion was a request for taxation of the cost of obtaining deposition copies, of videotaping depositions, and of electronically displaying trial testimony and exhibits. Included in the individual defendants' motion was a request for taxation of the costs of obtaining deposition copies and of videotaping depositions. Falls City filed objections to the motions. The district court conducted an evidentiary hearing at which it received affidavits in support of the motions.

On April 5, 2010, the district court entered a written order awarding costs. The court first determined that only those costs which were authorized by statute or historical procedure could be taxed. These included filing fees, sheriff service fees, witness fees, mileage paid to a witness to secure the witness' appearance on a subpoena, original deposition costs, and the cost of the bill of exceptions on appeal. The court concluded that the requested costs associated with obtaining deposition copies, videotaping depositions, and electronically displaying trial testimony and exhibits were not taxable.

The district court then addressed the apportionment of taxable costs among the parties in light of the APEA settlement during the pendency of the first appeal. The court generally reasoned that considering the APEA settlement and the judgment in favor of Falls City together, APEA had received about 78 percent of the total amount awarded and Falls City had

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[3] *Id.*

[4] *Id.*

received about 22 percent (prior to our reversal of the judgment in favor of Falls City). Because the court found that there was "no evidence that any of the taxable costs requested . . . were incurred solely due to the Falls City litigation," the court concluded that Falls City should be responsible for 22 percent of the taxable costs claimed by NMPP and the individual defendants.

NMPP filed this timely appeal, contesting both the items considered to be properly recoverable as costs and the apportionment of costs. The five individuals originally named as defendants cross-appealed and raised the same issues.

ASSIGNMENTS OF ERROR

Appellant NMPP assigns, restated and consolidated, that the district court erred in (1) determining that only those costs prescribed by statute or a uniform course of procedure are recoverable and (2) reducing the costs it could recover based on the claims asserted by APEA. The individual defendants (hereinafter cross-appellants) assign the same errors.

STANDARD OF REVIEW

[1] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[5]

ANALYSIS

Determination of Taxable Costs

Neb. Rev. Stat. §§ 25-1708 (Cum. Supp. 2010) and 25-1710 (Reissue 2008) govern the taxation of court costs in specified types of actions, but taxation of costs in equitable actions such as this is governed by Neb. Rev. Stat. § 25-1711 (Reissue 2008).[6] Section 25-1711 provides in part: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." Like §§ 25-1708 and 25-1710, § 25-1711 generally states when a court may tax

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[5] *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[6] See, generally, *id.*; *R & S Investments v. Auto Auctions*, 15 Neb. App. 267, 725 N.W.2d 871 (2006).

costs but does not specify what costs are taxable. We have long held that costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.[7] Applying this principle, we have held that expert witness fees[8] and expenses of making copies of depositions and enlargements of exhibits[9] are not taxable court costs. The Court of Appeals has applied this principle in holding that photocopy, fax, and postage expenses are not taxable costs.[10]

NMPP and the cross-appellants argue that our jurisprudence on the issue of what litigation expenses may be taxed as court costs does not reflect the realities of modern litigation and should be expanded. They ask that we establish guidelines for the lower courts to use in taxing costs based upon a standard of reasonability and note that other courts have specifically approved taxation of the types of costs which were disallowed by the district court in this case.

[2] We begin our discussion of taxable costs with an 1872 case, where this court stated:

> Costs are unknown to the common law. They are given only by statute, which may be changed at the will of the legislature. The recovery of costs must depend upon the statute law in force at the time the judgment was rendered. . . . The right to costs is a statutory right, and cannot be enlarged by judicial authority.[11]

At times, our jurisprudence has strayed somewhat from this categorical statement. For example, in *Kasparek v. May*,[12] a

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[7] *Bartunek v. Gentrup*, 246 Neb. 18, 516 N.W.2d 253 (1994); *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994); *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980).

[8] *Bartunek v. Gentrup, supra* note 7; *Kliment v. National Farms, Inc., supra* note 7.

[9] *Kliment v. National Farms, Inc., supra* note 7.

[10] *In re Estate of Snover*, 4 Neb. App. 533, 546 N.W.2d 341 (1996).

[11] *Geere v. Sweet*, 2 Neb. 76, 76-77 (1872).

[12] *Kasparek v. May*, 178 Neb. 425, 133 N.W.2d 614 (1965).

civil contempt action, this court concluded that under the facts and circumstances of that case, the trial court did not err in refusing to tax postage, mileage expenses, and other miscellaneous expenses as costs. Admittedly, the language used in *Kasparek* suggests that the trial court would have had discretionary authority to tax such expenses as costs under different facts and circumstances. But since 1980, we have adhered to the principle that litigation costs are not recoverable by a party unless authorized by statute or a uniform course of procedure.[13] We acknowledge that a "uniform course of procedure" which did not exist in 1980 could never develop under the principle we have applied since then. Thus, we are essentially back to where we started, recognizing that it is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs. We are not persuaded that we should abandon this principle.

[3] As the cross-appellants acknowledge in their reply brief, "[t]his appeal presents a policy issue for this Court, i.e., whether to allow district courts to consider additional elements as taxable costs."[14] Shifting of litigation expenses from one party to another could have "a chilling effect on a plaintiff's right to seek relief for injury or wrong" or subject an unsuccessful defendant to costs "greatly in excess of the monetary relief sought by the plaintiff."[15] It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[16] And in fact, the Legislature has done so with respect to certain court costs. For example, statutes authorize the taxation of costs associated with executed orders of attachment,[17] answers filed to garnishment interrogatories,[18] replevin

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[13] See *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes, supra* note 7.

[14] Reply brief for appellees on cross-appeal at 9.

[15] *Bartunek v. Gentrup, supra* note 7, 246 Neb. at 21, 516 N.W.2d at 255.

[16] See, *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

[17] Neb. Rev. Stat. § 25-1005 (Reissue 2008).

[18] Neb. Rev. Stat. § 25-1026 (Reissue 2008).

orders,[19] service of process,[20] and the completion of records in concluded district court cases.[21]

Although federal courts have held that the costs at issue in this case are taxable, they have done so not on their own authority but pursuant to 28 U.S.C. § 1920 (2006 & Supp. III 2009), which lists general categories of litigation expense which may be taxable as costs. These include "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case" and "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[22] Federal courts have construed the former provision as authorizing taxation of the cost of deposition copies[23] and, when read in conjunction with Fed. R. Civ. P. 30(b), the cost of videotaping depositions.[24] Similarly, federal courts have held that the cost of electronic display of trial exhibits is a form of "'exemplification,'" the costs of which may be taxed pursuant to § 1920(4).[25]

The parties direct us to no Nebraska statute or any "uniform course of procedure" authorizing the taxation of such costs, and we are aware of none. We therefore conclude that the district court correctly determined that its discretion to tax costs under § 25-1711 did not include authority to tax the costs of obtaining deposition copies, videotaping depositions, or presenting evidence electronically. As to NMPP's argument that litigation practice has changed dramatically over the years and thus the rules for taxation of costs should change accordingly, we conclude that it presents a policy question which is properly left to the Legislature.

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[19] Neb. Rev. Stat. § 25-10,107 (Reissue 2008).

[20] Neb. Rev. Stat. § 25-507(4) (Reissue 2008).

[21] Neb. Rev. Stat. § 33-106(3) (Reissue 2008).

[22] 28 U.S.C. § 1920(2) and (4).

[23] See, *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963); *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963).

[24] See, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894 (8th Cir. 2009); *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997).

[25] See *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000).

Apportionment of Taxable Costs

Section 25-1711 authorized the district court to apportion taxable costs "between the parties on the same or adverse sides, as in its discretion it may think right and equitable." NMPP and the cross-appellants contend that the district court abused its discretion in apportioning only 22 percent of the taxable court costs to Falls City.

This complex litigation involved two claimants, Falls City and APEA. At the conclusion of trial, the district court awarded APEA a judgment of approximately $3.2 million against Stauffer and Ward and a judgment of approximately $220,000 against NMPP. Falls City was awarded a judgment of approximately $477,000 against NMPP, Stauffer, Ward, and Harms, and another judgment of approximately $150,000 against NMPP. Thus, APEA was awarded a total of about $3.5 million and Falls City was awarded a total of about $628,000. As a result of the settlement, APEA received $2.25 million, and as a result of the first appeal, the judgment in favor of Falls City was vacated. Three of the five originally named individual defendants emerged from the litigation unscathed; Dibbern and Haase were dismissed at the close of trial, and Harms' liability to Falls City was extinguished as a result of the first appeal. APEA made no claim against these individuals.

The district court concluded that "all the costs incurred were the result of both claims." NMPP does not dispute this, but argues that its costs should not have been apportioned between the two claims, because APEA never asserted a claim against it. While that is true, it is also the case that APEA obtained a judgment against NMPP which was eventually resolved by a settlement in which NMPP participated. On these facts, it was entirely reasonable for the district court to conclude that NMPP did not prevail with respect to the APEA claim, which was settled with each party agreeing to bear its own costs. We conclude that the district court did not abuse its discretion by taking the APEA judgment and settlement into account and in arriving at the percentage of such costs which should be borne by Falls City.

The cross-appellants contend that the cost apportionment was flawed because it was "premised upon a valid damage

award"[26] in favor of Falls City which was in fact vacated by the first appeal. We find no merit in this argument. The district court properly considered the judgment in favor of Falls City in determining its percentage relationship to the entire amount of the judgments initially awarded, and then taxed that percentage of the costs against Falls City because it "failed to carry its claim and it should bear the costs associated with it." Dibbern and Haase also argue that their costs should not have been apportioned because they were never sued by APEA. But they do not challenge the finding of the district court that they did not incur any costs which were unique to them and separate from those incurred by Stauffer and Ward.

In sum, the district court provided a reasoned and logical explanation for the manner in which it apportioned the costs taxed against Falls City. It did not abuse its discretion.

CONCLUSION

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

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[26] Brief for appellees on cross-appeal at 16.

STOREVISIONS, INC., APPELLEE, V. OMAHA TRIBE OF NEBRASKA, ALSO KNOWN AS OMAHA NATION, APPELLANT.

795 N.W.2d 271

Filed March 25, 2011. No. S-10-280.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.
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 court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** A special proceeding includes every special statutory remedy which is not in itself an action.
6. **Actions: Judgments.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.
7. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Actions.** Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.
9. **Motions to Dismiss: Actions.** A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil statutory remedy, such as a juvenile court proceeding, a probate action, or a workers' compensation case.
10. ____: ____. The denial of a motion to dismiss does not occur within a special proceeding.
11. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an exception to the final order rule, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.
12. **Principal and Agent.** Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.
13. ____. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.
14. **Principal and Agent: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.
15. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.
16. ____. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

Ben Thompson and Amanda J. Karr, of Thompson Law Office, P.C., L.L.O., for appellant.

Michael J. Whaley and Elizabeth M. Skinner, of Gross & Welch, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

StoreVisions, Inc., brought an action alleging that the Omaha Tribe of Nebraska (the Tribe) breached several contracts entered into between the parties. The Tribe filed a motion to dismiss, arguing that it had not waived its sovereign immunity. The district court denied the motion to dismiss, and the Tribe appealed.

We conclude that we have jurisdiction over this appeal under the collateral order doctrine. We further conclude that the Tribe waived its sovereign immunity, and therefore we affirm the district court's denial of the Tribe's motion to dismiss.

FACTUAL BACKGROUND

Between April 4 and July 21, 2008, StoreVisions, a general contractor, and the Tribe entered into 11 different agreements related to plans the Tribe had to expand its casino operations. Per those agreements, StoreVisions agreed to provide certain material and labor to the Tribe in return for payment. Prior to the execution of the contracts, StoreVisions requested that the Tribe execute a document waiving its sovereign immunity. That document was signed by the Tribe's council chairman and vice chairman at a meeting held on January 7, 2008. The meeting included representatives of StoreVisions and five of the seven members of the Tribe's tribal council.

On October 9, 2009, StoreVisions sued the Tribe in Thurston County District Court, alleging 11 causes of action related to the breach of 11 different agreements. On November 19, the Tribe filed a motion to dismiss, which indicated that the Tribe was appearing "for the limited purpose of this motion," and further alleged that "[t]he Court does not have jurisdiction of the subject matter of the action because the action is against a sovereign tribal government that has not waived its immunity from suit in this action . . . ."

Following a hearing at which the district court permitted both parties to admit affidavits into evidence, the district court denied the Tribe's motion to dismiss, concluding that the chairman and vice chairman had apparent authority to act on behalf of the Tribe and that therefore the Tribe had waived its sovereign immunity. The Tribe appealed.

Initially, the Nebraska Court of Appeals dismissed without opinion the Tribe's appeal, concluding that the denial of a motion to dismiss was not a final order. The Tribe filed a motion for rehearing, contending that the district court's order was reviewable because it raised the issue of the Tribe's sovereign immunity. The Court of Appeals reinstated the Tribe's appeal, reserving the jurisdictional issue. We then moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals.[1]

ASSIGNMENTS OF ERROR

The Tribe assigns, restated and consolidated, that the district court erred in (1) concluding that the Tribe was not entitled to sovereign immunity and (2) converting the Tribe's motion to dismiss into a motion for summary judgment without proper notice to the Tribe.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

[2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.[3]

ANALYSIS

Jurisdiction: Final Order.

We are first presented with a jurisdictional question. On appeal, StoreVisions contends that the Tribe's appeal is not

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

[2] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[3] See *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

from a final order, and further argues that contrary to the Tribe's assertions, the collateral order doctrine is inapplicable. We consider each in turn.

[3] 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.[4]

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[5]

We note that the order denying the Tribe's motion to dismiss did not determine the action or prevent a judgment, because the denial allowed StoreVisions' action to proceed. In addition, the order was not made on summary application in an action after judgment was rendered. Thus, the initial question presented in this case is whether the district court's order was made during a special proceeding.

[5-8] A special proceeding includes every special statutory remedy which is not in itself an action.[6] A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.[7] Generally, a "special proceeding" entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[8] Examples of special proceedings include juvenile court proceedings, probate actions, and workers' compensation cases.[9]

[9,10] A motion to dismiss is merely a step or proceeding within the overall action, and is not a civil statutory remedy, such as a juvenile court proceeding, a probate action, or a

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[4] *Williams v. Baird, supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

workers' compensation case.[10] The Court of Appeals has specifically concluded that the denial of a motion to dismiss does not occur within a special proceeding.[11] We agree and conclude that this appeal does not present us with a final order for the purposes of § 25-1902.

Jurisdiction: Collateral Order.

[11] Indeed, the Tribe appears to be in agreement that the district court's order is not final. Instead, the Tribe asks this court to address its appeal under the collateral order doctrine, an exception to the final order rule.[12] To fall within the doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.[13] We set forth these elements in *Hallie Mgmt. Co. v. Perry*.[14]

Applying the above factors to the order denying the Tribe's claim of sovereign immunity, we initially note that the first two factors are met in this case. The order in question was an order denying the Tribe's motion to dismiss on the ground that the Tribe was entitled to sovereign immunity. In denying the Tribe's order, the district court explicitly concluded that the Tribe had waived its immunity in this case. In addition, the district court's order is separate from the merits of the case, which deals with whether the Tribe breached a series of contracts entered into between the Tribe and StoreVisions.

We also conclude the third factor—that the order be effectively unreviewable on appeal from a final judgment—is met in this case. Federal courts, including the U.S. Supreme Court, which have addressed this issue have concluded that like claims of qualified or absolute immunity, a claim of sovereign immunity is based in immunity from suit and is not simply a

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[10] See, *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[11] See *id.*

[12] See *Williams v. Baird, supra* note 2.

[13] *Id.*

[14] *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

defense against liability.[15] As such, those courts have concluded that such orders are immediately reviewable.[16]

StoreVisions relies on our decision in *Williams v. Baird*[17] to argue that this court should not review a nonfinal order under the collateral order doctrine if questions of fact must be decided and that this case presents such issues. The basis for this portion of our holding in *Williams* was the Supreme Court's conclusion in *Mitchell v. Forsyth*[18] and *Johnson v. Jones*[19] that immunity appeals interfere less with the final judgment rule when limited to issues of law.

While the propositions StoreVisions cites are properly stated, this case does not present any disputed questions of fact. The parties are in general agreement about *what* happened; the issue is whether that set of facts gave rise to a waiver of immunity. Thus, this court is presented with a question of law and not a question of fact. As such, this court has jurisdiction under the collateral order doctrine to consider the Tribe's appeal.

Waiver of Sovereign Immunity.

Having concluded that the district court's order overruling the Tribe's motion to dismiss is reviewable under the collateral order doctrine, we turn next to the question of whether the Tribe waived its sovereign immunity so as to make it amenable to suit by StoreVisions.

In its brief, the Tribe focuses on the fact that it is a separate sovereign with immunity from suit. But contrary to the

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[15] *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993); *Burlington Northern & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007); *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995). Cf., *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004); *Sault Ste. Marie Tribe v. State of Mich.*, 5 F.3d 147 (6th Cir. 1993).

[16] *Id.*

[17] *Williams v. Baird, supra* note 2.

[18] *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

[19] *Johnson v. Jones*, 515 U.S 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Tribe's discourse in its brief, there is no dispute that the Tribe is a separate sovereign and generally entitled to immunity from suit.[20] Nor is there any dispute that this immunity exists unless limited by Congress[21] or waived by the Tribe.[22] And no one disputes that any waiver of that immunity must be expressly made.[23] The only question in this case is whether such waiver was made.

The Tribe's primary contention is that its sovereign immunity can be waived only by a resolution of the tribal council and not by the independent acts of the chairman and vice chairman of the council. The Tribe contends that its bylaws provide no authority to the officers of the Tribe, save those delegated by the tribal council. As a result, according to the Tribe, the document signed in January 2008 purporting to act as a waiver was ineffective since the chairman and vice chairman cannot waive the Tribe's immunity.

Rush Creek Solutions v. Ute Mountain Tribe,[24] a case cited by the district court in its order, is instructive. In that case, Rush Creek Solutions, Inc., and the Ute Mountain Ute Tribe (Ute Tribe) entered into a contract wherein Rush Creek Solutions would provide the Ute Tribe with computer software and support. The Ute Tribe's chief financial officer (CFO) signed the contract on behalf of the Ute Tribe. The contract included a provision in which the Ute Tribe waived its immunity from suit.

The Ute Tribe later allegedly breached the contract, and Rush Creek Solutions brought suit. The Ute Tribe filed a motion to dismiss, alleging that although the CFO had the authority to enter into the contract, he lacked authority to waive the Ute Tribe's immunity. The Ute Tribe's constitution

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[20] See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[21] *Id.*

[22] *Native American Distrib. v. Seneca-Cayuga Tobacco*, 546 F.3d 1288 (10th Cir. 2008).

[23] *Santa Clara Pueblo v. Martinez, supra* note 20.

[24] *Rush Creek Solutions v. Ute Mountain Tribe*, 107 P.3d 402 (Colo. App. 2004).

and bylaws were similar to those in this case; namely, the Ute Tribe's council had the authority to prescribe the duties of the Ute Tribe's officers, but was silent concerning the authority regarding the waiver of sovereign immunity.

The trial court did not reach the issue of whether the CFO actually had the authority to exercise a waiver of the Ute Tribe's immunity, instead concluding that at the very least, the CFO had the apparent authority to do so. The court noted that

> [a]t all relevant times, the CFO was authorized to enter into contracts on behalf of the [Ute] Tribe. The contract at issue here designates the [Ute] Tribe as the customer. The CFO signed the contract on behalf of the customer on a line above the statement, "authorized signature." The [Ute] Tribe's Constitution and personnel policy are silent concerning procedures for signing contracts, waiving sovereign immunity, or authorizing persons to sign waivers.[25]

On this basis, the district court concluded that the Ute Tribe's motion to dismiss should be denied.

In arguing that *Rush Creek Solutions* is inapplicable, the Tribe contends that it is not appropriate to apply agency principles in a sovereign immunity analysis. While the Tribe cites to cases purporting to support that proposition, we have reviewed those cases and find them inapplicable. We adopt the reasoning of *Rush Creek Solutions* and apply agency principles, specifically the principles of apparent authority, to the purported waiver in this case.

[12-14] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.[26] Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.[27]

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[25] *Id.* at 407.

[26] *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

[27] *Id.*

Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.[28] Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.[29]

[15,16] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.[30] Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.[31]

The record in this case shows that the separate waiver signed by the chairman and vice chairman was entered into in the presence of five of the seven members of the tribal council at the Tribe's headquarters. In addition to the waiver, the Tribe's chairman, vice chairman, or both, executed all other contracts between the Tribe and StoreVisions. And a review of the record shows that in resolution No. 08-74, the tribal council acknowledged that it had entered into these previous contracts with StoreVisions. Moreover, because the Tribe's constitution and bylaws are silent as to the method of waiving sovereign immunity, it was reasonable for StoreVisions to rely upon the words and actions of the Tribe with respect to the waiver of immunity.

We note that no source of tribal law beyond the constitution and bylaws was presented to the district court, nor was the district court asked to take judicial notice of any sources. As such, this court will not judicially notice, or otherwise seek out, any authority that might support either position in this litigation.

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

The situation presented by this appeal is virtually identical to the one presented in *Rush Creek Solutions*. One difference is that, in this appeal, the Tribe and StoreVisions entered into a separate waiver prior to entering into the underlying contracts. As noted, this separate waiver was signed in the presence of five of the seven members of the tribal council and lends even more weight to an appearance that the signatories to the document—the chairman and vice chairman—were vested with the authority to waive the Tribe's sovereign immunity.

Like the *Rush Creek Solutions* court, we decline to address the question of whether the chairman and vice chairman had actual authority to waive the Tribe's sovereign immunity, instead concluding that the two had apparent authority to do so based upon the undisputed facts. The Tribe's first assignment of error is without merit.

Conversion of Motion to Dismiss to Motion for Summary Judgment.

In its second and final assignment of error, the Tribe contends that the district court erred in converting its motion to dismiss into a motion for summary judgment without proper notice. The Tribe cites to Neb. Ct. R. Pldg. § 6-1112(b) and *Crane Sales & Serv. Co. v. Seneca Ins. Co.*[32] in support of this argument. Both are inapplicable, and the Tribe's argument is without merit.

The basis of the Tribe's assignment of error is § 6-1112(b), which provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.

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[32] *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 754 N.W.2d 607 (2008).

The Tribe's motion to dismiss is not based in § 6-1112(b)(6), but instead on § 6-1112(b)(1) for lack of jurisdiction over the subject matter. Thus, this language in § 6-1112(b) and this court's opinion in *Crane Sales & Serv. Co.* are inapplicable.[33]

We additionally note that when the Tribe filed its motion, that motion indicated it would be supported by affidavit, and in fact, such affidavits were presented by the Tribe. We therefore question whether the Tribe was truly without notice as to whether the motion to dismiss would be converted to a motion for summary judgment.

The Tribe's final assignment of error is also without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[33] Cf. *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

KENNETH RIGGS AND LEANN RIGGS, HUSBAND AND WIFE, APPELLANTS, V. GARY NICKEL, APPELLEE.

796 N.W.2d 181

Filed March 25, 2011. No. S-10-459.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.

4. **Negligence.** Not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.
5. ____. Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.
6. **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.
7. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. ____. An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., and John M. Lefler for appellants.

Andrea D. Snowden and Stephanie F. Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

STEPHAN, J.

Kenneth Riggs (Riggs) and his wife, LeAnn Riggs, brought this action against Gary Nickel seeking damages for injuries Riggs suffered while repairing a motor grader, and for LeAnn's related loss of consortium. The district court for Lancaster County sustained Nickel's motion for summary judgment, and the Riggses appealed. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

The accident occurred on August 2, 2007, in rural Lancaster County on an acreage owned by Nickel. Nickel's neighbor had stored an older-model motor grader on Nickel's property for approximately 4 years prior to the accident, and Nickel had used the grader on the property a few times.

At the time of the accident, Riggs was 41 years old and had approximately 20 years' experience as a mechanic. In January 2007, he opened a business specializing in the repair of cars, trucks, and heavy machinery. Approximately 3 months before the accident, Riggs installed a new engine and clutch in

the grader. He considered himself to be "very familiar" with the machine.

The grader has an enclosed cab in which the operator's seat and controls are located. There is a door on the right side of the cab. The keyed ignition switch is located on the backwall of the cab to the right and adjacent to the rear portion of the operator's seat. The separate starter button is located on a panel to the right and near the front portion of the operator's seat. The grader is started by first turning the ignition switch to the "on" position and then pressing the starter button.

On the day of the accident, Riggs came to Nickel's acreage to repair a tractor owned by Nickel. As Riggs was completing work on the tractor, Nickel asked him to look at the grader, which had developed a hydraulic leak. Although the parties agree that the grader was parked near a shed on Nickel's property when Riggs began working on it, they disagree as to when it was parked there. According to Nickel, he parked the grader near the shed on the preceding weekend when it began to leak hydraulic fluid while he was using it. But Riggs testified that Nickel was using the grader when he asked him to look at it and that he parked it next to the shed just before Riggs began the repair.

Nickel testified that in order to bring the grader to a stop after operating it, he depressed the clutch and then turned the ignition switch to the "off" position, leaving the grader in gear as he did so. Nickel testified that turning the ignition switch to the "off" position was the only way he knew to stop the engine. Riggs stated in an affidavit that a grader engine is typically shut down by pulling up on the choke and flooding the engine.

The parties agree that when Riggs approached the grader to make the repair, its engine was not running. After examining the area of the leak, Riggs retrieved a wrench and, standing outside the right side of the cab with both feet on the ground, reached through the open doorway to the interior of the cab to tighten a bolt in the area of the leak. Riggs testified that after he finished the repair, which took about 30 seconds, he started to turn around to back away from the cab. But as he did so, his left elbow accidently struck the starter button, causing the grader to lurch forward. The lurch startled Riggs and caused

him to turn. When that occurred, he struck the starter button again, this time with his right wrist. The engine started and the grader began moving forward. Riggs fell to the ground and the grader passed over him, causing significant injuries.

In the complaint, the Riggses alleged that Nickel was negligent in "failing to turn the motor grader off before requesting that [Riggs] do the repair" and in "failing to warn [Riggs] that the motor grader was on before requesting that [Riggs] engage in the minor repair." Nickel answered by denying any negligence on his part and alleging that the accident and resulting injuries were caused by Riggs' own negligence.

Nickel then moved for summary judgment. The record includes the depositions of both Riggs and Nickel, Riggs' answers to Nickel's interrogatories, and Riggs' affidavit. In sustaining the motion for summary judgment, the district court reasoned that the Riggses could not recover under a premises liability theory because Nickel was not conducting an activity on his land and that the Riggses could not recover under a theory of direct negligence because Nickel owed Riggs no legal duty to protect him from harm. The Riggses perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

II. ASSIGNMENTS OF ERROR

The Riggses assign, summarized and restated, that the district court erred in granting summary judgment in favor of Nickel because the evidence does not show that Nickel was entitled to judgment as a matter of law.

III. STANDARD OF REVIEW

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

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

[2] *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010); *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.[3]

IV. ANALYSIS

1. Facts and Inferences

The only witnesses to the accident are Riggs and Nickel. Their accounts differ in two respects. First, as noted above, Nickel testified that he parked the grader near the shed on his property approximately 1 week before the accident, while Riggs testified that Nickel was operating the grader on the day of the accident and parked it just before asking Riggs to repair the hydraulic leak. Under our standard of review, we assume the truth of Riggs' version of these events for purposes of determining whether Nickel was entitled to summary judgment.

Second, the parties disagree as to whether the grader's ignition switch was in the "on" or "off" position just prior to the accident. Nickel testified that he turned the ignition switch off when he parked the grader, and he argues that there is no evidence to refute his testimony. Riggs testified in his deposition that Nickel did not leave the grader running when he parked it, and agreed that Nickel "turned it off." But in a subsequent affidavit, Riggs explained that in giving this testimony, he was referring only to the status of the engine because he "could not see what . . . Nickel had done with the key."

[3] Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.[4] In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly

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[3] *Id.*

[4] *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). See, also, *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972); *Clark v. Smith*, 181 Neb. 461, 149 N.W.2d 425 (1967).

apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.[5] Although Nickel argues otherwise, we conclude that the rule is not applicable here because the record does not show that Riggs changed his testimony to meet the exigencies of litigation. By agreeing in his deposition that Nickel "turned [the grader] off," Riggs could have meant either that Nickel turned the ignition switch to the "off" position or that Nickel shut down the motor in another manner. In his affidavit, Riggs simply explained that he meant the latter.

We also note that it is uncontroverted that the grader would start only if the ignition switch was "on" and the starter button was depressed. It is also uncontroverted that the grader lurched forward and then started when Riggs unintentionally depressed the starter button. From these facts, a finder of fact could reasonably infer that the ignition switch was in the "on" position when Riggs began working on the grader. The Riggses are entitled to the benefit of that inference under our standard of review.

2. Premises Liability

[4,5] The Riggses first argue that the district court erred in failing to recognize the existence of a duty on the part of Nickel under a theory of premises liability. But not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.[6] Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.[7] The Riggses argue that this case falls in the second category and is governed by the principle of premises liability stated in Restatement (Second) of Torts § 341A, which provides:

> A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if,

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[5] *Momsen v. Nebraska Methodist Hospital, supra* note 4.

[6] *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

[7] *Id.*

> but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.[8]

We found this principle to be applicable to the facts in *Haag v. Bongers*,[9] a case in which a person was injured while attending an estate auction. The auction was conducted on property owned by the estate by auctioneers hired by the estate. Antique vehicles offered for sale were towed into a building where the bidding and sale occurred. The plaintiff was struck and injured when a hitch ball came loose from the drawbar of a tractor which was towing one of the vehicles. In affirming the verdict against the estate, we reasoned that the estate was in possession of the premises on the day of the auction and that the injury arose out of an activity conducted on the premises.

The Riggses argue that the "activity" in this case was Nickel's act of driving the grader to the spot on his property where the repair was undertaken. Assuming without deciding that this could constitute the type of activity contemplated by § 341A of the Restatement (Second), it had clearly ended before the injury occurred. The only "activity" being conducted at the time of the injury was the repair of the grader by Riggs himself. The circumstance is no different than if Nickel had driven the grader to Riggs' property and left it there to be repaired. Here, the property was simply the place where the injury occurred. No defective condition of the property or negligently conducted activity on the property caused the injury. We conclude that *Haag* is factually distinguishable and that the Riggses' premises liability theory fails as a matter of law.

3. Negligence: Duty to Exercise Reasonable Care

The Riggses alleged in their complaint that Nickel was negligent in "failing to turn the motor grader off before requesting that [Riggs] do the repair" and in "failing to warn [Riggs] that the motor grader was on" before requesting that Riggs repair the hydraulic leak. As noted above, the words "on" and "off" as used here necessarily refer to the ignition switch, as Riggs

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[8] Restatement (Second) of Torts § 341A at 209 (1965).

[9] *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

admits that the grader's engine was not actually running when he began his work. The district court concluded that under the specific facts of this case, considered in a light most favorable to Riggs, there was no duty on the part of Nickel.

[6,7] 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.[10] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[11] In the past, we used the risk-utility test to determine the existence of a tort duty.[12] That approach required consideration of multiple factors, including "the foreseeability of the harm," in resolving the legal issue of whether a plaintiff owed a legal duty to a defendant under the particular circumstances of the case.[13] The district court utilized this test in determining that Nickel owed no duty to Riggs as a matter of law, noting that the "chance that someone working on a hydraulic leak would inadvertently hit the starter button twice causing the grader motor to start and move forward is extremely remote."

[8] In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[14] decided during the pendency of this appeal, we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts.[15] Under this approach, an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[16] This approach examines the defendant's conduct, not in terms of whether he had a "duty" to take particular actions, but, rather, in terms of whether his

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[10] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[11] *Id.*

[12] See, e.g., *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[13] *Id.* at 28, 735 N.W.2d at 805.

[14] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10.

[15] See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

[16] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10; Restatement (Third), *supra* note 15, § 7(a).

conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.[17]

Based on the analytical framework we adopted in *A.W.*, we conclude that Nickel had a duty to exercise reasonable care in operating the grader on his property. We examine the record to determine if there is a genuine issue of material fact as to whether he breached that duty in either of the ways alleged in the complaint.

(a) Failure to Turn Off Ignition Switch

Nickel could breach his duty to use reasonable care in operating the grader by failing to turn the ignition switch off only if it was reasonably foreseeable that harm to Riggs would result from the ignition switch's being left on.[18] The record shows that even with the ignition switch in the "on" position, the grader was not running and posed no immediate risk of harm to Riggs. The record further shows that Nickel had limited experience with the grader, while Riggs was an experienced mechanic who was very familiar with the grader and had the opportunity to use appropriate care while working on the machine. In light of these facts, we agree with the district court that the "chance that someone working on a hydraulic leak would inadvertently hit the starter button twice causing the grader motor to start and move forward is extremely remote." Although foreseeability of the risk is a question of fact,[19] on this record no reasonable fact finder could conclude that Nickel breached his duty to exercise reasonable care with respect to Riggs simply by leaving the ignition switch in the "on" position. Nickel was entitled to summary judgment on this theory of liability.

(b) Failure to Warn

The Riggses also alleged that Nickel failed to exercise reasonable care by "failing to warn [Riggs] that the motor grader was on" before requesting him to undertake its repair. Again,

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[17] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10; *Behrendt v. Gulf Underwriters Ins. Co.*, 318 Wis. 2d 622, 768 N.W.2d 568 (2009).

[18] See *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10.

[19] *Id.*

we understand the word "on" to refer to the position of the ignition switch.

In *Erickson v. U-Haul Internat.*,[20] we held that § 388 of the Restatement (Second) defined the common-law duty of a lessor to warn those expected to use a leased vehicle of dangers attendant to its use. Section 388 provided that one who supplied a chattel for use by another could be liable for physical harm caused by its use if the supplier

> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[21]

Other courts applied § 388 in defining the duty owed by the owner of personal property to one who performs repairs on the property at the owner's request.[22]

Section 18 of the Restatement (Third) broadens the scope of potential liability for negligent failure to warn beyond suppliers of chattels, providing:

> (a) A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if:
>
> (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and
>
> (2) a warning might be effective in reducing the risk of harm.[23]

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

[21] Restatement (Second), *supra* note 8, § 388 at 300-01.

[22] See, *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997 (Fla. App. 1998); *Overbeck v. Cates*, 700 A.2d 970 (Pa. Super. 1997); *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 582 N.E.2d 296, 164 Ill. Dec. 88 (1991).

[23] Restatement (Third), *supra* note 15, § 18(a) at 205.

The official comment to § 18 notes that an obligation to warn can arise in a wide range of circumstances, including that of the owner of a product who turns it over to another for repair.[24] We adopt § 18(a) as the standard for determining liability based upon alleged negligent failure to warn.

As noted, there is evidence in this record from which a finder of fact could reasonably conclude that Nickel left the ignition switch in the "on" position when he parked the grader. But nothing in the record supports an inference that he was aware that he had done so. There is no evidence upon which a finder of fact could reasonably infer that Nickel knew that the ignition switch was on when he asked Riggs to repair the grader.

Nor does the evidence support a reasonable inference that Nickel could have expected Riggs to be unaware of any risk created by the ignition switch's being left on. Failure to warn can be a breach of the standard of care articulated in § 18(a) of the Restatement (Third) "only if the defendant knows or can foresee that potential victims will be unaware of the hazard. Accordingly, there generally is no obligation to warn of a hazard that should be appreciated by persons whose intelligence and experience are within the normal range."[25] In this case, Nickel knew that Riggs was an experienced mechanic and that he had recently worked on the grader. The ignition switch did not constitute a "latent defect," as the Riggses allege, because there is no evidence that it was mechanically defective and it was within Riggs' view and reach when he worked on the grader. There is no evidence to support a reasonable inference that Nickel had reason to know that Riggs would not understand and appreciate the risk posed by accidentally depressing the starter while the ignition switch was in the "on" position. Indeed, Riggs admitted that he understood this risk.

We conclude as a matter of law that Nickel was not negligent in failing to warn, under the principles stated in § 18(a) of the Restatement (Third).

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[24] *Id.*, § 18, comment *a.*

[25] *Id.*, comment *f.* at 208.

V. CONCLUSION

Although for different reasons, we agree with the district court's determination that as a matter of law, Nickel had no liability to Riggs under theories of premises liability or common-law negligence. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH D. HOTZ, APPELLANT.
795 N.W.2d 645

Filed April 1, 2011. No. S-10-105.

1. **Rules of Evidence.** In proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **Insanity: Proof.** The two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
6. **Criminal Law: Intoxication: Intent.** Intoxication has never been considered a justification or excuse for a crime, although intoxication may be considered to negate specific intent.
7. **Criminal Law: Intoxication: Jury Instructions.** Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime

had been committed or to determine the degree where the offense consists of several degrees.

8. **Criminal Law: Intoxication: Mental Competency.** As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces psychosis or delirium.
9. **Constitutional Law: Criminal Law: Due Process.** Under the Due Process Clause of the 14th Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. The U.S. Supreme Court has long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.
10. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

Appeal from the District Court for Dawes County: BRIAN C. SILVERMAN, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, and Paul Wess, Dawes County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Joseph D. Hotz appeals from his convictions of second degree murder, attempted second degree murder, terroristic threats, and three counts of use of a deadly weapon to commit a felony. Hotz filed a petition to bypass, alleging that his case presented a new or novel issue of law, and we granted his petition. The underlying issue in this case is whether the voluntary use of drugs may give rise to a defense of insanity rather than voluntary intoxication. We find that the insanity defense instruction may not be given and that the proper jury instruction is the voluntary intoxication instruction. But because we find that Hotz was deprived of a fair trial due to irregularities in the proceedings, we reverse, and remand for a new trial.

II. FACTS

1. Events of December 5, 2008

The facts of this case are largely undisputed. Hotz and the victim, Kenneth Pfeiffer, were roommates in Chadron, Nebraska. On December 5, 2008, at approximately 4 p.m., both Hotz and Pfeiffer consumed psilocybin mushrooms and smoked marijuana.

At approximately 6 p.m., the Chadron Police Department received the first of several 911 emergency dispatch calls from Susan Jensen. Jensen testified that she called 911 after she thought someone was trying to break into her house located on King Street. Jensen stated that she saw Hotz through a window, that he did not appear to be in his right mind, and that he was yelling, "'Oh, my God, please help me.'" Jensen testified that after Hotz left, there was a crack in the door and red smears on the door that had not been there before.

A second 911 call was made from the home of Rolland Sayer and his wife, which home was also located on King Street. Sayer's wife was watching television in her living room when Hotz came through the front door holding two knives. Hotz had entered the home by breaking the glass of a small window near the door. Sayer was in the shower at the time Hotz entered the home. Sayer's wife testified that Hotz walked past her, went into the kitchen, and turned on the light. She stated that she exited the house and that Hotz did not follow her out. Sayer's wife then got inside the car parked in the driveway and locked the door. When Hotz came out of the house a short time later, she hid in the car until she thought he was gone.

Sayer testified that he was in the bathroom shaving when he heard an unusual noise, but when he called out to his wife, she did not respond. Sayer opened the door to find Hotz blocking his way. At that point, Hotz said, "'I want all your weapons,'" and Sayer responded, "'I do not have any weapons.'" Hotz then asked for all Sayer's possessions, and when Sayer said he did not have any possessions, Hotz stated, "'I'm going to kill you.'" Hotz dropped a cordless telephone in front of Sayer, who grabbed the telephone, barricaded himself in the bathroom, and dialed 911. Hotz began battering the door with

the knives, stabbing through the door. Sayer stated that Hotz' knives came within 6 or 8 inches of his hand. Sayer further testified that when the noise outside the bathroom door ceased, he exited the bathroom to check on his wife.

Patty Howard, the 911 dispatcher, also testified. She stated that the first 911 call came through at 6:08 p.m. from Jensen. Sgt. Shawn Banzhaf was present with Howard when the first call came in, so she immediately passed the information along to him. The second 911 call came in at 6:11 p.m. from Sayer. Howard stated that in the background of Sayer's call, she could hear a man shouting, "'Now give me the keys to your car. Give me the fucking keys.'"

Banzhaf, Sgt. Mike Loutzenhiser, and Lt. Richard Hickstein, all with the Chadron Police Department, responded to the 911 calls. Upon arrival at the intersection of Eighth and King Streets, Loutzenhiser saw Hotz come through a gate at the house on the southwest corner of the intersection. Loutzenhiser testified that Hotz' shirt was covered in blood and that he held a knife. Loutzenhiser identified himself as a police officer and ordered Hotz to stop. Hotz ran away, and Loutzenhiser pursued him on foot.

Hotz was apprehended shortly thereafter. Hotz was able to follow Loutzenhiser's instructions to put his hands behind his head and lie down on the ground. Loutzenhiser asked Hotz if he needed medical attention, and Hotz said that he did not. Because Hotz appeared to be covered in blood, Loutzenhiser asked Hotz where the blood had come from, and Hotz stated that it had come from his roommate and possibly "this old gentleman in this house." Loutzenhiser asked Hotz where his roommate was, and Hotz said "935 Shelton." Loutzenhiser then put Hotz in the back of the patrol car. The camera recording from the patrol car, offered as an exhibit, was played for the jury. In the recording, Hotz calls for his parents, demands his rights, screams obscenities, and pleads for God to save him, but he is also able to answer some questions.

After leaving Hotz with Banzhaf, Loutzenhiser went to 935 Shelton Street to check on Pfeiffer. When Loutzenhiser approached, he observed a broken sliding glass door and

broken glass on the porch. Loutzenhiser and Hickstein entered the house through the broken door and saw Pfeiffer's body lying in the hallway and blood all over the walls. One of the first floor bedrooms, later identified as Hotz', showed signs of forced entry on the door and latch.

2. Police Interviews With Hotz

Sgt. Monica Bartling of the Nebraska State Patrol interviewed Hotz beginning late in the evening on December 5, 2008, and continuing into the early morning hours of December 6. During the interview, Bartling asked Hotz to tell her what had happened. Hotz stated that he had taken mushrooms and that he had begun to have a horrible feeling of "not existing." Hotz also stated that he believed he had been tricked into behaving in a certain way. Hotz stated that this occasion marked the third time he had consumed mushrooms. He stated that on one prior occasion, he had experienced anxiety and the belief that "the CIA was after him." Hotz stated that on this occasion, he felt as though Pfeiffer was "mocking" him and all his intellectual pursuits. Hotz also said that he felt it was "kill or be killed."

Hotz stated that Pfeiffer would not leave him alone. Hotz brandished a knife to get Pfeiffer to back off, and they scuffled. Hotz dropped the knife and ran downstairs to the basement. When Hotz came upstairs again, Pfeiffer still would not leave him alone, and Hotz said that he had the feeling that Pfeiffer was going to kill him. Hotz stabbed Pfeiffer in the arm, and Pfeiffer yelled at him, saying, "Joey, this is real! This is real!" Hotz stated that they struggled in the hallway. Hotz stated that he did not remember much about stabbing Pfeiffer.

Trooper Mark Van Horn, a drug recognition expert with the Nebraska State Patrol, interviewed Hotz around midnight on December 5, 2008. Van Horn stated that at the time he conducted his interview, Hotz was no longer psychotic or hallucinating. Van Horn also testified that the amount of mushrooms Hotz ingested, one-eighth of an ounce, would be considered a heavy dose.

Dr. Peter Schilke performed Pfeiffer's autopsy. Schilke testified that Pfeiffer had marijuana and "psilocin" in his system at the time of his death. Psilocin is the metabolite of

psilocybin, which is the active ingredient in hallucinogenic mushrooms. Schilke documented 51 "sharp force" type injuries on Pfeiffer's body. Most of those wounds were superficial, but four wounds were potentially lethal: a stab wound to the right chest that punctured Pfeiffer's lung, a stab wound to the posterior left neck that cut the left carotid artery, a wound on the back of the head between the base of the brain and the upper spinal cord that caused a hemorrhage around the cerebellum, and an L-shaped wound in the right chest that also punctured the lung.

3. Trial Proceedings

Hotz timely filed a notice of intent to rely on the insanity defense as is required under Neb. Rev. Stat. § 29-2203 (Reissue 2008). Hotz claimed that he was temporarily insane when he killed Pfeiffer and that the crime was a direct result of his ingestion of the mushrooms. The State then filed a motion in limine to prohibit Hotz' expert witness from expressing an opinion concerning the insanity defense, because the evaluation of Hotz "did not show he was suffering from a mental disease, defect, or disorder as those terms are used in the context of an insanity defense." The State's position was that Hotz had taken psilocybin mushrooms in the past and so was aware of the possible negative effects the mushrooms would have on him. Hotz admitted that he had previously experienced anxiety and hallucinations after taking mushrooms, including the belief that "the CIA was after him." The record does not indicate how the trial court ruled on the motion in limine, although Hotz claimed that the trial court overruled it.

At the beginning of the trial, the district court gave the jury some preliminary instructions. Included in those instructions was the statement: "[Hotz] has also given notice of his intent to rely on the defense of not responsible by reason of insanity. [Hotz] has the burden of proving by the greater weight of evidence that he was insane at the time of the acts charged."

4. Testimony at Trial

At trial, Hotz presented testimony from an expert witness, Dr. Daniel Wilson, as to Hotz' mental state at the time of the crime. Wilson is board certified in forensic and general

psychiatry. Wilson testified that he reviewed the police reports, the toxicology results, the crime laboratory and interview reports, the camera recording from Banzhaf's patrol car, the police interviews, and the autopsy reports and photographs. Wilson also reviewed a medical report from the hospital in Chadron where Hotz had been transported.

Wilson testified that mushrooms are almost never associated with violent behavior. Wilson also stated that while most people have a significant change in their perception while using mushrooms, whether those effects are positive or negative is unpredictable. When asked about the definition of a psychosis, Wilson defined psychosis as "any derangement of reality whether it's perceptual with all these, you know, visions and hearing . . . . Or it can be quite complex . . . and develop into a delirium which is more chaotic and disturbing."

Wilson stated that he believed Hotz was developing a paranoid delusion that he was being threatened by his roommate, and was therefore misinterpreting cues in his environment. Hotz told Wilson that his memories of the altercation were indistinct, but that he remembered stabbing Pfeiffer several times. Hotz also told Wilson he believed there was a conspiracy to kill Hotz. Wilson stated that Hotz' calm responses to Sayer's wife and his violent behavior toward Sayer were indicative of a continuing psychosis. Wilson gave his expert opinion that Hotz had suffered from hallucinogen-induced psychosis and hallucinogen-induced delirium, both "DSM-IV"[1] disorders. Wilson stated that those disorders are generally accepted within the psychiatric community. Wilson called the video of Hotz in Banzhaf's cruiser a very rare and dramatic documentation of hallucinogen-induced psychosis and delirium.

Hotz' counsel asked Wilson if he had

> an opinion within a reasonable degree of psychiatric certainty whether the drug-induced psychosis and the drug-induced delirium impaired . . . Hotz's mental capacity at the time that he killed . . . Pfeiffer and committed these subsequent acts at the Sayer house to such an extent that

[1] See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev. 2000).

> he did not understand the nature and consequences of his actions?

At this point, the State objected on lack of foundation and relevancy, and argued that Wilson's opinion invaded the province of the jury. The district court sustained the objection. Hotz then made an offer of proof. In the offer, Wilson stated that Hotz' psychiatric illnesses at the time of Pfeiffer's death "so grossly impaired his awareness of reality that it's medically . . . all but impossible to attribute willful behavior to a man who is psychotic and delirious as was . . . Hotz." Wilson also stated that Hotz' illnesses "obliterated his ability to know right from wrong."

At the conclusion of evidence, Hotz asked the district court to instruct the jury on insanity, but the district court declined to do so. The jury was instructed on first degree murder, second degree murder, and manslaughter. The district court also gave the jury the following instruction on intoxication:

> There has been evidence that Hotz was intoxicated by drugs at the time the crimes charged were committed. Voluntary intoxication is a defense only when a person's mental abilities were so far overcome by the use of drugs that he could not have had the required intent. You may consider the evidence of drug use along with the other evidence in deciding whether [Hotz] had the required intent.

On November 6, 2009, during its deliberations, the jury submitted the following question: "From the beginning the jury was under the impression that we were to determine insanity or not. Why was the change made for our decision?" The district court referred the jury to instruction No. 1, paragraph 3, citing the district court's "duty to tell you what the law is." The jury then returned guilty verdicts on the charges of second degree murder, attempted second degree murder, terroristic threats, and three counts of use of a weapon to commit a felony.

Hotz made a timely motion for new trial, based in part on the district court's refusal to instruct on the insanity defense. Hotz also argued that he had relied on the district court's decision to overrule the State's motion in limine and claimed that he was deprived of a fair trial as a result. As part of his motion

for new trial, Hotz attempted to introduce several exhibits, including an affidavit from Hotz' trial counsel regarding the district court's decision on the motion in limine. The district court refused to accept the affidavit, finding that the grounds for a motion for new trial could not be proved by extraneous evidence outside the record.

The district court overruled Hotz' motion for new trial and sentenced Hotz to 20 to 50 years' imprisonment for second degree murder, 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony, 10 to 20 years' imprisonment on attempted second degree murder, 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony, 1 to 5 years' imprisonment on terroristic threats, and 5 to 20 years' imprisonment on the corresponding use of a weapon to commit a felony convictions. All sentences were ordered to run consecutively.

III. ASSIGNMENTS OF ERROR

Hotz assigns that the district court erred when it (1) excluded expert witness testimony concerning whether Hotz was legally insane at the time of the acts charged, (2) refused to give an insanity instruction, (3) refused to admit into evidence trial counsel's affidavit in support of Hotz' motion for new trial, (4) denied Hotz' motion for new trial, and (5) imposed consecutive sentences for Hotz' convictions for attempted second degree murder and terroristic threats.

IV. STANDARD OF REVIEW

[1] In proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2]

[2] Whether jury instructions given by a trial court are correct is a question of law.[3]

[3] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show

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[2] See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[3] *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[4]

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5]

V. ANALYSIS

1. Trial Court Did Not Err in Refusing to Instruct Jury on Insanity Defense or in Excluding Expert Witness Testimony on Insanity

Hotz first argues that the district court erred when it refused to allow his expert witness to give an ultimate opinion on whether Hotz met the legal definition of insanity at the time of the crime and when it refused to instruct the jury on insanity. We address these two assignments of error together. The underlying issue in this case is whether the voluntary use of drugs, rather than voluntary intoxication, may give rise to a defense of insanity. We have previously addressed whether voluntary alcohol intoxication can be used as a defense, but we have never addressed the use of drugs in this context. And, although we are remanding Hotz' cause for a new trial, we address these assignments of error first, because Hotz' motion for new trial rests on the assumption that he was entitled to an instruction on the insanity defense as a matter of law.

(a) Insanity and Intoxication in Nebraska Law

The insanity defense developed early at common law, and the *M'Naghten* rule is one of the most common definitions of insanity.[6] A number of states have adopted some version of the *M'Naghten* rule under common law, while other states have codified some version of the insanity defense by statute.[7]

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[4] *Id.*

[5] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[6] See Annot., 9 A.L.R.4th 526 (1981).

[7] *Id.*

Generally speaking, the *M'Naghten* rule requires that a defendant not know the nature and quality of his or her actions, as well as not knowing that what he or she was doing was wrong.[8]

Nebraska adopted by common law a modified *M'Naghten* rule for the first time in 1876, stating that "where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible."[9] Although the *M'Naghten* rule places the burden on the defendant to prove insanity, in 1876, this court shifted the burden to the prosecution to disprove it.[10]

[5] Under our current common-law definition, the two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.[11] While the insanity defense itself is a product of common law, the procedural aspects of the insanity defense are set out in § 29-2203. That statute also places the burden for proving insanity back on the defendant.

[6] In Nebraska, the intoxication defense has been available to a defendant under common law almost as long as the insanity defense.[12] However, intoxication has never been considered a justification or excuse for a crime, although intoxication may be considered to negate specific intent.[13] We first addressed the juxtaposition of intoxication and insanity in *Schlencker v. The State*.[14] In that case, the defendant had been charged with murder. Several witnesses testified to the defendant's strange conduct shortly before the crime. The jury was instructed

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[8] *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 10 Cl. & Fin. 200.

[9] *Wright v. The People*, 4 Neb. 407, 409 (1876).

[10] *Id.*

[11] See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[12] *O'Grady v. State*, 36 Neb. 320, 54 N.W. 556 (1893).

[13] See *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951).

[14] *Schlencker v. The State*, 9 Neb. 241, 1 N.W. 857 (1879), *reversed on rehearing on other grounds* 9 Neb. 300, 2 N.W. 710.

that "'*settled* insanity produced by intoxication affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility when the patient, when sane and responsible, made himself voluntarily intoxicated.'"[15] We affirmed.

[7] We also addressed this issue generally in *Tvrz v. State*.[16] There, the defendant presented evidence that he had been very intoxicated at the time of the murder, that he did not remember anything that had occurred, and that there was evidence of mental instability in his family. We concluded that the defendant had not presented any evidence of a mental disease or defect, but also noted:

> "Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees."[17]

Hence, the law in Nebraska is clear regarding the use of the insanity defense where a defendant is voluntarily intoxicated through the use of alcohol.[18] In contrast, we have never specifically addressed its application to voluntary drug use. Hotz argues that he was rendered temporarily insane as a result of his use of hallucinogenic mushrooms and marijuana. We read Hotz' argument as asking us to repudiate our previous position on intoxication and on whether a defendant can claim intoxication as a complete defense. Other states have addressed whether a defendant may assert the defense of insanity where he or she is voluntarily intoxicated through the use of drugs, however. We next turn to case law from those jurisdictions.

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[15] *Id.* at 252, 1 N.W. at 861 (emphasis in original).

[16] *Tvrz, supra* note 13.

[17] *Id.* at 651, 48 N.W.2d at 767.

[18] *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

(b) Insanity and Intoxication in Other Jurisdictions

The general rule in other jurisdictions is that voluntary intoxication through the use of drugs will not give rise to an insanity defense.[19] The State cites two of those cases in its brief: one from Iowa and the other from Vermont.[20] Even though Iowa follows a modified common-law *M'Naghten* rule and Vermont has codified its insanity defense by statute, the reasoning and conclusions are generally the same in both cases.[21]

The general rule can be summarized as follows:

> Insanity combined with, or resulting from, intoxication is a defense to homicide if it is of a permanent nature and meets the test of insanity generally, but a mere temporary frenzy induced by intoxication is not a defense.
>
> . . . Insanity resulting from intoxication, in order to free a person from responsibility for a homicide, must be of such degree as would render a person irresponsible if the insanity were due to any other cause. Intoxication alone, however, is not insanity.[22]

In an Iowa Supreme Court decision, the defendant claimed that he had taken a pill causing him to believe that the victim was a dog and was about to kill him. He argued that as a result of this drug, he was temporarily insane at the time of the murder and that consequently, the jury should have been instructed on the insanity defense.[23] The trial court disagreed and instead instructed the jury on intoxication. On appeal, the Iowa Supreme Court stated, "This court has held that a temporary mental condition caused by voluntary intoxication from alcohol does not constitute a complete defense. . . . Is the rule the same when the mental condition results from voluntary ingestion of other drugs? We think so, and the cases so hold."[24]

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[19] See Annot., 8 A.L.R.3d 1236 (1966).

[20] *State v. Sexton*, 180 Vt. 34, 904 A.2d 1092 (2006); *State v. Hall*, 214 N.W.2d 205 (Iowa 1974).

[21] *Id.* See, *State v. Harkness*, 160 N.W.2d 324 (Iowa 1968); Vt. Stat. Ann. tit. 13, § 4801(a)(1) (2009).

[22] 40 C.J.S. *Homicide* § 23 at 386-87 (2006).

[23] *Hall, supra* note 20.

[24] *Id.* at 207 (citations omitted).

In *State v. Sexton*,[25] a Vermont Supreme Court case, the defendant had been using the drug LSD prior to the murder for which he was convicted. A court-appointed psychiatrist determined that the defendant had an underlying mental condition that, combined with the drug use, rendered him insane at the time of the offense. Another psychiatrist concluded the defendant's mental condition was due solely to his use of the drug. The trial court determined that the defendant could present evidence that his drug use had exacerbated an underlying mental condition resulting in his being insane at the time of the murder.

The Vermont Supreme Court held:

> [W]e have long held that, while voluntary intoxication may mitigate the crime charged, it will not operate as a total bar to criminal responsibility. . . . This is the rule nationally as well. . . .
>
> While the mental state resulting from extreme intoxication may in some cases be "tantamount to insanity" . . . its origin as a self-induced impairment fundamentally distinguishes it for most courts from a naturally occurring mental disease or defect that leads to insanity. . . . Indeed, it is universally recognized that a condition of insanity brought about by an individual's voluntary use of alcohol or drugs will not relieve the actor of criminal responsibility for his or her acts. . . .
>
> The only generally recognized exception to this rule is the doctrine known as "fixed" or "settled" insanity. Nearly every court and commentator that has addressed this doctrine has defined it as a permanent or chronic mental disorder caused by the habitual and long-term abuse of drugs or alcohol.[26]

The court further noted:

> The underlying rationale for the settled insanity doctrine is generally explained as an acknowledgment of "the futility of punishment, since the defective mental

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[25] *Sexton, supra* note 20.

[26] *Sexton, supra* note 20, 180 Vt. at 44-45, 904 A.2d at 1100-01 (citations omitted).

> state is permanent," . . . or, more commonly, as a compassionate concession that at some point a person's earlier voluntary decisions become so temporally and "morally remote" that the cause of the offense can reasonably be ascribed to the resulting insanity rather than the use of intoxicants.[27]

The court noted that the defendant had taken the drug LSD precisely because he wanted to alter his perceptions and experience hallucinations. The court stated:

> As we have seen, it is a fundamental tenet of our criminal code that a defendant must be held accountable for the consequences of his or her actions resulting from the voluntary ingestion of illegal drugs or alcohol, and this rule remains unaffected by the possibility that the substance will activate an unknown condition leading to an unexpected reaction.[28]

Therefore, the defendant was barred from asserting an insanity defense on the basis of voluntary intoxication, but he was not barred from adducing evidence of his mental disease or defect aside from that caused by intoxication.

A majority of states abide by the rule that intoxication is not a defense, except to the extent that it negates intent, and have particularly noted that temporary insanity brought on by voluntary intoxication is not an excuse.[29] The rationale in these jurisdictions is, much as the Iowa and Vermont courts noted, that temporary insanity brought on by voluntary intoxication is not a "mental disease or defect" as understood under the common law.[30]

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[27] *Id.* at 47, 904 A.2d at 1102.

[28] *Id.* at 53, 904 A.2d at 1107.

[29] See 8 A.L.R.3d, *supra* note 19.

[30] *Downing v. Com.*, 26 Va. App. 717, 496 S.E.2d 164 (1998); *State v. Sette*, 259 N.J. Super. 156, 611 A.2d 1129 (1992); *People v. Whitehead*, 171 Ill. App. 3d 900, 525 N.E.2d 1084, 121 Ill. Dec. 777 (1988); *State v. Stevenson*, 198 Conn. 560, 504 A.2d 1029 (1986); *Hanks v. State*, 542 S.W.2d 413 (Tex. Crim. App. 1976); *Parker v. State*, 7 Md. App. 167, 254 A.2d 381 (1969); *State v. Salmon*, 10 Ohio App. 2d 175, 226 N.E.2d 784 (1967).

(c) Insanity Defense and Legislature

Hotz argues that not allowing a defense of temporary insanity due to voluntary intoxication is a decision for the Legislature. He contends that the Legislature recently refused to pass a proposed law that would have prevented intoxication from being used as a defense unless the defendant could prove by clear and convincing evidence that the intoxication was involuntary. Hotz cites *State v. Klein*,[31] a Washington case, in support of his contention that the Legislature and not the courts ought to define "mental disease or defect."

In *Klein*, the Washington Supreme Court used the dictionary definition of "mental disease or defect," noting that there was no statutory definition. *Klein*'s reasoning is inapplicable in this state. Though Washington's insanity defense closely follows the *M'Naghten* rule, it is statutory based and is not a common-law construct.[32] In this state, however, the basis of our insanity defense is the common law.

The court in *Sexton*, the Vermont case previously cited, also addressed the argument that the legislature ought to make this sort of policy decision. The court noted that the insanity defense was a common-law construct. The court stated:

> As we have seen, it is well settled that, absent a fixed insanity developed over a prolonged period of abuse, the voluntary use of drugs or alcohol that triggers a psychotic reaction will not absolve a defendant of criminal responsibility. Our holding, therefore, is consistent with controlling common law, and does no violence to the separation of powers doctrine or the prerogatives of the Legislature.[33]

Therefore, even though Vermont has codified its insanity defense, the court in *Sexton* still relied on the common law, rather than the legislature.

Generally speaking, other states do not define temporary insanity as a result of voluntary drug use as a "mental disease

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[31] *State v. Klein*, 156 Wash. 2d 103, 124 P.3d 644 (2005).

[32] See Wash. Rev. Code Ann. § 9A.12.010 (West 2009).

[33] *Sexton, supra* note 20, 180 Vt. at 58, 904 A.2d at 1110.

or defect."[34] And some courts have found that a defendant may not plead insanity where there was voluntary intoxication because intoxication is a separate, if partial, defense.[35]

(d) Conclusion

Nebraska case law has consistently held that "'[v]oluntary intoxication is no justification or excuse for crime unless the intoxication is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent.'"[36] As noted above, other states that utilize the common-law insanity defense have held the same.

However, Hotz argues that even if we determine this decision is one best left up to the Legislature, two of our prior cases involve defendants who received the insanity defense after being voluntarily intoxicated. In *State v. Reeves*,[37] the defendant pled not guilty by reason of insanity to the murder of two women. The defendant claimed that he had been drinking alcohol and had consumed peyote prior to the murders. The defendant's expert testified that the defendant did not have the capacity to know what he was doing and that he did not know right from wrong. The trial court instructed the jury on the insanity defense, but the jury nevertheless found the defendant guilty on both counts.

Hotz claims that because the jury in *Reeves* was given the insanity instruction, he, Hotz, should have received that instruction as well. We disagree. In *Reeves*, although we did generally find that the jury had been properly instructed, we did not rule on the legitimacy of receiving the insanity instruction. The parties never raised the issue of whether a defendant may plead temporary insanity brought about by the voluntary use of drugs.

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[34] See, *id.*; *Downing, supra* note 30; *Sette, supra* note 30.

[35] See *People v. Free*, 94 Ill. 2d 378, 447 N.E.2d 218, 69 Ill. Dec. 1 (1983).

[36] *Reynolds, supra* note 18, 235 Neb. at 692, 457 N.W.2d at 423 (quoting *Prim, supra* note 18).

[37] *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

State v. Nielsen,[38] the second case Hotz cites, gives no more direction. In that case, the defendant presented evidence that he was very drunk when he killed his father-in-law and mother-in-law. The defendant relied upon the insanity defense even though no expert could testify that the defendant had met the legal standard of insanity at the time of the offense. In his motion for postconviction relief, the defendant alleged that his trial counsel was ineffective for relying on the insanity defense. We found that the defendant's counsel was not ineffective for choosing that particular trial strategy; but the issue of whether a defendant may claim temporary insanity through voluntary intoxication was never addressed.

Based on our past case law and the case law of other states, we find that the district court did not err when it refused to instruct the jury on insanity in the present case.

> While the mental state resulting from extreme intoxication may in some cases be "tantamount to insanity," . . . its origin as a self-induced impairment fundamentally distinguishes it for most courts from a naturally occurring mental disease or defect that leads to insanity. . . . Indeed, it is universally recognized that a condition of insanity brought about by an individual's voluntary use of alcohol or drugs will not relieve the actor of criminal responsibility for his or her acts.[39]

In this case, Hotz voluntarily ingested hallucinogenic mushrooms and marijuana. He had taken mushrooms in the past and had experienced anxiety and delusions. Hotz was well aware of the mind-altering effects the mushrooms might have. While Hotz may have experienced a state that was "tantamount to insanity," that state was temporary. Hotz took the mushrooms around 4 p.m. on December 5, 2008, and by late that night, he was lucid and able to respond to questions. Hotz had no history of mental illness, and there is no evidence that he suffered permanent mental problems from his use of drugs.

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[38] *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

[39] *Sexton, supra* note 20, 180 Vt. at 44, 904 A.2d at 1100 (citations omitted).

[8] As a matter of law, voluntary intoxication is not a complete defense to a crime, even when it produces the sort of psychosis or delirium Hotz claims to have suffered. Because Hotz was not entitled to an insanity instruction, the trial court also did not err when it excluded testimony from Wilson, Hotz' expert witness. We find Hotz' first and second assignments of error to be without merit.

2. District Court Erred in Denying Hotz New Trial

Hotz next argues that the trial court erred by overruling his motion for new trial. Hotz argues that he relied solely on the insanity defense after the district court overruled the State's motion in limine. Hotz claims that the district court's decision not to instruct the jury on insanity therefore amounted to an "[i]rregularity in the proceedings" under Neb. Rev. Stat. § 29-2101(1) (Reissue 2008) because Hotz was deprived of that defense. Hotz also claims this deprivation affected his substantial right to due process of law and a fair trial as guaranteed by the 5th and 14th Amendments.

Although Hotz was not entitled to the insanity defense as a matter of law, we agree that he was led to believe that he would receive an insanity instruction. Under § 29-2101,

> [a] new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, of the prosecuting attorney, or of the witnesses for the state or in any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial . . . .

Hotz gave timely notice of his intent to rely on the insanity defense. The State made a motion in limine to exclude Hotz' expert testimony as to his insanity at the time of the offense. We do not have a record of the trial court's ruling on the motion in limine, but it is clear that Hotz proceeded under the assumption that he would be allowed to assert the insanity defense.

During voir dire, the prosecutor informed the jury that Hotz would be proceeding with a defense of "not responsible by reason of mental illness of insanity." Hotz' attorney also told prospective jurors that Hotz would be relying on the insanity

defense. Hotz' attorney questioned prospective jurors extensively as to their opinions on the use of the insanity defense when the defendant had been using drugs. At least one prospective juror was excused for cause because he stated that he could not find a defendant not guilty by reason of insanity if the person's mental state was a product of drug use, even if so instructed.

Both the prosecutor and Hotz' trial counsel stated during opening arguments that Hotz would be relying on the insanity defense. The trial court also informed the jury that Hotz would be relying on the insanity defense. Hotz' expert, Wilson, was allowed to testify regarding his evaluation of Hotz, as well as give extensive definitions of drug-induced delirium and drug-induced psychosis. The State objected to Wilson's opinion as to whether Hotz met the legal definition of insanity, and the trial court sustained this objection. This ruling appears to be the first indication Hotz had that the trial court was not going to give an instruction on the insanity defense.

After Hotz had rested his case, the trial court informed Hotz that it would not instruct the jury on the insanity defense. This last-minute decision required Hotz' counsel to try to explain during his closing argument why the jury would not receive an insanity instruction. We also note the jury's question shortly after deliberations began: "From the beginning the jury was under the impression that we were to determine insanity or not. Why was the change made for our decision?" Clearly, the jury believed that it was to determine the issue of insanity as well.

[9,10] "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."[40] The determination of whether procedures afforded an individual comport with constitutional requirements

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[40] *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

for procedural due process presents a question of law.[41] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.[42]

Given the circumstances, we find that Hotz' ability to mount a defense was severely compromised when he was barred from asserting the insanity defense at what amounted to the eleventh hour. Although Hotz is not entitled to an insanity instruction as a matter of law, he and the jury proceeded through trial with the assumption that the defense was available. Such amounted to an irregularity in the proceedings under § 29-2101(1), which irregularity prevented Hotz from receiving a fair trial and now entitles him to a new trial. We therefore reverse Hotz' convictions and remand the cause for a new trial. For that reason, we need not address Hotz' remaining assignments of error.

VI. CONCLUSION

In line with our prior case law concerning alcohol and the case law in a majority of states, we find that a defendant may not assert an insanity defense when the insanity was temporary and brought on solely by voluntary intoxication through the use of drugs. Because Hotz was not entitled to an insanity instruction, the trial court did not err in excluding Hotz' expert witness' testimony on insanity. However, Hotz was led to believe that he would be able to rely on the insanity defense, and this constituted an irregularity in the proceedings sufficient for a new trial under § 29-2101(1). We therefore reverse Hotz' convictions and remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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

[42] *Id.*

GARY'S IMPLEMENT, INC., APPELLANT AND CROSS-APPELLEE, V. BRIDGEPORT TRACTOR PARTS, INC., FORMERLY KNOWN AS GARY'S TRACTOR PARTS, INC., APPELLEE AND CROSS-APPELLANT.

799 N.W.2d 249

Filed April 1, 2011. No. S-10-122.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **Expert Witnesses: Testimony: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.
3. **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.
4. **Restitution.** Restitution is not a mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.
5. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
6. ____: ____. One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
7. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
8. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
9. **Jury Instructions.** The instructions contained in the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and the evidence call for such an instruction.
10. **Contracts: Damages.** The measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation; however, an injured party will not be precluded from recovering because of that fact.
11. **Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.
12. **Expert Witnesses: Proof: Juries.** When an assumption used by an expert is not proved untrue or to be without any basis in fact, whether the stated grounds for the assumption are credible is a jury question.

13. **Expert Witnesses: Appeal and Error.** An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.
14. **Restitution.** The right of restitution may be enforced by proceedings in the lower court in the same cause, or by an independent action or suit.
15. ____. It is the duty of the court to compel restitution upon the reversal of a judgment which has been executed; however, restitution is not in all cases a matter of absolute right.

Appeal from the District Court for Morrill County: LEO DOBROVOLNY, Judge. Affirmed.

Howard P. Olsen, Jr., Steven W. Olsen, and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellant.

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

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

MCCORMACK, J.

I. NATURE OF CASE

Gary's Implement, Inc., appeals the judgment in favor of Bridgeport Tractor Parts, Inc. (Bridgeport Tractor), in the amount of $1,250,000. Bridgeport Tractor cross-appeals the denial of its motion for restitution. The issues on appeal are whether the district court properly admitted the testimony of a particular expert; whether the court properly instructed the jury on the issue of damages; and whether Bridgeport Tractor is entitled to recover sums allegedly paid in execution of the original judgment, which was subsequently reversed. For the following reasons, we affirm.

II. BACKGROUND

1. PROCEDURAL BACKGROUND

This appeal follows the second trial in this matter. The dispute arose from transactions related to the sale of a business by Gary's Implement to Bridgeport Tractor. On July 15, 1998, Gary's Implement entered into a contract to sell its "salvage and used parts business" to Bridgeport Tractor. The contract was accompanied by a noncompetition agreement. The contract

which embodies this sale is made up of the agreement, the promissory note, the noncompetition agreement, and the bill of sale. Pursuant to the agreement, Bridgeport Tractor purchased the equipment, inventory, and all goodwill and other intangible assets of the business. The agreement called for periodic payments by Bridgeport Tractor over a period of 5 years. The noncompetition agreement provided that Gary's Implement was prohibited from engaging in "the agricultural and machinery salvage and used, new or rebuilt agricultural parts business" within 150 miles of Bridgeport, Nebraska, for a period of 5 years. The noncompetition agreement expired on July 15, 2003.

(a) Original Trial

After executing the contract, Bridgeport Tractor became concerned that Gary's Implement was engaging in competitive activity by salvaging and selling used parts, by competing with Bridgeport Tractor for the supply of salvage tractors and machinery, and by trading on the goodwill that Gary's Implement had sold to Bridgeport Tractor. Bridgeport Tractor demanded this activity cease. After determining that Gary's Implement refused to do so, Bridgeport Tractor deemed the noncompetition agreement and the agreement to sell goodwill breached, and chose to stop payments to Gary's Implement. Gary's Implement ultimately sued for the balance due under the contract, and Bridgeport Tractor counterclaimed, seeking damages for breach of the noncompetition agreement. The jury returned a verdict in favor of Gary's Implement, finding that Bridgeport Tractor, not Gary's Implement, had breached the contract. The district court entered judgment in favor of Gary's Implement and against Bridgeport Tractor pursuant to the remaining amounts due under the contract: $612,225 on the promissory note and $20,000 on the noncompetition agreement.

Bridgeport Tractor appealed. In *Gary's Implement v. Bridgeport Tractor Parts* (*Gary's I*),[1] we reversed, and remanded for a new trial on Bridgeport Tractor's counterclaim for breach

[1] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

of the noncompetition agreement. We concluded that the district court committed prejudicial error when it instructed the jury as to the meaning of certain provisions within the agreement, because the agreement was ambiguous and its interpretation was, accordingly, a question of fact. We further determined the promissory note representing the sale of goodwill to Bridgeport Tractor was inextricably intertwined with Gary's Implement's agreement not to compete. Thus, we also reversed the jury's verdict on Gary's Implement's counterclaim, and the issue of damages under the promissory note was again submitted to the jury upon retrial.

(b) Order in Aid of Execution

Prior to our reversal of the original judgment, while the appeal by Bridgeport Tractor was pending, the district court issued an order granting a motion in aid of execution filed by Gary's Implement. The order imposed sanctions against Bridgeport Tractor for bad faith for having filed a chapter 11 bankruptcy case, which the district court concluded was "for the sole and only purpose of frustrating [the] efforts [of Gary's Implement] to collect and enforce its judgment." The order also directed Bridgeport Tractor to "cease and desist" from making any transfers or sales of personal property from its salvage yard outside the ordinary course of business. After our decision in *Gary's I*, we considered an appeal from the order granting the motion in aid of execution. In *Gary's Implement v. Bridgeport Tractor Parts* (*Gary's II*),[2] we reversed the order, noting that, generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it.

2. Remand

(a) Hearing on Restitution

Upon remand, Bridgeport Tractor filed a motion for restitution in Morrill County District Court on January 17, 2006. In

[2] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 337, 701 N.W.2d 367 (2005) (citing *Upah v. Ancona Bros. Co.*, 246 Neb. 608, 521 N.W.2d 906 (1994), and *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987)).

its motion, Bridgeport Tractor requested Gary's Implement make restitution of sums paid at a trustee's sale, alleging such sums were paid pursuant to the original judgment in favor of Gary's Implement which was subsequently reversed. This motion was based on events which transpired after the initial judgment was entered, but prior to our decisions in *Gary's I*[3] and *Gary's II*.[4]

On July 15, 1998, David Dyke, then president of Bridgeport Tractor, purchased real estate from Gary's Implement. To secure the purchase price, Dyke gave a deed of trust, wherein Gary's Implement was named as the beneficiary/lender. Neither the deed of trust nor the real estate agreements indicate that Dyke was acting on behalf of Bridgeport Tractor. However, the deed of trust recited that the deed was executed for the purpose of securing the "obligations . . . payable by Borrower to Lender" under a noncompetition agreement and a promissory note of the same date. Bridgeport Tractor and Gary's Implement's agreements, as described above, were executed on July 15, 1998.

The deed of trust included a provision prohibiting the transfer of the real estate without Gary's Implement's written consent. It stated:

> Trustor [Dyke] shall not sell, transfer, or otherwise convey in any manner all or any part of the Trust Estate or interest in it without Lender's [Gary's Implement's] prior written consent. . . . If a sale, transfer or conveyance occurs, Lender [Gary's Implement] may declare all sums secured by this Deed of Trust to be immediately due and payable, and/or cause Trustee to file a notice of default.

Judgment was entered against Bridgeport Tractor in the original trial on July 22, 2003, and Dyke transferred the real estate to Bridgeport Tractor on August 1. Thereafter, Bridgeport Tractor filed a petition for chapter 11 bankruptcy in South Dakota. The South Dakota bankruptcy court determined that the petition was not filed in good faith. The bankruptcy court noted that Dyke acknowledged that he conveyed the real estate

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[3] *Gary's I, supra* note 1.

[4] *Gary's II, supra* note 2.

to Bridgeport Tractor to avoid losing the property to Gary's Implement and that he was aware this was prohibited under the deed of trust. The bankruptcy case was dismissed on April 2, 2004.

In April 2004, Gary's Implement sent Dyke a notice of trustee sale under the July 15, 1998, deed of trust. Gary's Implement held a trustee's sale on May 18, 2004, pursuant to the power of sale in the deed of trust. The only bidders at the sale were Gary's Implement and Dyke. Dyke made the final bid of $476,000, which was accepted. The trustee executed and delivered to Dyke a trustee's deed to the real estate. Gary's Implement retains the funds from the sale.

In its 2006 motion for restitution, Bridgeport Tractor sought $476,000 in restitution, plus interest, and asserted that Gary's Implement was unjustly enriched based on our holdings in *Gary's I*[5] and *Gary's II*.[6] Bridgeport Tractor argued that the funds paid to Gary's Implement were transferred as partial satisfaction of the money judgment ordered at the original trial, as opposed to an independent transaction related to the real estate alone. Because our holdings vacated that original judgment, Bridgeport Tractor argued it was entitled to restitution. Gary's Implement filed a brief in opposition to the motion for restitution and asserted that the sale of the real estate from Dyke to Bridgeport Tractor had violated the terms of the deed of trust under the transfer of property provision. The trustee's sale, Gary's Implement argued, was based on this violation of the deed of trust and was independent of our reversal of the original judgment. Gary's Implement also asserted that Bridgeport Tractor was not entitled to restitution under the maxim of unclean hands, based on the bankruptcy court's determination that Bridgeport Tractor's purchase of the property and its subsequent bankruptcy petition were "primarily motivated by insider . . . Dyke's desire to place the realty under the protection of a bankruptcy stay." The district court overruled Bridgeport Tractor's 2006 motion for restitution. In denying restitution, the court noted that Gary's Implement had the

[5] *Gary's I, supra* note 1.

[6] *Gary's II, supra* note 2.

right to foreclose on the deed of trust because of the improper transfer and that, at that point in time, Bridgeport Tractor "had unclean hands."

Prior to retrial on the contract issues, the case was transferred to another judge of the district court. On July 27, 2009, Bridgeport Tractor again filed a "Motion for Restitution of Sums Paid at Void Execution Sale." A hearing was held on the motion on October 19. At the hearing, Gary's Implement argued that the motion was in essence a motion for reconsideration and could not be considered by the court because it was untimely under Neb. Rev. Stat. § 25-2001(1) (Reissue 2008). Neither party presented facts or arguments contrary or supplemental to those presented with the 2006 motion. The motion was taken under advisement. After retrial, the district court denied restitution. In the court's order, it was noted that no authority was shown to support reconsideration of the previous ruling on the 2006 motion. Further, the court stated that the restitution issue was the subject of a separate lawsuit. The facts surrounding Bridgeport Tractor's motion for restitution will be explored more fully in our analysis below.

(b) Retrial

On retrial, the jury resolved the ambiguities in the contract in favor of Bridgeport Tractor. It rejected Gary's Implement's claim and found in favor of Bridgeport Tractor's counterclaim. The jury awarded Bridgeport Tractor $1,250,000 in damages.

John Wenande, a certified public accountant and financial planner accredited in business valuation, testified at trial that he was employed to determine whether Gary's Implement's competitive activities had damaged Bridgeport Tractor and, if so, to what extent. Wenande described the analytical steps he took to form his opinion: (1) gather financial information, (2) summarize the financial information, (3) consider available methods for analysis that could be applied to determine and calculate an economic loss, (4) apply the methods to determine a range of loss, and (5) calculate the loss.

In analyzing this case, Wenande gathered financial statements and tax returns of both Gary's Implement and Bridgeport Tractor, financial statements of chosen comparable companies,

copies of the underlying agreements, depositions related to the facts of the case, and interviews with Dyke's son, who is the current president of Bridgeport Tractor. Wenande reviewed Bridgeport Tractor's income and expenses over a time period running from 1999 through 2007. Gary's Implement objected numerous times to the admission of Wenande's opinions on the basis of foundation and relevance. Gary's Implement asserted that Wenande's conclusions lacked foundation because they were based on impermissible assumptions and because the comparables utilized in his methodology were not sufficiently comparable. The court initially sustained objections to Wenande's calculation of the amount of loss suffered by Bridgeport Tractor and to his opinion as to the cause of that loss. After further testimony, however, Wenande was ultimately allowed to testify that in his opinion, the range of loss Bridgeport Tractor suffered as a result of Gary's Implement's competition was $1,395,000 to $1,521,000. The details of Wenande's testimony will be discussed in more detail below.

Prior to submitting the case to the jury, the court overruled Gary's Implement's objection to jury instruction No. 7, which pertained to damages. It states:

> If you find in favor of Defendant [Bridgeport Tractor] on Defendant's counterclaim, you must decide how much money will fairly compensate Defendant for the damage which it has sustained. Defendant is entitled to recover the reasonable value of the profits it has lost.
>
> Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

The jury found in favor of Bridgeport Tractor on its counterclaim. Pursuant to the jury's verdict, the court entered judgment in favor of Bridgeport Tractor in the amount of $1,250,000.

III. ASSIGNMENTS OF ERROR

Gary's Implement assigns that the district court erred in (1) giving instruction No. 7 to the jury and (2) receiving the opinion testimony of Wenande. Bridgeport Tractor cross-appeals and assigns that the district court erred in (1) denying

Bridgeport Tractor's motion for restitution and (2) failing to award interest on the amount for which restitution is allegedly proper.

IV. STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[7]

[2,3] An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.[8] 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.[9]

[4] Restitution is not a mere right.[10] It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.[11]

V. ANALYSIS

1. Damages

[5-7] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.[12] One injured by a breach of contract is entitled to recover all its damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.[13] While damages need not be proved with mathematical certainty, neither

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[7] *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[8] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

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

[10] *Johnson v. Ruhl*, 162 Neb. 330, 75 N.W.2d 717 (1956).

[11] *Id.*

[12] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[13] *Id.*

can they be established by evidence which is speculative and conjectural.[14]

(a) Jury Instruction No. 7

Gary's Implement assigns that the district court erred in failing to impose a time limit on damages awarded to compensate Bridgeport Tractor for breach of the agreement not to compete. Gary's Implement contends that the jury was entitled to award damages only for the 5-year period contemplated in the agreement, ending July 15, 2003. Because there is no legal basis for such limitation, we find no merit to Gary's Implement's first assignment of error.

[8] Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[15] The instructions in the present case provided that the jury award only those damages proximately caused by the breach complained of. Section 2.03 of jury instruction No. 2 stated Bridgeport Tractor was required to establish the terms of the contracts and agreements and what they meant, that Gary's Implement breached the noncompetition agreement, that this breach was a proximate cause of some damage to Bridgeport Tractor, and the nature and extent of that damage. Proximate cause is defined in jury instruction No. 5.

[9] On the issue of damages, the court instructed the jury, in relevant part: "If you find in favor of Defendant [Bridgeport Tractor] on Defendant's counterclaim, you must decide how much money will fairly compensate Defendant for the damage which it has sustained." Gary's Implement objected to this instruction at trial. The instruction was taken from the Nebraska Jury Instructions.[16] The instructions contained in the Nebraska Jury Instructions are designed to be used when they

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[14] *Aon Consulting v. Midlands Fin. Benefits, supra* note 12; *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002).

[15] *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

[16] NJI2d Civ. 4.51.

reflect the law and the pleadings and the evidence call for such an instruction.[17]

The noncompetition agreement at issue provided that Gary's Implement would not compete with Bridgeport Tractor, directly or indirectly, for a period of 5 years from the closing date. The date of closing was July 15, 1998; therefore, the agreement expired on July 15, 2003. Gary's Implement argues that the jury should have been instructed on this fact and that, without such instruction, instruction No. 7 was misleading.

In contrast, Bridgeport Tractor asserts that because the closing date was recited in the agreement itself and because the jury had access to this agreement, the 5-year term was "overtly included in the instructions given the jury."[18] Bridgeport Tractor argues that instruction No. 7, as set out above, was correct and not misleading, because the jury was told to determine the damages under the contract and the contract stated the time period during which the noncompetition agreement applied. The statement of the case instruction given by the court, jury instruction No. 2, instructed that Bridgeport Tractor claimed it was damaged based on a breach of the noncompetition agreement and sought judgment for those damages. Bridgeport Tractor argues that the noncompetition agreement contained language stating the enforcement period of the contract and that this was sufficient to avoid any confusion or speculation by the jury. Bridgeport Tractor also argues that the jury was instructed to find only those damages which would "fairly compensate" Bridgeport Tractor and that it was reasonable to conclude that Gary's Implement's breach of the covenant not to compete "so retarded [Bridgeport Tractor] in the operation of its business that its entire loss was not fully absorbed by the end of five years, because the competition continued unfairly until the end of the five-year period."[19]

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[17] See, *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000); *Nguyen v. Rezac*, 256 Neb. 458, 590 N.W.2d 375 (1999).

[18] Brief for appellee at 30.

[19] *Id.* at 35.

[10] The measure of damages in an action for the breach of an agreement by the seller not to reenter business in competition with the buyer is usually difficult of exact computation; however, an injured party will not be precluded from recovering because of that fact.[20] The rule that lost profits from a business are too speculative and conjectural to permit the recovery of damages is not a hard and fast one, and loss of prospective profits may nevertheless be recovered if the evidence shows with reasonable certainty both the loss and the extent thereof.[21] Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not.[22] If sufficient evidence is presented that it clearly appears that a loss of profits was suffered, it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case allows.[23] Our law limits recovery of lost profits only to the extent that they must not be based on mere speculation or conjecture.

Once the issue of damages is properly submitted to a jury, it is within the province of the jury to determine what amount will reasonably compensate the injured party. There is no legal basis for an instruction limiting the award of damages to the time period specified in an agreement not to compete, so long as the evidence provided establishes damages with reasonable certainty. Because the evidence supports instruction No. 7 and because the jury instructions, taken as a whole, indicate that the instructions correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, we find no reversible error.

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[20] *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978). Cf. *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985).

[21] See, *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

[22] *Id.*

[23] See, e.g., *Ferrell Const. Co. v. Russell Creek Coal Co.*, 645 P.2d 1005 (Okla. 1982).

(b) Expert Testimony

The evidence which Bridgeport Tractor presented in support of its claim for damages consisted primarily of the opinion of Wenande. Wenande is a certified public accountant and financial planner accredited in business valuation. Gary's Implement assigns that the district court erred in receiving, over Gary's Implement's foundational objections, Wenande's opinion testimony with regard to lost profits. Gary's Implement argues that the opinion testimony was improperly received, because Wenande's analysis covered the time period through 2007, the comparable businesses used in his analysis were not sufficiently similar, and his conclusions were not adequately justified because they were based on unexplained assumptions. We review for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.[24]

In arriving at his opinion on loss, Wenande testified that he utilized the "yardstick" or "comparison" approach, which compares the company's income to that of a comparable company. Wenande also considered the "but for" approach, which attempts to make a reasonable determination of what a company's profitability would have been but for a certain event.

In applying the yardstick approach, Wenande measured Bridgeport Tractor's business against the business of Bridgeport Tractor's sister stores, Wisconsin Tractor Parts and Downing Tractor Parts, both located in Wisconsin. Based on comparison of these companies, Wenande concluded that the competitive activity engaged in by Gary's Implement led to some loss of income. Wenande testified that the comparisons showed a deficiency of $1,845,000 between Bridgeport Tractor and Wisconsin Tractor Parts, and a deficiency of $1,742,000 between Bridgeport Tractor and Downing Tractor Parts. He explained that these deficiencies were calculated by comparing the companies' historical financial summaries, including gross revenue, costs of sales, operating expenses, and net income.

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[24] *Tolliver v. Visiting Nurse Assn., supra* note 8.

Wenande explained that he analyzed the financial information of the comparable companies, looked at the comparison of the financial results, and assumed the difference was due to the acts of competition. To explain this assumption, Wenande testified that because of the manner in which management conducted operations, similarities in the industry, and expectations for sales, the compared businesses should have performed similarly.

When Wenande was asked to state his ultimate opinion about whether the cause of loss was due to competition, the court sustained Gary's Implement's objection on foundation. After a bench conference, Wenande provided more detail regarding the comparable companies to support his conclusions, including when the companies were acquired and the similar management model and management teams. Wenande also explained that the companies' managers agreed that the operations were reasonably comparable for purposes of his calculation. Following this testimony, Wenande was again asked to state the possible cause of the losses suffered by Bridgeport Tractor; Gary's Implement interposed with an objection on foundation, which the court sustained. Wenande then explained how possible causes other than the acts of competition were ruled out through his analysis. Ultimately, Wenande was allowed to testify, over Gary's Implement's objection, that he "found no evidence of anything else that would have a proximate relationship to the difference other than the issue of competition."

Wenande also testified to his application of the "but for" approach to determine possible loss. His analysis began with a starting point of $1 million because Gary's Implement had generated approximately that amount of revenue in 1996 and 1997. Next, Wenande looked at the average annual growth of Wisconsin Tractor Parts and Downing Tractor Parts, which was approximately 7 percent over the period 1999 to 2002. Wenande then calculated what the revenue for Bridgeport Tractor would have been, assuming an average growth of 7 percent a year. He then did a second calculation, assuming a rate of annual growth at 10 percent. Wenande explained that he used the rate of 10 percent because, through discussions with Bridgeport Tractor's president, he learned that the

company was planning to implement a new business model and that this model "could improve the growth of this store in the future beyond the 7 percent." To reach an ultimate opinion on loss, Wenande testified, he considered the cost of operation to come to a net figure representing the calculated loss. Over Gary's Implement's foundation objection, the court admitted Wenande's conclusion that the range of loss Bridgeport Tractor suffered as a result of Gary's Implement's competition was $1,395,000 to $1,521,000.

[11] Though Gary's Implement asserted numerous objections to Wenande's testimony on the basis of foundation, Gary's Implement does not contend that Wenande does not qualify as an expert in the field or that his methodology is not commonly accepted. Rather, Gary's Implement asserts that Wenande's testimony was not supported by adequate financial data, that the data Wenande analyzed was inappropriate, that the comparables utilized in forming his opinion were not truly comparable, that the conclusions drawn from the comparable analysis were not justified, and that Wenande made assumptions with no proper basis in fact to support his conclusion on damages. These allegations focus on the facts and data relied upon by Wenande, not his qualifications or the methodologies which he employed.

Neb. Rev. Stat. § 27-703 (Reissue 2008) states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In addition, we have said that expert testimony should not be received if it appears the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and that where the opinion is based on facts shown not to be true, the opinion lacks probative value.[25] The opinion

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[25] *Nebraska Nutrients v. Shepherd, supra* note 12; *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

must have a sufficient factual basis so that the opinion is not mere conjecture or guess.[26]

Our cases distinguish between the circumstance in which an expert's opinion on damages is based either upon a misconception of the applicable law or upon factual assumptions shown to be untrue or wholly unsupported by the record and the circumstance where there is a factual weakness in the underpinnings of an opinion.[27] In the former, the opinion is inadmissible, whereas in the latter, the opinion is admissible and the factual weakness goes to the weight and credibility as determined by the trier of fact.[28]

The record does not indicate that Wenande relied upon any factual assumptions that have been shown to be untrue or that are wholly unsupported by the record. It is arguable that factual weaknesses in the underpinnings of the opinion exist insofar as the comparables utilized by Wenande have distinguishing characteristics, and the financial data he considered went outside the time period specified by the noncompetition agreement. But such weaknesses go to the weight of his testimony, not its admissibility. The jury was free to discount Wenande's conclusions if it found that the comparables were not truly comparable or that his analysis did not conform to a specified timeframe. These issues were appropriately examined to allow the jury to make such a determination.

On cross-examination, Wenande acknowledged that the time period covered by his analysis did not directly correspond with the agreement not to compete. Wenande stated that he relied on such data, but did not explain, and was not asked, how this data was utilized. We will not assume Wenande used such data improperly.

[12] Wenande also acknowledged that both comparable companies had greater sales than those of Bridgeport Tractor. On direct examination, he explained that he considered the different markets in which the comparable companies were

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[26] *Id.*

[27] *Nebraska Nutrients v. Shepherd, supra* note 12.

[28] *Id.*

situated. Wisconsin has a larger population and more farms than Nebraska, while Nebraska farms tend to be larger than Wisconsin farms. Gary's Implement argues that Wenande cannot assume that the loss experienced by Bridgeport Tractor is attributable to Gary's Implement, because the comparables were not comparable and the financial data considered was from the wrong timeframe. But when an assumption used by an expert is not proved untrue or to be without any basis in fact, whether the stated grounds for the assumption are credible is a jury question.[29] Wenande's assumptions, reliance on facts, and ultimate conclusions were explored on cross-examination. And Gary's Implement was free to attempt to discredit Wenande's conclusions through presentation of its own expert and argument to the jury. Once Wenande's testimony was properly submitted, the jury was free to give weight to his testimony in determining an appropriate award of damages.

[13] Gary's Implement's objections at trial and arguments on appeal assert a challenge to the factors which Wenande considered in forming his opinions. While recognizing the principle that an expert's opinion must have a sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, we have stated that an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider.[30] Such matters go to the weight and credibility of the opinion itself and not to its admissibility.[31] Based upon our review of the record, it appears that Wenande relied on an adequate factual basis to form his opinion.

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.[32] We conclude that the district court did

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[29] See *Little v. Gillette*, 225 Neb. 70, 402 N.W.2d 852 (1987).

[30] *Nebraska Nutrients v. Shepherd, supra* note 12.

[31] *Id.*

[32] See *id.*

not err in receiving Wenande's opinions regarding lost profits over Gary's Implement's objections.

2. Bridgeport Tractor's Motion for Restitution

Bridgeport Tractor cross-appeals the denial of its motion for restitution. Bridgeport Tractor asserts that denial of the motion for restitution was error because Gary's Implement still holds the financial fruits of execution on a vacated judgment. Because restitution is not appropriate in the present case, we affirm the district court's denial of Bridgeport Tractor's motion for restitution.

[14] The right to restitution as alleged in Bridgeport Tractor's motion was long ago recognized in Nebraska.[33] The right of restitution may be enforced by proceedings in the lower court in the same cause, or by an independent action or suit.[34] While it is true that Bridgeport Tractor could have properly sought restitution in a separate proceeding, the remedy pursued by motion was appropriate. Where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.[35] The relief sought in Bridgeport Tractor's motion for restitution must be addressed on appeal in accordance with the procedure by which it was originally brought. We therefore address the merits of Bridgeport Tractor's motion for restitution.

[15] The Restatement of Restitution defines the general rule of restitution based on judgments subsequently reversed: "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract

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[33] See, *Horton v. Hayden*, 74 Neb. 339, 104 N.W. 757 (1905); *State v. Horton*, 70 Neb. 334, 97 N.W. 434 (1903); *Horton v. State*, 63 Neb. 34, 88 N.W. 146 (1901); *Hier v. Anheuser-Busch Brewing Ass'n*, 60 Neb. 320, 83 N.W. 77 (1900).

[34] See, *Horton v. Hayden, supra* note 33; *Hier v. Anheuser-Busch Brewing Ass'n, supra* note 33. See, also, 5 C.J.S. *Appeal and Error* § 1162 (2007).

[35] *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

that payment is to be final . . . ."[36] It is the duty of the court to compel restitution upon the reversal of a judgment which has been executed.[37] However, restitution is not in all cases a matter of absolute right.[38] Restitution may be denied where the party in possession of the money or property in question is equitably entitled to retain it[39] or where the money has been paid or property taken otherwise than in pursuance of the judgment or decree which has been reversed.[40] The court indicated that Bridgeport Tractor was not entitled to restitution, because the sums paid were independent of the judgment reversed and because the doctrine of unclean hands precluded recovery.

Bridgeport Tractor contends that our opinion in *Gary's II* controls the issue of restitution, citing the rule that generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree that is reversed shares its fate and falls with it.[41] However, Bridgeport Tractor concedes that our previous opinions regarding the controversy between these parties did not determine the issue of restitution. *Gary's II* therefore is not controlling. For this reason, it was the duty of the district court, on Bridgeport Tractor's motion, to determine whether this was a case in which restitution was a matter of right or whether the case presented an exception to the rule in which the court, in the exercise of sound discretion, would not order restitution.[42] This court has stated that restitution is not a mere right.[43] It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the

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[36] Restatement of Restitution § 74 at 302-03 (1937).

[37] *Horton v. Hayden, supra* note 33.

[38] *Id.*

[39] See, e.g., *Gould v. McFall*, 118 Pa. 455, 12 A. 336 (1888).

[40] See, e.g., *Sanger Lum. Co. v. Western Lum. Exchange*, 128 Wash. 335, 222 P. 609 (1924).

[41] *Gary's II, supra* note 2.

[42] See *State v. Horton, supra* note 33. See, also, *Bank of America, etc., v. McLaughlin*, 37 Cal. App. 2d 415, 99 P.2d 548 (1940); *Healy v. Wostenberg, et al.*, 47 Wyo. 375, 38 P.2d 325 (1934); *Market Nat. Bk. of N. Y. v. Pac. Nat. Bk.*, 102 N.Y. 464, 7 N.E. 302 (1886).

[43] *Johnson v. Ruhl, supra* note 10.

justice of the case does not call for it.[44] We therefore review the district court's denial of Bridgeport Tractor's motion for restitution for an abuse of discretion.

Bridgeport Tractor's claim for restitution is necessarily controlled by a deed of trust executed on July 15, 1998. The deed of trust names Dyke as trustor, an attorney as trustee, and Gary's Implement as beneficiary/lender. At the time of execution, Dyke was a shareholder and president of Bridgeport Tractor. The motion for restitution seeks sums paid by Dyke to Gary's Implement at a trustee's sale of the property described in the deed of trust.

The deed of trust states that it was executed for the purpose of securing "[p]ayment of the following obligations (collectively the 'Obligations') payable by [Bridgeport Tractor] to [Gary's Implement]: A Non-Competition Agreement of this date[, July 15, 1998,] with a balance due of $25,000; and A Promissory Note of this date[, July 15, 1998,] in the principal amount of $500,000 . . . ." It is clear that the above-referenced obligations secured by the deed of trust were the subject of the litigation below, and the original money judgment in favor of Gary's Implement. However, it is not clear whether our reversal of the original judgment defeated any other rights or obligations stipulated in the deed of trust. The deed of trust provides various events of default:

> a. [Bridgeport Tractor's] failure to make a payment of principal or interest or any other amount secured when due.
>
> b. [Gary's Implement's] expenditure of any amounts to protect the Trust Estate.
>
> c. A filing by or against [Dyke] or [Bridgeport Tractor] of an action relating to bankruptcy, insolvency or other relief for debtors, or the appointment of a trustee, receiver, or liquidator for [Bridgeport Tractor] or of the Trust Estate, or if [Dyke] makes any general assignment for the benefit of creditors.
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> d. [Dyke's] failure for 30 days after written notice from [Gary's Implement] to (i) pay delinquent taxes and

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[44] *Id.*

> assessments, (ii) provide insurance as agreed, (iii) keep the real [estate] and improvements in good repair [or] make repairs and restoration caused by previous waste, or (iv) to comply with any other terms of this Deed of Trust or any other Loan Instruments [including the noncompetition agreement and promissory note].

The deed of trust further states:

> [Dyke] shall not sell, transfer, or otherwise convey in any manner all or any part of the Trust Estate or interest in it without [Gary's Implement's] prior written consent. . . . If a sale, transfer, or conveyance occurs, [Gary's Implement] may declare all sums secured by this Deed of Trust to be immediately due and payable, and/or cause Trustee to file a notice of default.

In the event of default, the deed specifies that Gary's Implement may demand that the trustee exercise the power of sale granted in the deed. Under the power of sale provision,

> [i]f [Gary's Implement] elects to foreclose by exercise of the Power of Sale, [Gary's Implement] shall notify Trustee and shall deposit with Trustee this Deed of Trust and the Obligations [on the noncompetition agreement and promissory note] along with any receipts and evidence of expenditures made and secured as Trustee may require.
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> a. Upon receipt of the notice from [Gary's Implement], Trustee shall record, publish, and deliver to [Dyke] the Notice of Default and Notice of Sale as required by law. Trustee shall, after the appropriate time as required by law and after recording the Notice of Default and after giving Notice of Sale as required by law, sell the Trust Estate at the time and place of sale fixed by it in the Notice of Sale, either as a whole, or in separate lots or parcels or items as Trustee shall deem appropriate, and in the order as it may determine, at public auction to the highest bidder for cash payable at the time of sale. Trustee shall deliver to the purchaser or purchasers its deed or deeds conveying the property sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters or facts shall be conclusive proof of their

> truthfulness. Any person, including [Dyke], [Bridgeport Tractor], Trustee, or [Gary's Implement], may purchase at the sale and [Dyke] covenants to warrant and defend the title of the purchaser.
>
> b. As may be permitted by law, after deducting all costs, fees, and expenses of Trustee and of this Trust, including costs of evidence of title in connection with the sale, Trustee shall apply the proceeds of sale to payment of (i) all sums expended or advanced under the terms of the Loan Instruments [including the noncompetition agreement and promissory note] which remain unpaid, with accrued interest, (ii) all other sums then secured by this Deed of Trust, and (iii) the remainder, if any, to the person or persons legally entitled to the balance.

Following execution of the deed of trust, the following events took place. As of July 17, 2003, Bridgeport Tractor had refused to make payments on the obligations secured by the deed of trust in the amount of $632,225. These obligations represented deferred payments for the purchase of Gary's Implement by Bridgeport Tractor. The original judgment in favor of Gary's Implement's breach of contract action was entered on July 22 in the amount of $632,225 plus interest. On July 31, a notice of default was filed by the trustee named in the deed, citing Bridgeport Tractor's failure to make payments on the secured obligations. On August 1, Dyke transferred the above-referenced property to Bridgeport Tractor. Immediately thereafter, on August 7, Bridgeport Tractor filed a chapter 11 bankruptcy petition in South Dakota. On April 2, 2004, the case was dismissed on the determination that the petition was filed in bad faith.

Gary's Implement sent a notice of trustee's sale to Dyke on April 15, 2004. The sale was held on May 18, wherein Dyke paid $476,000 to purchase the property via trustee's deed. On June 8, Gary's Implement's attorney sent a letter to Bridgeport Tractor's attorney indicating that the $476,000 paid at the trustee's sale would be applied to the original judgment minus the costs and fees of the transaction. Bridgeport Tractor's attorney responded on June 14, acknowledging the letter and stating there was no objection to the deduction of the fees. The record

reflects that Dyke retains ownership of the property and that Gary's Implement retains the sums paid at the trustee's sale.

Bridgeport Tractor asserts that the sums collected by Gary's Implement at the trustee's sale must be returned to Bridgeport Tractor because "they represent payments on debt the jury below concluded Gary's [Implement] cannot collect due to its own contractual breaches."[45] Gary's Implement argues that restitution is improper because the sums were paid on property sold under the power of sale granted by the deed of trust independent of the subsequently reversed money judgment. The issue presented for our review is limited to whether the district court abused its discretion in overruling Bridgeport Tractor's motion for restitution.

Bridgeport Tractor correctly states that we have recognized that restitution of real estate sold in execution of a judgment is proper after the judgment is set aside.[46] Bridgeport Tractor argues that the trustee's sale in the instant case is analogous to the execution sale in *Coon v. O'Brien*.[47] We disagree. The property sold in *Coon* was sold for the express purpose of executing a judgment. The present case is distinguishable. Here, it is unclear whether the trustee's sale was commenced for the purpose of executing a judgment or for other legally sound reasons.

Where money has been paid or property has been transferred under a judgment subsequently reversed, a court issuing such judgment has power to remedy the consequences of its error and to order restitution.[48] This power is inherent, and should be exercised to remedy a party's wrongful gains on the erroneous judgment.[49] When the district court has jurisdiction over the

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[45] Brief for appellee at 42.

[46] See *Coon v. O'Brien*, 107 Neb. 427, 186 N.W. 340 (1922).

[47] *Id.*

[48] Restatement, *supra* note 36, comment *b*.

[49] See *Hier v. Anheuser-Busch Brewing Ass'n, supra* note 33. See, also, *Rogers v. Bill & Vince's, Inc.*, 219 Cal. App. 2d 322, 33 Cal. Rptr. 129 (1963); *DeMayo v. Lyons*, 360 Mo. 512, 228 S.W.2d 691 (1950); *Turner v. Ewald etc.*, 295 Ky. 764, 174 S.W.2d 431 (1943); *Smith v. Phillips*, 175 La. 198, 143 So. 47 (1932).

parties and the amount of overpayment is readily determinable or conceded, we see no reason why the court should not enter judgment.[50] However, the context of Bridgeport Tractor's motion for restitution did not place the district court, nor does it place this court, in a position where a right to restitution can be readily ascertained. Under the circumstances of the case, a court will not order a return of the money in controversy when it is not a proper case in which to summarily order a return of the money before the rights of the parties have been adjudicated in an action at law.[51]

The respective rights of the parties pursuant to the deed of trust likely govern the issue of who is entitled to retain the sums paid at the trustee's sale. Because the deed of trust was not interpreted below, it cannot be appropriately considered on appeal. Specifically, it has yet to be determined whether Gary's Implement's power of sale under the deed of trust was affected by the reversal of the original judgment. It has also yet to be determined whether Dyke was indeed acting on behalf of Bridgeport Tractor in executing the deed of trust or in purchasing the real estate subject thereto at the trustee's sale. We also do not address whether Dyke is a party necessary to afford relief on this claim. Further, we do not address whether our reversal of the original judgment on the obligations secured by the deed of trust defeated any or all other grounds for default which afforded Gary's Implement the power of sale. To order the relief sought by Bridgeport Tractor—a money judgment in the amount of the sums paid at the trustee's sale—the respective rights of the parties under the deed of trust must first be determined. The foregoing issues need not be determined for the purposes of our review. Such determinations are clearly not contemplated by the general rule of restitution on sums paid pursuant to judgments subsequently reversed. Accordingly, we determine that restitution was properly denied below.

We make no determination as to whether Gary's Implement was unjustly enriched by the sums paid by Dyke at the trustee's sale. This claim was not pleaded or litigated below; we therefore

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[50] See *Schwennen v. Abell*, 471 N.W.2d 880 (Iowa 1991).

[51] See *Horton v. Hayden, supra* note 33.

cannot address it on appeal. We also do not determine whether Gary's Implement is entitled to retain the sums paid at the trustee's sale pursuant to its rights granted by the deed of trust. Such a finding requires inquiry beyond whether Bridgeport Tractor is owed restitution based on reversal of the original judgment. Because these matters have not been fully litigated, we note that our present determination does not preclude the parties from raising such claims in the case currently pending in district court.

The facts underlying Bridgeport Tractor's cross-appeal indicate that this is not a proper case for restitution on the basis of a judgment subsequently reversed as we have recognized it. Therefore, the district court did not abuse its discretion in overruling Bridgeport Tractor's motion for restitution. For the foregoing reasons, we find Bridgeport Tractor's assignments of error on cross-appeal to be without merit.

VI. CONCLUSION

We find that jury instruction No. 7 does not amount to prejudicial error and that Wenande's expert testimony was properly admitted at trial. We also find that the district court did not err in denying Bridgeport Tractor's motion for restitution. Therefore, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONALD L. SIDZYIK, APPELLANT.
795 N.W.2d 281

Filed April 1, 2011. No. S-10-278.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
3. **Appeal and Error: Words and Phrases.** 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.

4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to 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.
6. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order.
7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
8. **Trial: Effectiveness of Counsel: Appeal and Error.** Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial.
9. **Plea Bargains.** When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.
10. **Effectiveness of Counsel: Proof.** To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
11. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
12. **Trial: Attorneys at Law: Appeal and Error.** An appellate court affords trial counsel due deference to formulate trial strategy and tactics.
13. **Sentences: Appeal and Error.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
14. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
15. ____. 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.
16. ____. In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or

her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge. Judgment of Court of Appeals affirmed.

Chad M. Brown and Jeremy C. Jorgenson for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

This case is before us on a petition for further review in which appellant, Donald L. Sidzyik, claims that the Nebraska Court of Appeals erred with respect to three sentencing issues. Sidzyik was convicted in Douglas County District Court of second degree sexual assault based on a plea agreement. At the sentencing hearing, the State failed to remain silent as had been promised in the plea agreement and instead commented that its position was stated in the presentence investigation (PSI), which recommended a substantial period of incarceration. Sidzyik was sentenced to 18 to 20 years' incarceration, with credit for 33 days served.

On direct appeal to the Court of Appeals, Sidzyik claimed that he received ineffective assistance of trial counsel based on his counsel's failure to object when the State did not stand silent at sentencing, that the district court committed plain error when it proceeded with sentencing after the breach of the plea agreement, and that the sentence imposed was excessive. The Court of Appeals summarily affirmed Sidzyik's conviction and sentence.

Sidzyik petitioned for further review. We granted the petition. We determine that the record is insufficient to determine the ineffective assistance of counsel claim, that there was no

plain error, and that the sentence imposed was not an abuse of discretion. Accordingly, we affirm.

STATEMENT OF FACTS

Sidzyik was originally charged with first degree sexual assault on a child, his biological daughter. The sexual assault covered by the amended information is alleged to have occurred between January 1, 2005, and December 31, 2006, while the victim was between the ages of 12 and 14. In a plea agreement, the State had agreed to amend the charge to second degree sexual assault. At the plea hearing, the prosecutor acknowledged that as part of the plea agreement, he would stand silent at sentencing. Sidzyik pled no contest.

At the sentencing hearing, a different prosecutor stated:

> I am covering the case for [the prosecutor who had previously appeared in the case,] who is on military leave right now. With regard to the matter, he wanted the Court to know the State's position is stated in the PSI and we would submit on the PSI. I had the opportunity to speak with the victim and the victim's family. They will rest on the documentation they've provided to the Court at this point . . . .

Sidzyik's counsel did not object to this statement. Sidzyik was sentenced to 18 to 20 years' imprisonment for the conviction of second degree sexual assault, which is a Class III felony.

The PSI was lengthy and, in summary, stated: "Based upon the seriousness of the original charge, this officer believes [Sidzyik] is not an appropriate candidate for probation. This officer would . . . recommend the Court sentence [Sidzyik] to a substantial period of incarceration under the statutory penalties for the conviction of Sexual Assault 2nd Degree-III Felony."

On direct appeal to the Court of Appeals, Sidzyik was represented by new counsel and claimed that (1) trial counsel was ineffective when he failed to object to the State's breach of the plea agreement, (2) the sentencing court committed plain error when it sentenced him after the alleged breach of the plea agreement, and (3) the sentence imposed was excessive. The State moved for summary affirmance pursuant to Neb. Ct. R. App. P. § 2-107(B)(2) (rev. 2008). The Court of

Appeals sustained the motion and summarily affirmed without opinion.

Sidzyik petitioned for further review. We granted the petition.

ASSIGNMENTS OF ERROR

On further review, Sidzyik claims that the Court of Appeals erred when it summarily affirmed his conviction and sentence, because trial counsel was ineffective when he failed to object at the sentencing to the State's breach of the plea agreement, the district court committed plain error when it proceeded to sentencing Sidzyik after the State breached the plea agreement, and the sentence imposed was excessive.

STANDARDS OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[2] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.*

[3] 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. *Id.*

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

ANALYSIS

Ineffective Assistance of Counsel: Failure to Object to Breach of Plea Agreement.

The first issue for our determination on further review is whether the Court of Appeals erred when it rejected Sidzyik's claim of ineffective assistance of trial counsel and summarily affirmed Sidzyik's conviction and sentence. At the Court of

Appeals and again before this court, Sidzyik claims he received ineffective assistance of trial counsel at his sentencing hearing when his counsel failed to object when, in contravention of the State's plea agreement to stand silent at sentencing, a prosecutor stated that the State's position was contained in the PSI, which included victim impact statements. The PSI recommended a substantial period of incarceration.

Sidzyik indicates that if he is successful in establishing trial counsel's ineffectiveness, he would be entitled to withdraw his plea or to specific performance in the form of a resentencing before a different judge, at which sentencing the State would stand silent. The State notes that Sidzyik received a considerable advantage from the plea agreement when the charge was reduced from first degree to second degree sexual assault, thereby reducing the range of penalties from a maximum of 50 years' incarceration to a maximum of 20 years' incarceration. See Neb. Rev. Stat. §§ 28-319, 28-320(2), and 28-105 (Reissue 2008). The State also suggests that Sidzyik suffered no prejudice when his counsel did not object and that relief would be pointless because "there is little hope of a lesser sentence" before a different judge. The State acknowledges that the record does not show trial counsel's reasoning for not objecting. We conclude that the record on appeal is not sufficient to decide Sidzyik's claim of ineffective assistance of counsel and that therefore, the Court of Appeals did not err when it rejected this assignment of error.

[5,6] In order to establish a right to 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. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.*

[7] Sidzyik had different counsel on appeal, and in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance

of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

[8] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*. We have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was "'so egregious and resulted in such a high level of prejudice [that] no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial.'" *Id*. at 607-08, 780 N.W.2d at 34 (quoting *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007)).

[9] In *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the U.S. Supreme Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The failure of the State to remain silent in violation of a plea agreement is a material breach.

We have previously considered *Santobello* and written about violations of plea agreements and the redress afforded defendants for such violations in *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), and *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In *Birge*, the State failed to remain silent at sentencing as promised in connection with a plea agreement. The defendant's attorney objected to the State's violation of the plea agreement, but did not move to withdraw the plea. We explained on direct appeal in *Birge* that where the State breaches a plea agreement and defense counsel objects to the breach, the defendant can seek to withdraw the plea at the sentencing hearing or seek specific performance of the plea agreement by way of a sentencing before a different judge. With respect to the available outcomes on appeal, we concluded

that where the breach has been preserved by an objection, the defendant is entitled on appeal to specific performance of the agreement, which would take the form of resentencing, before a different judge, wherein the State remains silent. However, if counsel did not move to withdraw the plea at the time of the objection, this form of recovery is waived on direct appeal based on alleged violation of a plea agreement. *Id.*

In *Gonzalez-Faguaga*, we addressed a breach of a plea agreement where no objection had been made at sentencing, raised in a motion for postconviction relief in the form of a claim of ineffective assistance of counsel. Accordingly, this court examined the issue using the two prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance by the defendant's counsel and prejudice.

Contrary to the State's suggestion in its brief in the instant case, in addressing the prejudice prong of the ineffective assistance of counsel claim in *Gonzalez-Faguaga*, we observed that the focus should not be on whether the judge would have imposed a different sentence had the State remained silent. This observation is derived from *Santobello*, and we relied in part on *State v. Carrillo*, 597 N.W.2d 497 (Iowa 1999).

In *Gonzalez-Faguaga*, we reasoned that instead of focusing on whether the sentence would have been different, the focus regarding prejudice should be on whether counsel's alleged deficient performance prevented the defendant from protecting the bargain he had struck with the State in exchange for his plea and thus rendered the proceedings "'fundamentally unfair.'" 266 Neb. at 79, 662 N.W.2d at 589. We observed that a proper objection by counsel would have led to a different outcome at the trial level in the sense that the defendant would have had the opportunity at trial to either withdraw his plea or seek a resentencing in a proceeding not tainted by the State's recommendation. *State v. Gonzalez-Faguaga, supra.* See, similarly, *State v. Carrillo, supra*.

[10-12] In addressing the deficient performance prong of the ineffective assistance of counsel claim in *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), we noted that to demonstrate that his or her counsel's performance was

deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). We also noted that in determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Gonzalez-Faguaga, supra*. We afford trial counsel due deference to formulate trial strategy and tactics. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). In *Gonzalez-Faguaga*, we observed that it is difficult to imagine what possible advantage a defendant could gain by his or her counsel's choosing not to object when the State, contrary to the plea agreement, failed to remain silent at the sentencing. Nevertheless, we concluded that given the possibility that not objecting was a deliberate trial strategy, an evidentiary hearing was needed to establish alleged deficient performance by the defendant's counsel.

Unlike the instant case, neither *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), nor *Gonzalez-Faguaga, supra*, was a direct appeal asserting ineffective counsel where defense counsel did not object at sentencing when the State violated its agreement to stand silent. This is our first opportunity to address a failure to object to a breach on direct appeal, and we take guidance from *Birge* and *Gonzalez-Faguaga* in resolving the current appeal.

In this case, the parties agree that as part of the plea agreement, the State agreed to stand silent at sentencing. However, it is clear from the record that rather than remain silent, the prosecutor at sentencing stated, "[T]he State's position is stated in the PSI and we would submit on the PSI" and made other comments referring the court to the PSI for elaboration. The PSI is lengthy and in no uncertain terms recommended that Sidzyik receive a substantial period of incarceration. The prosecutor's statements therefore articulated a position, and the State thus failed to stand silent at sentencing. Accordingly, there was a material breach of the plea agreement. For completeness, we note that we are cognizant that the prosecutor at sentencing was different from the prosecutor at the plea hearing. This change in staffing does not excuse the breach. In *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427

(1971), the Court found such circumstances to be of no consequence because "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done."

The record shows that the State breached its plea agreement with Sidzyik and that Sidzyik's counsel did not object to this breach. In *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), we left open the possibility, albeit rare, that trial counsel could choose not to object to the State's breach to retain or gain an advantage. We stated: "If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach." *Id*. at 77, 662 N.W.2d at 588.

It is not clear from the record in the instant case whether Sidzyik's counsel did not object to the breach of the plea agreement based on trial strategy. Accordingly, the record is not sufficient to adequately review the question of ineffectiveness of trial counsel raised in this appeal. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). We cannot say that the Court of Appeals erred when it did not find counsel was ineffective.

Plain Error.

Sidzyik claims that the district court committed plain error when it proceeded with sentencing after the State failed to stand silent in contravention of the plea agreement. The Court of Appeals did not err when it rejected this assignment of error.

Plain error will be noted only when 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. *State v. Young, supra*; *State v. Drahota*, 17 Neb. App. 678, 772 N.W.2d 96 (2009), *reversed on other grounds* 280 Neb. 627, 788 N.W.2d 796 (2010). We have concluded above that the record on appeal is not sufficient to decide Sidzyik's ineffective assistance of counsel claim relative to the sentencing hearing. It is not clear

that the record shows that the error of which Sidzyik complains resulted in a "'fundamentally unfair trial.'" See *State v. Young*, 279 Neb. at 608, 780 N.W.2d at 34. It logically follows that plain error is not evidenced from the record.

In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the Court observed that the case with which it was confronted resulted from the failure of the prosecutor to adhere to the promises made in the negotiation of the plea. With regard to imposition of a sentence despite the prosecutor's failure to remain silent, the Court said: "[T]he fault here rests on the prosecutor, not on the sentencing judge." *Id.*, 404 U.S. at 263. Similarly, there was no plain error committed by the district court in the instant case, and the Court of Appeals did not err when it rejected this assignment of error.

Excessive Sentence.

[13] Sidzyik claims that the district court abused its discretion by imposing an excessive sentence. The Court of Appeals did not err when it rejected this assignment of error. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Sidzyik's sentence is within the statutory limits. Second degree sexual assault is a Class III felony. § 28-320(2). A Class III felony is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both and a minimum of 1 year's imprisonment. § 28-105(1). Sidzyik was sentenced to a period of 18 to 20 years' incarceration with credit for 33 days previously served.

[14-16] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances

surrounding the defendant's life. *Id*. In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

The details of Sidzyik's profile and the crime are amply set forth in the PSI. To summarize, Sidzyik's date of birth is January 14, 1970. The victim was born in 1993. The amended information alleged first degree sexual assault between January 2005 and December 2006. Sidzyik pled no contest to second degree sexual assault.

According to the PSI, Sidzyik has used a variety of controlled substances since his teenage years. He indicated he used methamphetamine while out on bond, 2 days prior to his evaluation for sentencing purposes. He was assessed as a moderate to high risk for sexual reoffending and a poor candidate for community-based treatment. He has been the subject of protective orders and has an extensive history of alcohol-related offenses. He claims he does not have any recollection of the offenses. He suggests he may have been on drugs if the offenses occurred.

Numerous statements from family members are included in the PSI. The victim indicated that she was sexually assaulted over a period of years. The victim reports mental health issues for which she is being treated. Essays written by the victim reflect her ongoing efforts to cope with these issues.

At the sentencing hearing, the sentencing judge commented upon and considered the facts and circumstances of Sidzyik's life and the crime of which he was convicted. The sentencing judge remarked: "Frankly, you know, father figure, I mean, this whole thing offends me. It offends me because you've accepted no responsibility, you've done nothing about treatment, and clearly, even while this matter is — you're out on bond, you continue to go use meth."

The sentencing judge considered the factors, including Sidzyik's age, mentality, education, and family; the nature of the offenses; his criminal history; and statements from the

victim. The district court did not abuse its discretion in the sentence imposed. The Court of Appeals did not err when it rejected this assignment of error.

CONCLUSION

In this case on further review, raising various sentencing issues, we conclude that the record is insufficient to rule on Sidzyik's claim of ineffective assistance of counsel. The record shows that the sentencing court did not commit plain error when it proceeded to sentence Sidzyik after the State failed to remain silent at the sentencing hearing, in breach of the plea agreement, and that the sentence imposed was not an abuse of discretion. The Court of Appeals did not err when it affirmed Sidzyik's conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
SAMANTHA A. SHAMBLEY, APPELLANT.
795 N.W.2d 884

Filed April 8, 2011. No. S-10-556.

1. **Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.
2. ____. Applying the Due Process Clause to the facts of any given case is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.
3. ____. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.
4. **Constitutional Law: Probation and Parole.** The conditional liberty of a parolee or probationer includes many of the core values of unqualified liberty and is, therefore, an interest within the contemplation of the liberty or property language of the 14th Amendment.
5. **Probation and Parole: Due Process.** At a hearing to determine revocation of parole or probation, the following minimum due process protections apply: (1) written notice of the time and place of the hearing; (2) disclosure of evidence;

(3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise specifically finds good cause for not allowing confrontation; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty.

6. **Probation and Parole: Due Process: Evidence.** A parole or probation revocation hearing is not a criminal prosecution, and the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.
7. **Courts: Probation and Parole: Due Process.** Drug court program participants are entitled to the same due process protections as persons facing termination of parole or probation.
8. **Courts: Probation and Parole: Evidence: Witnesses.** Despite the flexible standard for drug court program termination and parole or probation revocation hearings which allows the consideration of hearsay evidence inadmissible under the rules of evidence, absent a showing of good cause, the drug court participant, parolee, or probationer has the right to confront adverse witnesses with personal knowledge of the evidence upon which the termination or revocation is based.
9. **Courts: Proof.** In drug court termination proceedings, the State bears the burden of proving, by a preponderance of the evidence, the alleged grounds for termination.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Vacated in part, and in part reversed and remanded with directions.

Melissa A. Wentling, Madison County Public Defender, and Christopher Bellmore for appellant.

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

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

MCCORMACK, J.

NATURE OF CASE

This case presents an appeal from a participant's discharge from the drug court program.[1] The participant argues she was

[1] See, Neb. Rev. Stat. §§ 24-1301 and 24-1302 (Reissue 2008); Neb. Ct. R. §§ 6-1201 to 6-1209.

denied her rights to due process and confrontation when no adverse witnesses were available for cross-examination and the only evidence considered in support of the alleged violations of her drug court contract was a letter, written to the judge by the drug court coordinator, and its attachments. This is the first time we consider what process is due in drug court termination proceedings.

BACKGROUND

On December 23, 2008, Samantha A. Shambley pled guilty to possession of a controlled substance, a Class IV felony, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 2008). The district court accepted the plea and adjudged her guilty of the offense. In lieu of sentencing at that time, the court transferred the case to the drug court program.

The drug court program is a postplea or postadjudicatory intensive supervision drug and alcohol treatment program for eligible offenders.[2] The purpose of the program is to reduce offender recidivism by fostering a comprehensive and coordinated court response composed of early intervention, appropriate treatment, intensive supervision, and consistent judicial oversight.[3] A drug court program participant pleads guilty and agrees to the terms and conditions of the program in exchange for the possibility of avoiding sentencing and, oftentimes, being allowed to withdraw the plea upon successful completion of the program. If the participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the district court for sentencing. Throughout this opinion, we have, for convenience, used the term "drug court." In this case, when the term is used, it refers to the district court. There is not a separate drug court under the Nebraska Constitution, and when the term "drug court" is used, it simply refers to a program of the district court, county court, or juvenile court, rather than to a separate court.[4]

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[2] § 6-1206.

[3] *Id.*

[4] See § 24-1302.

The parties agree that Shambley signed a drug court contract which, among other things, required that she stay drug free. On August 28, 2009, Shambley appeared before a judge of the drug court after reports that she had used marijuana. Shambley admitted that she had used. Shambley promised to try harder to comply with the terms and conditions of the program. She was not represented by counsel, and no evidence was adduced or specific findings made. In a written order, the judge revoked Shambley's bond for 72 hours, during which time she was ordered incarcerated "for violations of [her] Drug Court program."

Similar proceedings occurred on November 13 and December 4, 2009. At the November 13 proceeding, the judge told Shambley that she could not smoke marijuana and referred to the fact that she had missed drug tests. Shambley neither specifically admitted nor denied having done so. Shambley again told the judge that she wanted to stay in the program. The judge revoked her bond for 72 hours and sent Shambley to jail "for violations of [her] Drug Court program." Shambley was told that thereafter, she was to report to the drug court weekly. These meetings are not in the record.

During her appearance on December 4, 2009, Shambley admitted to having had another "setback." She was sent to spend the weekend in jail "for violations of [her] Drug Court program." She was ordered to report back on December 18, but there is no record of any meeting on that date.

On February 5, 2010, Shambley appeared to discuss yet another report of drug usage, which she neither admitted nor denied. The judge warned Shambley that she was at risk for termination from the drug court program.

On March 12, 2010, the judge again told Shambley that she had tested positive for drugs. Shambley, however, denied that she had used on the occasion in question. The judge informed Shambley that this time, the drug court team had recommended that she be terminated from the program. The judge scheduled an informal hearing to determine the issue of the recommended termination.

The hearing on termination was held on March 25, 2010. For the first time, Shambley appeared with counsel. The court

explained that it was Shambley's burden to go forward with showing why she should not be terminated from the program, stating:

> We have a termination hearing from the drug court. And this is a non — I guess the term is informal hearing to address that under our policy. And under the policy I believe that [Shambley] has the responsibility of going forward with that. Any evidence to remain as the recommendation of the drug court team has been to terminate her from the drug court, and I've received a report. Have you folks seen that . . . ?

The State did not argue any position as to the termination and did not present any evidence or call witnesses. The judge noted that he had received the letter from the drug court coordinator recommending Shambley's termination. The letter and its attachments were the only evidence in support of termination.

In the letter, the drug court coordinator alleged three instances of drug usage for the court to consider at the termination hearing: (1) February 5, 2010, (2) March 11, 2010, and (3) March 19, 2010. The coordinator made a brief synopsis of Shambley's recent difficulties in following the drug court contract and included five attachments as proof of those difficulties.

The first attachment was a discharge summary report from the rehabilitation center where Shambley stayed from December 2009 to January 2010. The report summarized that Shambley had relapsed three times while at a previous center and that that was the reason for her transfer. The report stated that Shambley made good progress at the center. She was discharged, with a favorable prognosis, to a halfway house.

According to the drug court coordinator's letter, the placement at the halfway house was unsuccessful. The second attachment was a letter written by a therapist of a therapeutic community where Shambley was admitted on February 9, 2010, apparently after her discharge from the halfway house. The therapist stated that Shambley was admitted "due to her continued substance use." The therapist also stated that while at the community, Shambley violated the conditions of a pass when she skipped an appointment to go shopping and she tested positive for marijuana on March 8, 2010.

The third and fourth attachments were printouts from a toxicology laboratory. Under the "result" column, one printout showed "25.5 mg/dL" of creatinine from a sample collected from Shambley on February 24, 2010. The other printout showed "209.6 mg/dL" of creatinine and an indication in the "positives" column adjacent to a result of "404 ng/mL" of "THC" from a sample collected on March 8.

The final attachment, a printout of an e-mail from an unidentified author to an unidentified recipient, discussed the fact that a February 24, 2010, drug test of Shambley was negative with a weak concentration, but should nevertheless be considered a positive result.

Shambley's counsel objected to the court's consideration of the letter and its attachments on the grounds of hearsay and lack of foundation. Counsel also argued that the manner in which the report was received and in which the proceedings were being conducted violated Shambley's rights to due process and confrontation. Counsel argued that he was neither able to adequately question the veracity of the unsworn hearsay allegations contained in the letter and its attachments nor able to effectively examine the meaning and reliability of the unauthenticated laboratory printouts.

The court overruled all objections. Shambley testified at the hearing that she did not use illegal drugs on March 11, 2010. She was not asked and did not discuss whether she had used drugs on the other two occasions alleged by the drug court coordinator as grounds for termination from the program.

The judge concluded that he agreed with the letter and its attachments outlining Shambley's "difficulties." Apparently in reference to prior meetings with Shambley and ex parte meetings with the drug court team, the judge said he was "certainly . . . familiar with" these difficulties. He also observed that the letter now "indicate[d] a positive test, which [he had] no reason to dispute."

Based on this evidence, the judge agreed with the drug court team's recommendation to discharge Shambley from the program. The judge found that keeping Shambley in the drug court would not be in her best interests and would erode the integrity of the drug court program. In light of Shambley's discharge

from the drug court program, the court scheduled a hearing in the district court to determine Shambley's sentence on the possession of a controlled substance conviction.

At the sentencing hearing, the same judge, now acting as a judge of the district court, sentenced Shambley to 90 days' incarceration with credit for 9 days served while awaiting sentence. Shambley appeals her termination from the drug court program.

ASSIGNMENTS OF ERROR

Shambley assigns that the lower court erred in (1) terminating Shambley from the drug court program without affording her due process of law, in violation of the 14th Amendment to the U.S. Constitution and corresponding sections of Nebraska law; (2) placing the burden of proof on Shambley to go forward and show why she should not be terminated from the drug court program, thereby violating her rights to due process as guaranteed to her under the 14th Amendment to the U.S. Constitution and corresponding sections of Nebraska law; (3) receiving into evidence the probation report over Shambley's objections, thereby denying her the right to confront and cross-examine witnesses against her; and (4) finding sufficient evidence to terminate Shambley from the drug court program, insofar as the inadmissible report was the only evidence against her.

STANDARD OF REVIEW

[1] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.[5]

ANALYSIS

[2,3] In considering claims under the Due Process Clause of the 14th Amendment, we first consider whether the nature of the interest is one within the contemplation of the liberty or

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[5] *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999).

property language of the 14th Amendment.[6] If it is, we must then determine what procedural protections the particular situation demands, for "not all situations calling for procedural safeguards call for the same kind of procedure."[7] Applying the Due Process Clause to the facts of any given case is an "uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."[8] Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[9]

Conditional Liberty Interest

The U.S. Supreme Court has not had occasion to address due process in the context of termination from problem-solving diversion programs such as the drug court program. The Court has, however, examined what procedures due process requires in the revocation of parole or probation.[10] In *Morrissey v. Brewer*[11] and *Gagnon v. Scarpelli*,[12] the Court explained that revocations of parole or probation deprive an individual of the

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[6] See, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[7] *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[8] *Lassiter v. Department of Social Services, supra* note 6, 452 U.S. at 24-25.

[9] *Id.*; *Cafeteria Workers v. McElroy*, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

[10] *Black v. Romano*, 471 U.S. 606, 105 S. Ct. 2254, 85 L. Ed. 2d 636 (1985); *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

[11] *Morrissey v. Brewer, supra* note 7.

[12] *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

"conditional liberty properly dependent on observance of special . . . restrictions."[13]

[4] The Court said that such liberty, although indeterminate and perhaps a "'privilege,'" includes many of the core values of unqualified liberty and is, therefore, an interest within the contemplation of the liberty or property language of the 14th Amendment.[14] It is a condition very different from confinement in a prison; the parolee or probationer is still able to do "a wide range of things."[15] For instance, subject to conditions, the parolee or probationer may be "gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life."[16] Termination of this conditional liberty inflicts a "'grievous loss'"[17] and "calls for some orderly process."[18]

To determine exactly what process is due, the Court balanced the individual's interest in his or her conditional liberty with the interests of the State. Because the termination of parole or probation does not deprive an individual of the absolute liberty to which every citizen is entitled, that having already been taken away upon conviction, the Court held that the process a parolee or probationer is due does not include "the full panoply of rights due a defendant in [a criminal prosecution]."[19] The Court described that the State has "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole."[20] A full-blown adversary process, moreover, may be "less attuned to the rehabilitative needs of the individual probationer or parolee."[21]

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[13] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 480.

[14] See *id.*, 408 U.S. at 482.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*, 408 U.S. at 480.

[20] *Id.*, 408 U.S. at 483.

[21] *Gagnon v. Scarpelli, supra* note 12, 411 U.S. at 787-88.

On the other hand, the Court concluded that there is no necessity for summary treatment of the parolee or probationer and that revocation is not such a discretionary matter that some form of hearing would be "administratively intolerable."[22] Furthermore, "[s]ociety has a stake in whatever may be the chance of restoring [the parolee or probationer] to normal and useful life within the law."[23] To this extent, the State shares the parolee's or probationer's "interest in not having parole [or probation] revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole [or probation], given the breach of . . . conditions."[24]

Having considered the weight of the relative interests at stake, the Court concluded that before a parolee or probationer is deprived of his or her conditional liberty, there must be "an informal hearing structured to assure that the finding of a . . . violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge" of the parolee's or probationer's behavior.[25] At such a hearing, the parolee or probationer is entitled to an opportunity to show that he or she did not violate the conditions and, where discretion exists, that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.[26]

[5] More specifically, the Court held that due process requires, at a minimum, both a preliminary hearing at or near the time of arrest, to determine whether there is probable cause or reasonable ground to believe that the parolee or probationer has committed acts that would constitute a violation of his or her conditions, and another opportunity for a hearing before the final finding of a violation and decision of revocation.[27] In both hearings, the following minimum due process

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[22] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 483.

[23] *Id.*, 408 U.S. at 484.

[24] *Id.*

[25] *Id.*

[26] See *Black v. Romano, supra* note 10.

[27] *Morrissey v. Brewer, supra* note 7.

protections apply: (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed[28] or unless the officer otherwise "'specifically finds good cause for not allowing confrontation'"[29]; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty.[30] In addition, the parolee or probationer has a right to the assistance of counsel in some circumstances where the parolee's or probationer's version of a disputed issue can fairly be represented only by a trained advocate.[31]

[6] Beyond this, the Court described the required procedure as "flexible" and subject to further refinement by the states.[32] The Court reiterated that a parole or probation revocation hearing is not "a criminal prosecution" and that the process should be "flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[33] In *Morrissey*, the Court also noted that if it turned out that the parolee had admitted parole violations to the parole board, and if those violations were found to be reasonable grounds for revoking parole under

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[28] *Id.*

[29] *Gagnon v. Scarpelli, supra* note 12, 411 U.S. at 786.

[30] *Id.* See, also, *Black v. Romano, supra* note 10; *United States v. Smith*, 767 F.2d 521 (8th Cir. 1985); *United States v. Rilliet*, 595 F.2d 1138 (9th Cir. 1979); *State v. Moreno*, 21 Ariz. App. 462, 520 P.2d 1139 (1974); *State v. Fortier*, 20 Or. App. 613, 533 P.2d 187 (1975); *State v. Myers*, 86 Wash. 2d 419, 545 P.2d 538 (1976).

[31] See *Gagnon v. Scarpelli, supra* note 12.

[32] *Morrissey v. Brewer, supra* note 7, 408 U.S. at 489.

[33] *Id.*

state standards, then that "would end the matter."[34] In *Young v. Harper*,[35] the U.S. Supreme Court held that preparole, early release programs were sufficiently similar to parole and probation to require the same due process protections.

Application of *Morrissey* and *Gagnon* to Drug Courts

Shambley argues that a participant in the drug court program has a conditional liberty interest in continuing in the program similar to the conditional liberty interests of participants in preparole, early release programs; parolees; and probationers. She asserts that she should thus be afforded the same due process protections and that those protections were not afforded in this case.

We have never directly addressed this question. In *In re Interest of Tyler T.*,[36] we were asked to consider whether the State complied with due process in revoking the probation of a juvenile adjudicated delinquent and sent to a drug treatment court program as a condition of his probation. The revocation was based on an alleged positive drug test. We vacated the detention order because of the absence of either a verbatim record of the hearing or a written order. We held that due process requires a written record when a judge of a problem-solving court conducts a hearing and enters an order affecting the terms of the juvenile's probation. "[W]here a liberty interest is implicated in problem-solving-court proceedings, an individual's due process rights must be respected."[37]

[7] The majority of other courts considering the issue have determined that participants facing termination from post-plea diversion programs, such as the drug court program, are entitled to the same due process protections as persons

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[34] *Id.*, 408 U.S. at 490.

[35] *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148, 137 L. Ed. 2d 270 (1997).

[36] *In re Interest of Tyler T.*, 279 Neb. 806, 781 N.W.2d 922 (2010).

[37] *Id.* at 811, 781 N.W.2d at 925.

facing termination of parole or probation.[38] We agree. While restrictions upon the liberty of drug court participants may depend on their individual program plans, participants are not imprisoned, and, like parolees or probationers, they may still do a wide range of things.[39] Participants are generally allowed to live at home and maintain gainful employment. They are allowed to be with family and friends and form the other enduring attachments of normal life, so long as these relationships are not a detriment to their rehabilitation.[40] The termination of the conditional liberty granted drug court participants inflicts a "'grievous loss'"[41] similar to the loss of parole or probation.

The State's interests, as in parole or probation, include an interest in being able to terminate participation in the program without the burden of a full adversary criminal trial.[42] But perhaps even more so than in parole or probation, the State has little necessity for summary treatment.[43] Drug court participants must generally plead guilty in order to qualify for the program, and the State thereby avoids the burden of a full adversary trial in the first instance. Furthermore, in order to qualify for the program, the crime cannot be a crime of violence and the offender must not have a significant criminal history of crimes of violence. Thus, the risk inherent to any delay caused by conducting a termination hearing is minimal.

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[38] *State v. Rogers*, 144 Idaho 738, 170 P.3d 881 (2007); *Gosha v. State*, 931 N.E.2d 432 (Ind. App. 2010); *Hagar v. State*, 990 P.2d 894 (Okla. Crim. App. 1999); *State v. Varnell*, 137 Wash. App. 925, 155 P.3d 971 (2007). See, also, *Torres v. Berbary*, 340 F.3d 63 (2d Cir. 2003); *People v. Bishop*, 7 P.3d 184 (Colo. App. 1999); *People v. Anderson*, 358 Ill. App. 3d 1108, 833 N.E.2d 390, 295 Ill. Dec. 557 (2005); *State v. Devatt*, 173 N.J. Super. 188, 413 A.2d 973 (1980); *Harris v. Com.*, 279 Va. 541, 689 S.E.2d 713 (2010); *State v. Cassill-Skilton*, 122 Wash. App. 652, 94 P.3d 407 (2004).

[39] *Morrissey v. Brewer, supra* note 7.

[40] *Id.*

[41] *Id.*, 408 U.S. at 482.

[42] *Id.*

[43] *Id.*

As with parole and probation, it is in the State's interests that drug court participants are restored to a normal and useful life. This is, after all, the point of the program. Accordingly, the State, like the participant, has an interest in seeing that there is a termination process which ensures participants are not terminated from the program because of erroneous information or because of an erroneous evaluation of the need to terminate.[44]

Considering the relative interests in the drug court program together with those of parole or probation, their balance is essentially the same. Therefore, the minimal due process to which a parolee or probationer is entitled under *Morrissey* and *Gagnon* also applies to participants in the drug court program. Case law decided in Nebraska setting forth minimum due process for parolees and probationers is equally applicable to our drug courts. We expect drug court termination proceedings to be conducted similarly to hearings terminating parole or probation.

Termination Hearing Violated Due Process

Applying these standards, we conclude that Shambley's termination hearing did not comport with the minimal due process to which a drug court participant is entitled. The drug court coordinator's letter and its attachments, considered without establishing foundation or reliability and containing statements made without personal knowledge, were insufficient to sustain the State's burden of proof. In addition, the failure to proffer any witness for Shambley to cross-examine as to the veracity of those statements, and the soundness of the recommendation to terminate, violated Shambley's right to cross-examination as set forth in *Morrissey* and *Gagnon*.[45]

In *State v. Mosley*[46] and *State v. Clark*,[47] our courts addressed the *Morrissey*/*Gagnon* right to cross-examine. In *Mosley*, we

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[44] *Id.*

[45] See, *Gagnon v. Scarpelli, supra* note 12; *Morrissey v. Brewer, supra* note 7.

[46] *State v. Mosley*, 194 Neb. 740, 235 N.W.2d 402 (1975), *overruled on other grounds, State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989).

[47] *State v. Clark, supra* note 5.

reversed an order revoking probation, because the probationer was denied his right to confront and cross-examine the informant regarding his alleged probation violation. The probationer was alleged to have robbed a store. The evidence of the robbery consisted of the testimony of the investigating officer at the hearing, who related the hearsay statements of a store clerk describing the robbers and suggesting that one of them might have left a fingerprint on a freezer door. The State also presented a technician's testimony that a fingerprint in the store matched the probationer's fingerprints. We observed that there was no finding, as required by *Morrissey*, of good cause for denying the probationer his right to confront the store clerk. Therefore, the court could not deny the defendant his right to cross-examination:

> The Morrissey requirement [of the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation] reserves to the defendant the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. In State v. Kartman, [192 Neb. 803, 224 N.W.2d 753 (1975)], this court stated: "Persons who have given adverse information should be available for questioning unless the hearing officer determines that they would be subjected to risk of harm if their identity were disclosed."[48]

The probationer's objection at the hearing claiming hearsay and the right to confrontation was sufficient to preserve these rights.[49]

Subsequently, in *Clark*,[50] the Nebraska Court of Appeals reversed an order revoking probation, when the State failed to present the laboratory technician to establish foundation for the urine screening test upon which the revocation was based. At the hearing, the probation officer testified that he had conducted

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[48] *State v. Mosley, supra* note 46, 194 Neb. at 744, 235 N.W.2d at 404.

[49] *Id.*

[50] *State v. Clark, supra* note 5.

the test on the probationer and sent the specimen to a laboratory for analysis, and the State offered a copy of the laboratory test result showing positive for marijuana. The district court overruled the probationer's objection that there was no evidence as to the specific procedures followed or the specific tests done and no opportunity to cross-examine the person who conducted the test. The Court of Appeals held that by denying the probationer his right to confront the technician who conducted the test, the district court denied the probationer's rights to due process as stated in *Gagnon*. While the court acknowledged that the Nebraska Evidence Rules do not apply to proceedings for revocation of probation,[51] minimum due process, the court explained, includes the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation.

[8] Despite the flexible standard which allows the consideration of hearsay evidence inadmissible under the rules of evidence, absent a showing of good cause, the drug court participant, parolee, or probationer has the right to confront adverse witnesses with personal knowledge of the evidence upon which the termination or revocation is based.[52] Not a single adverse witness was available for Shambley to cross-examine, despite her protests that she was thus unable to adequately challenge the evidence against her. The drug court denied Shambley her right to cross-examination without making any findings that there was good cause to disallow it. In this manner, she was deprived of her right to procedural due process.

[9] In addition, we agree with Shambley that the State failed to sustain its burden of proof when the sole evidence against her was the drug court coordinator's letter and its accompanying attachments, consisting of hearsay and hearsay within hearsay and considered without specific findings of reliability. While the burden of proof is not a point specifically discussed in *Morrissey* or *Gagnon*, it is understood that the State carried

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[51] See Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008).

[52] See, *State v. Mingua*, 42 Ohio App. 2d 35, 327 N.E.2d 791 (1974); *Jones v. Com. Pennsylvania Bd. of Probation and Parole*, 47 Pa. Commw. 438, 408 A.2d 156 (1979); *State v. Styles*, 166 Vt. 615, 693 A.2d 734 (1997).

a greater burden of proof at the final revocation hearing than at the preliminary "probable cause" hearing. Other jurisdictions specifically hold that minimal due process demands that the State bear the burden of showing the grounds for revocation of parole or probation by a preponderance of the evidence.[53] While the Nebraska Legislature, through Neb. Rev. Stat. § 29-2267 (Reissue 2008), has set forth a higher standard of proof in the case of violations of probation, we agree that the minimal standard under the Due Process Clause is a preponderance of the evidence. Having found no significant variance between the respective interests in parole and probation and those involved in postplea diversion, we conclude that the minimal preponderance of the evidence standard should also apply to demonstrating the alleged grounds for terminating a participant from the drug court program. The State and Shambley agree that this is the proper standard.

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[53] *Rich v. State*, 640 P.2d 159 (Alaska App. 1982); *State v. Gerlaugh*, 134 Ariz. 164, 654 P.2d 800 (1982), *modified on other grounds* 135 Ariz. 89, 659 P.2d 642 (1983); *Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990); *People v. Rodriguez*, 51 Cal. 3d 437, 795 P.2d 783, 272 Cal. Rptr. 613 (1990); *State v. Davis*, 229 Conn. 285, 641 A.2d 370 (1994); *Harris v. U.S.*, 612 A.2d 198 (D.C. 1992); *Rita v. State*, 470 So. 2d 80 (Fla. App. 1985); *People v. Wadelton*, 82 Ill. App. 3d 684, 402 N.E.2d 932, 37 Ill. Dec. 930 (1980); *Jaynes v. State*, 437 N.E.2d 137 (Ind. App. 1982); *Calvert v. State*, 310 N.W.2d 185 (Iowa 1981); *State v. Carter*, 5 Kan. App. 2d 201, 614 P.2d 1007 (1980); *Rasdon v. Com.*, 701 S.W.2d 716 (Ky. App. 1986); *State v. La Casce*, 512 A.2d 312 (Me. 1986); *Wink v. State*, 317 Md. 330, 563 A.2d 414 (1989); *Commonwealth v. Holmgren*, 421 Mass. 224, 656 N.E.2d 577 (1995); *People v Ison*, 132 Mich. App. 61, 346 N.W.2d 894 (1984); *Stapleford v. Perrin*, 122 N.H. 1083, 453 A.2d 1304 (1982); *State v. Reyes*, 207 N.J. Super. 126, 504 A.2d 43 (1986) (superseded by statute on other grounds as stated in *State in Interest of S.T.*, 273 N.J. Super. 436, 642 A.2d 422 (1994)); *People v. Hemphill*, 120 A.D.2d 767, 501 N.Y.S.2d 503 (1986); *State v. Saavedra*, 406 N.W.2d 667 (N.D. 1987); *McCaskey v. State*, 781 P.2d 836 (Okla. Crim. App. 1989); *State v. Donovan*, 305 Or. 332, 751 P.2d 1109 (1988); *Com. v. Brown*, 503 Pa. 514, 469 A.2d 1371 (1983); *Lloyd v. State*, 574 S.W.2d 159 (Tex. Crim. App. 1978); *State v. Hodges*, 798 P.2d 270 (Utah App. 1990); *State v. Begins*, 147 Vt. 295, 514 A.2d 719 (1986); *State ex rel. Thompson v. Riveland*, 109 Wis. 2d 580, 326 N.W.2d 768 (1982); *Krow v. State*, 840 P.2d 261 (Wyo. 1992).

The U.S. Supreme Court has said that the required procedure is flexible enough to allow consideration of evidence, including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. Nevertheless, the *sole* reliance on hearsay evidence in parole and probation hearings, especially when no findings of substantial reliability are made, is generally considered a failure of proof.[54] No lesser standard should be applied to drug court termination proceedings. As one court said, "Although evidentiary rules may be relaxed somewhat at a revocation hearing, . . . they cannot be relaxed to the point where a parole violation may be proved entirely by unsubstantiated hearsay testimony."[55]

Few instances can be found, such as the one with which we are now presented, where the only evidence against the participant is letters and printouts with not even a single witness testifying in support of these documents. Needless to say, courts confronted with such a record find the evidence insufficient.[56] The State here, in fact, did not present a case. It did not proffer evidence, call any witnesses, or make any argument as to its position at the discharge hearing. Yet the drug court imposed upon Shambley the burden to show that the statements against her were untrue and that she had not violated the conditions of her liberty.

We disagree with the State's argument that it made a prima facie case and that the drug court was merely shifting the burden to Shambley to rebut it. A prima facie case is made by an amount of evidence sufficient to counterbalance the general presumptions of innocence if not overthrown by evidence

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[54] See, *State v. Portis*, 187 Ariz. 336, 929 P.2d 687 (Ariz. App. 1996); *Collins v. State*, 897 A.2d 159 (Del. 2006); *Glenn v. State*, 558 So. 2d 513 (Fla. App. 1990); *Goodson v. State*, 213 Ga. App. 283, 444 S.E.2d 603 (1994); *State v. Rochelle*, 877 So. 2d 250 (La. App. 2004); *Com. v. Foster*, 77 Mass. App. 444, 932 N.E.2d 287 (2010); *Com. v. Ortiz*, 58 Mass. App. 904, 788 N.E.2d 599 (2003); *State ex rel. Henschel v. H&SS Department*, 91 Wis. 2d 268, 282 N.W.2d 618 (Wis. App. 1979).

[55] *State ex rel. Henschel v. H&SS Department, supra* note 54, 91 Wis. 2d at 271, 282 N.W.2d at 619 (citation omitted).

[56] *Torres v. Berbary, supra* note 38; *Ex parte Belcher*, 556 So. 2d 366 (Ala. 1989); *State v. Mingua, supra* note 52.

contradicting it.[57] There was very little in the way of "evidence" at Shambley's hearing—certainly not enough to make a prima facie case. While we understand that the judge was familiar with Shambley's history, this does not diminish Shambley's right to have a hearing "structured to assure that the finding of a . . . violation will be . . . informed by an accurate knowledge" of her behavior.[58] In this case, the court conducted something more akin to a summary procedure than a hearing commensurate with the interests at stake in depriving a person of conditional liberty.

While we acknowledge, as the State points out, that on some prior occasions before the drug court, Shambley appeared to admit certain acts of drug usage, we note that she was less clear on other occasions. Most importantly, she adamantly denied having used drugs on the occasion for which the drug court team finally recommended her termination. Therefore, Shambley did not waive her due process right to have the State prove by a preponderance of the evidence the alleged drug court contract violations for which her participation was to be terminated, at a hearing conducted in accordance with the principles set forth in *Morrissey* and *Gagnon.* The drug court failed to conduct such a hearing, and we must reverse.

CONCLUSION

We reverse the order of termination and vacate Shambley's sentence, which was imposed after her termination from the program. We remand the cause for a new hearing before the drug court, conducted in accordance with the principles set forth above, to determine the extent to which Shambley violated the terms of the drug court contract and the appropriate action to be taken.

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

HEAVICAN, C.J., and WRIGHT, J., not participating.

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[57] See *Mantell v. Jones*, 150 Neb. 785, 36 N.W.2d 115 (1949).

[58] See *Morrissey v. Brewer, supra* note 7, 408 U.S. at 484.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BRUCE G. THOMAS, RESPONDENT.

799 N.W.2d 661

Filed April 8, 2011. No. S-11-180.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Bruce G. Thomas, was admitted to the practice of law in the State of Nebraska on March 22, 1982, after having been previously admitted to the practice of law in the State of Iowa in 1976.

On March 2, 2011, the office of the Counsel for Discipline of the Nebraska Supreme Court filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. The motion stated that on February 18, 2011, the Iowa Supreme Court suspended the respondent for 60 days commencing February 18.

In its motion for reciprocal discipline, the Counsel for Discipline moves this court to impose a suspension of 60 days to run concurrently with the respondent's Iowa suspension.

On March 2, 2011, 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 motion for reciprocal discipline and waived all proceedings against him in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. The motion for reciprocal discipline and the conditional admission are before the court for rulings. Upon due consideration, the court approves the conditional admission and grants the motion for reciprocal discipline.

FACTS

In summary, the decision of the Iowa Supreme Court which is attached and incorporated into the motion for reciprocal

discipline states that the Iowa Supreme Court Attorney Disciplinary Board initiated a disciplinary action against respondent in connection with his conduct in representing two clients in their personal injury claim arising from an automobile accident that occurred in December 2005. Respondent met with his clients about their claim in March 2006, and he timely filed a petition in Iowa district court in December 2007. Respondent, however, failed to timely serve the defendant until 28 days after the deadline for service, and consequently, the case was later dismissed on June 2, 2008, at which time it was time barred.

Respondent did not inform his clients about the dismissal until November 2008, because he was embarrassed by his conduct. In an effort not to tell his clients, he avoided calls, and in September 2008, he informed them that he would "'get to the bottom of the matter.'" Respondent defended his failure to accomplish timely service by confessing that he had been distracted by the poor health of his elderly mother.

As a result of the dismissal, respondent's clients lost the right to pursue a direct claim for their injuries against the defendant. Respondent suggested that they pursue a malpractice action against him to hold him accountable for his mistake. Respondent's clients pursued a malpractice action in June 2009, with respondent's insurance carrier. Respondent did not dispute that the lawsuit was dismissed as a result of his inaction.

In the Iowa disciplinary action, the parties moved to waive a hearing in this matter and submitted the complaint to the "Grievance Commission" based on the stipulated facts, stipulated ethical violations, stipulated mitigating and aggravating factors, and recommended sanctions.

On February 22, 2010, the commission filed findings of fact, conclusions of law, and recommendations. The commission adopted the parties' stipulation of facts and adopted the parties' stipulation that respondent violated the following provisions of the Iowa Rules of Professional Conduct: 32:1.1 (requiring lawyer to provide competent representation), 32:1.3 (requiring lawyer to act with reasonable diligence and promptness in representing client), 32:1.4 (requiring lawyer to keep client informed), 32:3.2 (requiring lawyer to make reasonable

efforts to expedite litigation), 32:7.1(a) (finding misconduct for lawyer to engage in false or misleading communication related to lawyer services), 32:8.4(a) (finding misconduct to violate disciplinary rule), and 32:8.4(d) (finding misconduct to engage in conduct that is prejudicial to administration of justice). The commission also found that respondent violated rule 32:8.4(c) (finding misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The commission recommended a 6-month suspension from the practice of law and recommended that, as a condition to reinstatement, respondent be required to demonstrate that he had adopted office practices and policies consistent with preventing further neglect of deadlines and ensuring more prompt and direct client communication.

Respondent appealed the commission report. The Iowa Supreme Court issued an order in the case and concluded that respondent's conduct violated rules 32:1.3, 32:1.4, 32:8.4(d), and 32:8.4(c). The Iowa Supreme Court declined to address the commission's conclusion that respondent violated rules 32:1.1 and 32:8.4(a) and concluded that respondent did not violate rule 32:7.1(a). The Iowa Supreme Court reviewed the aggravating and mitigating facts and suspended respondent's license to practice law with no possibility of reinstatement for 60 days from the date of the filing of the opinion, which was February 18, 2011.

ANALYSIS

Section 3-313 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent

> knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

For purposes of § 3-313, we read formal charges to include a motion for reciprocal discipline. See *State ex rel. Counsel for Dis. v. Chavez*, 279 Neb. 183, 776 N.W.2d 791 (2010). Pursuant to his conditional admission, respondent knowingly does not challenge the allegations in the motion for reciprocal discipline conditioned on the receipt of the following discipline: that respondent be suspended from the practice of law in Nebraska for a period of 60 days effective February 18, 2011, the date of the Iowa suspension, and that he be automatically reinstated to the practice of law in the State of Nebraska on the day after the 60-day suspension period expires, provided that he has paid all costs assessed against him herein.

Pursuant to § 3-313 of the disciplinary rules, and given the conditional admission, we find that respondent knowingly does not challenge or contest the facts contained in the motion for reciprocal discipline, which we now deem to be established facts. We further find that respondent violated the Nebraska Rules of Professional Conduct that are comparable to the rules he violated in Iowa, to wit: requiring a lawyer to act with reasonable diligence and promptness in representing a client, requiring a lawyer to keep clients informed, engaging in conduct that is prejudicial to the administration of justice, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent has waived all additional proceedings against him in connection herewith, and upon due consideration, the court approves the conditional admission, grants the motion for reciprocal discipline, and enters the orders as indicated below.

CONCLUSION

The motion for reciprocal discipline is granted, and the conditional admission is approved. 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 the Nebraska Rules of Professional Conduct that are comparable to the rules respondent violated in Iowa and that respondent should be and hereby is suspended from the practice of law in Nebraska for 60 days applied retroactively to February 18, 2011, the date of discipline in Iowa. 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 shall be eligible to be reinstated to the practice of law in the State of Nebraska on the day after the 60-day suspension period expires, provided that respondent has paid all 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) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court. In order to effectuate reinstatement, relator and respondent are ordered to submit a proposed order of reinstatement, signed by both parties, stating that respondent has complied with § 3-316 of the disciplinary rules and paid all costs and expenses, and that the parties are in agreement that reinstatement is therefore warranted.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BARBARA A. FERGUSON, RESPONDENT.

795 N.W.2d 291

Filed April 8, 2011. No. S-11-227.

Original action. Judgment of disbarment.

HEAVICAN, C.J., 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, Barbara A. Ferguson, on March 18, 2011. 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 September 24, 1996. On October 6, 2010, the Counsel for Discipline of the Nebraska Supreme Court received a grievance from the individual who replaced respondent as a guardian and conservator in a matter pending in the county court for Sarpy County. The grievance alleged that while respondent was serving as guardian and conservator in the same matter, she had misappropriated funds of her ward. At the time respondent filed her voluntary surrender on March 18, 2011, the Counsel for Discipline was investigating respondent for possible misuse of funds that were held in her client trust account. Respondent has entered into a court-approved settlement agreement with the successor guardian and conservator, agreeing to repay the funds, and respondent has already repaid a substantial portion of the funds.

On March 18, 2011, the Counsel for Discipline filed with this court a motion to accept respondent's voluntary surrender. Submitted simultaneously with the motion to accept respondent's voluntary surrender is a document signed by respondent surrendering her license to practice law in the State of Nebraska. In addition to surrendering her license, respondent does not challenge or contest the truth of the allegations made against her, consents to the entry of an order of disbarment, and waives 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.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered her license to practice law and knowingly does not challenge or contest the truth of the allegations made against her. Further, respondent has waived all proceedings against her 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 she freely, knowingly, and voluntarily does not contest the allegations that she misappropriated her ward's funds and misused funds held in her client trust account. The court grants the relator's motion to accept respondent's voluntary surrender, accepts respondent's voluntary 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.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DANIEL C. MILLER, APPELLANT.

798 N.W.2d 827

Filed April 15, 2011. No. S-10-582.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **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.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
4. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force.
5. ____. The force used in self-defense must be immediately necessary and must be justified under the circumstances.
6. ____. A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for a new trial.

Greg Abboud, of Abboud Law Firm, and A. Michael Bianchi for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

A jury found the appellant, Daniel C. Miller, guilty of first degree murder and use of a deadly weapon to commit a felony. The district court sentenced him to life in prison on the murder conviction and 10 years in prison on the use of the deadly weapon conviction, with the sentences to be served consecutively. Miller appeals, claiming that the court erred

in instructing the jury on self-defense, in granting the State's *Batson* challenge, in allowing inadmissible testimony, and in refusing to grant a mistrial because of prosecutorial misconduct. Because the court erred in instructing the jury on self-defense, we reverse, and remand for a new trial.

BACKGROUND

The facts are not in serious dispute. The parties do not dispute that Miller was entitled to a self-defense instruction, and there is no dispute that NJI2d Crim. 7.3 was the correct instruction. The dispositive issue is whether the language added to the self-defense instruction by the trial judge misstated the law or likely would have confused the jury.

The charges in this case stemmed from a confrontation between two rival gangs. The rivalry was central to Miller's defense, and Miller does not dispute that he was affiliated with a gang. In June 2008, Miller and some friends, many of whom were gang members, drove to a gas station in Millard, Nebraska, to fight a rival gang. Miller was carrying a gun that he had retrieved earlier that day. The gangs were meeting to fight because one of Miller's friends had a dispute with Julius Robinson, one of the rival gang's members, over money.

When Miller's group arrived at the gas station, they did not see the rival gang, so they turned onto Deauville Drive, a street that fronted the gas station. As they were driving down the street, the rival gang emerged in what some witnesses described as an ambush. There is a dispute as to how many rival gang members emerged and what kind of weapons they had. Miller testified that the attackers had guns and baseball bats, while others stated that they just had bats. Still others claimed there were no weapons at all. As the attackers approached, Miller fired two shots. Robinson was hit in the chest and later died.

At Miller's trial, the court adopted the State's proposed jury instruction on self-defense without substantial change. Miller objected to the instruction. Miller argued that the proposed instruction contained a sentence that was not part of any instruction within the Nebraska Jury Instructions and that this sentence misstated the law. The State countered that this

sentence came from the comments to one of the self-defense instructions and argued that *State v. Eagle Thunder*[1] supported the sentence. The court, noting that the challenged language came from a comment to NJI2d Crim. 7.1, ultimately gave the instruction. We set out the court's instruction below in our analysis.

Miller complained of the instruction again when he moved for a new trial. Miller argued that neither *Eagle Thunder* nor the self-defense statute supported the instruction given. The court denied the motion for a new trial.

ASSIGNMENTS OF ERROR

Miller assigns, restated and renumbered, that the district court erred in

(1) giving a self-defense instruction that misstated the law and confused the jury;

(2) granting the State's *Batson*[2] challenge when Miller had stated valid, race-neutral reasons for striking the juror;

(3) admitting improperly elicited testimony from Miller about his involvement in other crimes;

(4) allowing the State to question a police officer about whether Miller had contacted the police after the crime; and

(5) failing to grant a mistrial because of prosecutorial misconduct during the State's closing argument.

STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision.[3]

ANALYSIS

[2,3] Miller contends that the jury instructions regarding self-defense were incorrect and likely confused the jury. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction

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[1] *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

[2] See, *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

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

was prejudicial or otherwise adversely affected a substantial right of the appellant.[4] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[5]

The court gave the following instruction on self-defense:

> The Defendant . . . Miller acted in self-defense if:
>
> (1) . . . Robinson and others threatened or attempted to kill or cause serious bodily harm to the Defendant and other occupants of the vehicle;
>
> (2) The Defendant and the other occupants of the vehicle did not provoke any such threat or use of force against them with the intent of using deadly force in response;
>
> (3) Under the circumstances as they existed at the time, the Defendant reasonably believed that his use of deadly force was immediately necessary to protect him and the others against death or serious bodily harm; and
>
> (4) Before using deadly force the Defendant and the others either tried to get away or did not try because they reasonably did not believe that they could do so in complete safety.
>
> "Deadly force" means force used with the intent to cause death or serious bodily harm or force used with the knowledge that its use would create a substantial risk of death or serious bodily harm.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably to that belief.
>
> To raise the defense of self-defense, a defendant cannot have been the aggressor in the unlawful use of force. A defendant who is not the initial aggressor but responds to force with more force than is necessary to repel the attack becomes the aggressor at this new and more serious level of force.

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[4] *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

[5] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> The State has the burden of proof beyond a reasonable doubt in disproving the elements of self defense.

Miller objects only to the part of the instruction that states, "A defendant who is not the initial aggressor but responds to force with more force than is necessary to repel the attack becomes the aggressor at this new and more serious level of force." Miller argues that this sentence is a misstatement of the law and cannot be read harmoniously with the sentence that states that Miller could have been wrong in estimating the danger so long as there was a reasonable basis for his belief and he acted reasonably on that belief.

As mentioned, there is no dispute over whether the court should have given a self-defense instruction; the State did not object to the instruction. But the challenged sentence is not part of NJI2d Crim. 7.3, which may be given if a defendant uses deadly force. Nor is it a part of any other jury instruction. Instead, the language is found in the comments to NJI2d Crim. 7.1, which is the self-defense instruction that may be given when the defendant uses nondeadly force.

The State argued that *Eagle Thunder*[6] supports the challenged sentence, but we do not read *Eagle Thunder* to state such a rule. In *Eagle Thunder*, the defendant had been attacked but had escaped to safety. Although he was under no present threat, he picked up a pipe and returned to assault those who had previously attacked him. In addition to assaulting those who had attacked him, he also hit a man who had not been involved in the attack. We affirmed the trial court's refusal to instruct the jury on self-defense, stating, "[The] defendant was the aggressor in this instance and therefore the trial court was correct in refusing to instruct the jury" on self-defense.[7] *Eagle Thunder* thus stands for the rule that a defendant who is the initial aggressor is not entitled to a self-defense instruction; it does not hold that one who uses more force than is necessary loses his privilege of self-defense. In sum, the challenged comment finds no support in *Eagle Thunder*.

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[6] *Eagle Thunder, supra* note 1.

[7] *Id.* at 211, 266 N.W.2d at 757.

[4-6] We have consistently stated that to successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force.[8] Further, the force used must be immediately necessary and must be justified under the circumstances.[9] A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger.[10] This statement of the law is reflected in the jury instructions, which state that a defendant may have been wrong in estimating the danger so long as there was a reasonable basis for that belief and he acted reasonably in response to that belief.

As we have stated, a person is justified in using deadly force in self-defense if the person reasonably believes he is threatened with death or serious bodily harm. Conversely, if the evidence shows that such a belief was unreasonable, the defendant loses the protection of the defense.[11] At that point, his use of force is unlawful. But the challenged sentence does not state that the defendant loses his justification when his belief is unreasonable. Instead, it states that if the defendant responded with more force than was necessary, he or she became the aggressor at this new and more serious level of force.

As we read this challenged sentence, it allows the jury to determine whether the force used was necessary, even if a reasonable ground existed under the circumstances to support Miller's belief that he was imminently threatened with

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[8] E.g., *France, supra* note 4; *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). See, also, Neb. Rev. Stat. § 28-1409 (Reissue 2008).

[9] E.g., *Kinser, supra* note 8.

[10] See, *Iromuanya, supra* note 8; *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); § 28-1409.

[11] See, *Iromuanya, supra* note 8; 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(c) (2d ed. 2003).

death or serious bodily harm. The challenged sentence is thus an incorrect statement of the law. It conflicts with the jury's duty to determine whether Miller reasonably believed, in the light of the circumstances known to him at the time, that the use of deadly force was necessary to prevent death or serious bodily injury. If the jury finds that the defendant did have such a reasonable belief, the killing was justified. What the jury believes is actually necessary in response to such a threat with the benefit of calm hindsight is not the inquiry, because "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[12]

Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.[13] Here, the instruction did not correctly state the law. That alone results in prejudice requiring reversal. Moreover, when all the jury instructions are read as a whole, they are at best confusing. At worst, the challenged sentence effectively negates the court's instruction that Miller could be mistaken so long as reasonable grounds for the belief existed. We cannot read these two provisions harmoniously. The instruction was prejudicial error. Because we find that the trial court's erroneous jury instructions require reversal, we decline to consider Miller's other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

MOORE, Judge, participating on briefs.

WRIGHT, J., not participating.

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[12] *Brown v. United States*, 256 U.S. 335, 343, 41 S. Ct. 501, 65 L. Ed. 961 (1921).

[13] See, *Young, supra* note 5.

IN RE APPLICATION OF NEBRASKA PUBLIC POWER DISTRICT.
JAMES CHOQUETTE ET AL., APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT, APPELLEE.

798 N.W.2d 572

Filed April 15, 2011. No. S-10-707.

1. **Nebraska Power Review Board: Appeal and Error.** A decision of the Nebraska Power Review Board will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **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.
3. **Nebraska Power Review Board: Electricity.** The Nebraska Power Review Board is required under Neb. Rev. Stat. § 70-1014 (Reissue 2009) to determine whether the applicant before it can economically and feasibly supply the electric service resulting from the proposed construction.
4. **Nebraska Power Review Board: Administrative Law.** The Nebraska Power Review Board, as an administrative board, has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act.
5. **Administrative Law: Due Process.** In administrative agency decisions, due process requires neutral and unbiased decisionmakers.
6. **Administrative Law: Presumptions.** Administrative decisionmakers serve with a presumption of honesty.
7. **Administrative Law: Due Process.** Although due process requires disqualification when an administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue.

Appeal from the Power Review Board. Affirmed.

Adam D. Pavelka, of Sullivan, Shoemaker, Witt & Burns, P.C., L.L.O., for appellants.

John C. McClure and Bonnie J. Hostetler, of Nebraska Public Power District, and Kile W. Johnson and Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The Nebraska Public Power District (NPPD) filed an application with the Nebraska Power Review Board (PRB) requesting authorization to construct an electric transmission line. A group of people who described themselves as residents and owners of farms and ranches in close proximity to the proposed line filed a protest and were permitted to intervene. The PRB granted NPPD's application. The protestors appeal. We affirm.

STATEMENT OF FACTS

On March 3, 2010, NPPD filed application PRB-3617 with the PRB, seeking authority to construct an approximately 53-mile, 345-kilovolt transmission line in Kearney and Franklin Counties, Nebraska. The construction would be part of a project to build a 225-mile transmission line from NPPD's Axtell, Nebraska, substation to Spearville, Kansas. The remainder of the transmission line would be built in Kansas by another company. NPPD asserted that the purpose of the project was to relieve system congestion on the transmission grid in western Nebraska and western Kansas and that the project would enable more efficient utilization of NPPD facilities and benefit NPPD customers with low rates and enhanced system reliability. Construction of the project was planned to commence in the winter of 2011 to 2012, to be completed by December 2012, and to cost approximately $78 million.

Several people who described themselves as residents and owners of farms and ranches located in close proximity to the proposed transmission line filed a protest and petition for intervention. The petition to intervene was granted. The protestors asserted that the line would not serve the public convenience and necessity of Nebraskans and that NPPD would not most economically and feasibly supply electric service resulting from the line. They asserted that the line would primarily benefit the interests of Kansas and that NPPD and its customers would bear a disproportionate amount of the costs of the transmission line project.

The PRB held a hearing on NPPD's application on May 14, 2010. NPPD presented the testimony of three witnesses who were NPPD employees and offered numerous exhibits into evidence. The protestors presented the testimony of two witnesses: one of the protestors and a consultant with knowledge of engineering issues related to powerlines. The protestors offered several exhibits into evidence.

Following the hearing, the PRB approved NPPD's application. In an 18-page order dated June 14, 2010, with citations to the record of the hearing, the PRB made the following findings: Southern Power District, in whose service area the proposed line would be located, had consented to approval of NPPD's application. After required consultations with the Nebraska Game and Parks Commission and the U.S. Fish and Wildlife Service, NPPD selected the easternmost of the alternate routes it was considering for the location of the line, because that route would pose the least threat to endangered species and the species' habitats. The Game and Parks Commission and the U.S. Fish and Wildlife Service did not object to the selected route but would have objected to the other proposed routes. It was estimated that selecting the easternmost route to accommodate such concerns increased the cost of the project by at least $14 million.

The PRB further found that with the installation of the proposed transmission line, NPPD would have excess baseload generating capacity that it could sell and the proposed transmission line would remove constraints preventing NPPD from moving most or all of its excess power to the market. The sale of excess power would reduce costs for NPPD ratepayers. The proposed transmission line would also facilitate NPPD's ability to purchase electricity when needed. The increased revenue from sales of excess power and the ability to purchase electricity when needed were expected to offset the cost to build the line. The PRB further found that the transmission line would relieve congestion in western Nebraska and western Kansas, relieve constraints by increasing transfer capability and reducing loading on NPPD's transmission system in central and eastern portions of Nebraska, and provide additional reliability in NPPD's transmission system for ratepayers in

western and south central Nebraska. The congestion that NPPD would relieve by building the transmission line could not be economically relieved by Omaha Public Power District or the Lincoln Electric System.

The PRB finally found that although the proposed transmission line would provide benefits to Kansas interests, serving those interests would not be the primary purpose of the line. The PRB found little or no evidence that the proposed transmission line would cause electricity generated in Kansas wind farms to be sold in Nebraska. In this regard, the PRB noted that NPPD had its own wind generation resources and access to areas in Nebraska with "good wind potential."

The PRB addressed the protestors' concerns about the route of the transmission line. The protestors claimed that the route was wasteful and chosen for the convenience of the Kansas power company. The PRB relied on *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 298 N.W.2d 366 (1980), for the proposition that the utility rather than the PRB had the authority to select a particular route and that the PRB's authority was limited to either approving or disapproving the utility's application. The PRB noted that NPPD selected the easternmost route of the variations it had been considering because it posed the least threat to endangered species and that if NPPD had chosen one of the other routes, the PRB would have been constrained to deny the application on the ground that the transmission line threatened endangered species.

The PRB found:

> [T]he evidence shows the proposed transmission line will serve the public convenience and necessity[,]
>
> . . . the evidence demonstrates that [NPPD] can most economically and feasibly supply the electric service resulting from the proposed transmission line[,]
>
> [and] the evidence demonstrates that the proposed transmission line will not unnecessarily duplicate other facilities or operations.

The PRB therefore approved NPPD's application designated as "PRB-3617."

The protestors appeal the PRB's decision.

ASSIGNMENTS OF ERROR

The protestors claim, restated and summarized, that the PRB erred when it approved NPPD's application. The protestors also claim that the PRB was biased and made findings in favor of NPPD before the conclusion of the hearing.

STANDARDS OF REVIEW

[1] A decision of the PRB will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999).

[2] 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. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

ANALYSIS

The PRB Did Not Err When It Found That NPPD Could Most Economically and Feasibly Supply the Electric Service Resulting From the Proposed Construction.

On appeal, the protestors assert that the PRB erred when it approved NPPD's application, because (1) NPPD's evidence failed to show "how the proposed transmission line compared to other alternatives" and was the most economic and feasible route, brief for appellants at 5, and (2) the PRB "took NPPD at its word with regard to what was the most economic or beneficial route" and failed to draw its own conclusion, *id.* at 8. We conclude that the protestors' first argument fails primarily because it is based on a misreading of the controlling statute, Neb. Rev. Stat. § 70-1014 (Reissue 2009), and that the second argument fails because it is based on a misunderstanding of the scope of the PRB's authority with respect to applications.

Section 70-1014 is central to our resolution of this appeal. Section 70-1014 provides that before the PRB can approve an application for construction of an electric generation facility or transmission line, the PRB "shall find that the application will serve the public convenience and necessity, and that

the applicant can most economically and feasibly supply the electric service resulting from the proposed construction or acquisition, without unnecessary duplication of facilities or operations."

The PRB's task in § 70-1014 furthers "the policy of this state to avoid and eliminate conflict and competition between public power districts [and other public utility entities] in furnishing electric energy to retail and wholesale customers [and] to avoid and eliminate the duplication of facilities and resources which result therefrom." Neb. Rev. Stat. § 70-1001 (Reissue 2009).

A final action of the PRB may be appealed to the appellate courts of this state. Neb. Rev. Stat. § 70-1016 (Reissue 2009). A decision of the PRB will be affirmed if it is supported by the evidence and is not arbitrary, capricious, unreasonable, or otherwise illegal. *In re Application of City of North Platte, supra*.

In connection with their insufficiency of the evidence argument, the protestors do not dispute the PRB's finding that NPPD's evidence satisfied the first portion of § 70-1014 and showed that the proposed transmission line "will serve the public convenience and necessity." Instead, the protestors focus on the second portion of § 70-1014 regarding whether "the applicant can most economically and feasibly supply the electric service resulting from the proposed construction" and claim that because NPPD's evidence failed to establish this second requirement, approval was not warranted. This argument misreads the statute and is without merit.

In making their insufficiency of the evidence argument, the protestors focus on the word "most" in § 70-1014 and assert that "most" is intended to describe the route identified in the application. According to the protestors' reading of § 70-1014, the PRB is required to find that the proposed transmission line is the "most" economic and feasible route and such determination can only be done after comparing the proposal to alternative routes. We reject this argument. We give the language of § 70-1014 its plain and ordinary meaning, see *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010), and a sensible construction,

see *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). We conclude that "most" describes the word "applicant," the protestors misread § 70-1014, and the PRB correctly applied § 70-1014 to the facts of this case.

According to the plain language of § 70-1014, the PRB must first find that the application will serve the public convenience and necessity and then determine if the applicant can most economically and feasibly supply the resulting service. The word "most" qualifies the word "applicant," not the route in the application. Having found public convenience and necessity, the inquiry then proceeds to focus on the applicant and its ability to economically and feasibly provide the proposed service.

[3] We recognize that the comparative word "most" has its greatest application where there are competing applicants. See, e.g., *City of Auburn v. Eastern Nebraska Public Power Dist.*, 179 Neb. 439, 138 N.W.2d 629 (1965) (reviewing PRB's decision with regard to two competing applicants, City of Auburn and Eastern Nebraska Public Power District). We acknowledge that in the absence of competing applicants, the comparative word "most" in § 70-1014 is awkward. However, pursuant to § 70-1014, the PRB must nevertheless complete its task of evaluating an application regardless of whether competing applications by competing applicants exist. Giving § 70-1014 a sensible reading, we reject the protestors' argument that the PRB was tasked with finding the "most" economic and feasible route. Instead, the PRB was required under § 70-1014 to determine whether the applicant it had before it could economically and feasibly supply the electric service resulting from the proposed construction which it had found would serve the public convenience and necessity.

[4] Our reading of § 70-1014 is consistent with prior decisions of this court. In *Lincoln Electric System v. Terpsma*, 207 Neb. 289, 291-92, 298 N.W.2d 366, 368 (1980), we noted that the PRB, as an administrative board, had "no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act." And we concluded that the PRB had "no authority to select a particular route other than that selected by the utility."

Id. at 292, 298 N.W.2d at 368. We further stated that "[t]here is nothing in the pertinent statutes to suggest that the [PRB] has the power to determine that a transmission line shall be built along a particular route." *Id.* at 291, 298 N.W.2d at 368. The protestors' suggestion that the PRB affirmatively investigate other possible routes is contrary to the statute and the case law.

With respect to the sufficiency of the evidence, the record shows that Southern Power District, in whose service area the proposed transmission line would be built, had consented to approval of the application and stipulated that NPPD could most economically and feasibly supply the service. There was also evidence that general notice of the application had been given through newspapers in the area and that specific notice of the filing had been given to one other potential supplier, the city of Minden, Nebraska. No other potential supplier filed a protest or a competing application. We also note that in its order, the PRB considered whether Omaha Public Power District or Lincoln Electric System might be appropriate entities to build a transmission line to alleviate congestion in the area and concluded that neither of those utilities was sufficiently impacted by the congestion such that it would be economical for either of them to construct a line. The PRB noted that in contrast to these two entities, NPPD owned and operated transmission lines in the surrounding area, had crews in the area, and was directly impacted by the constraint. The foregoing suggests that even in the absence of competing applications, the PRB gave consideration to potential other applicants and determined that NPPD could "most economically and feasibly supply the electric service resulting from the proposed transmission line."

As an additional argument, the protestors claim that "the PRB simply took NPPD at its word with regard to what was the most economic or beneficial route for the proposed transmission line" and failed to draw its own conclusion. Brief for appellants at 8. The protestors further suggest that we adopt standards from federal cases not repeated here to the effect that an administrative agency must exercise its own judgment and not cede deference to a private party on matters before the

agency. Given our statutes, these authorities are inapposite. We reject these arguments.

As discussed above, the PRB did not have the authority to substitute its selection of a route in lieu of NPPD's proposal. *Lincoln Electric System v. Terpsma, supra.* See § 70-1014. Instead, the PRB was to determine whether NPPD could economically and feasibly supply the service, and after examination, the PRB determined that NPPD could. The protestors' argument is without merit.

In accordance with our standard of review, we conclude that there was evidence to support PRB's decision to approve NPPD's application and that such decision was not arbitrary, capricious, unreasonable, or otherwise illegal.

The Record Does Not Indicate Bias on the Part of the PRB.

The protestors assert that the PRB decision should be reversed because the PRB made findings in favor of NPPD before the conclusion of the hearing. They assert that "certain members of the PRB had already made their mind up about certain facts and that they had already drawn conclusions regarding the application." Brief for appellants at 8-9. They argue that the PRB's decision cannot be affirmed, because members of the PRB showed "extreme bias" and "great deference and bias to NPPD and NPPD's initiatives, making the hearing inherently unfair" for the protestors. *Id.* at 9. As examples of the PRB's alleged bias, the protestors refer us to one member's questioning of the protestors' witness and another member's expression of knowledge and opinion regarding wind energy. We find no merit to this assignment of error.

[5-7] We have recognized that in administrative agency decisions, due process requires neutral and unbiased decisionmakers. See *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). Factors which may indicate partiality include a pecuniary interest in the outcome, a familial or adversarial relationship with one of the parties, and a failure to disclose a suspect relationship. See *id.* We have recognized that administrative decisionmakers serve with a presumption of honesty. See *id.* And "[a]lthough due process requires

disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue." *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 466, 513 N.W.2d 847, 865 (1994).

As an initial matter, the record does not show that the protestors sought to disqualify any decisionmakers. We do not read the identified portions of the record as indicating that members of the PRB either were biased, appeared to be biased, or had prejudged the application. Instead, the questioning of witnesses by the PRB indicated critical examination of testimony which included an opportunity for witnesses to provide explanations for what might be considered weaknesses in the protestors' position. While the expression by PRB members of knowledge or opinion regarding matters related to the application might not have been necessary to the hearing, it indicates the knowledge of the power industry a PRB member would necessarily develop rather than indicating bias on the part of the PRB member. We find no basis in the record to support the protestors' assertion of bias.

CONCLUSION

We conclude that there was evidence to support PRB's decision to approve NPPD's application PRB-3617 and that such decision was not arbitrary, capricious, unreasonable, or otherwise illegal. The record does not support the protestors' claim that the PRB was biased in NPPD's favor. We therefore affirm the decision of the PRB to grant NPPD's application.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JASON L. GOLKA, APPELLANT.

796 N.W.2d 198

Filed April 22, 2011. No. S-10-484.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** 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.
3. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Postconviction: Effectiveness of Counsel: Pleas.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading.
7. **Effectiveness of Counsel: Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.

8. **Effectiveness of Counsel: Pleadings: Trial.** Where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.
9. **Jury Instructions: Homicide: Evidence.** No error occurs by not instructing the jury regarding second degree murder and manslaughter where there is no evidence that would give a fact finder a rational basis to find the defendant guilty of second degree murder or manslaughter and acquit him or her of first degree murder.
10. **Homicide: Intent.** A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice or in the commission of a felony or by administering poison.
11. ____: ____. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
12. ____: ____. The material elements of manslaughter are an unintentional killing while in the commission of an unlawful act or upon sudden quarrel.
13. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
14. **Effectiveness of Counsel: Appeal and Error.** Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
15. **Pleas.** To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
16. **Constitutional Law.** Once a defendant is informed of his or her constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of those same rights.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

In this postconviction case, appellant, Jason L. Golka, was convicted in the district court for Sarpy County of two counts of first degree murder pursuant to a guilty plea. On the date of the offenses, Golka was 17 years old. Golka was sentenced to two consecutive terms of life imprisonment "without parole." Golka appealed the sentences and, on direct appeal, claimed that the provision that his sentences be "without parole" should be vacated pursuant to *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). This court issued a memorandum opinion and affirmed Golka's convictions on both counts of first degree murder; however, because we found the "without parole" feature to be error, we vacated the sentences of life imprisonment "without parole" and remanded the cause for resentencing. Golka was resentenced to two life terms to be served consecutively, from which he did not appeal.

After resentencing, Golka filed a motion for postconviction relief which gives rise to the instant appeal. In his motion, Golka alleged that he received ineffective assistance of trial counsel based on counsel's advising him to waive his right to a jury trial, failing to advise him of certain defenses, and advising him to enter into the plea agreement. Golka argues that he received ineffective assistance of appellate counsel because his counsel on appeal did not assign as error that the district court erred in accepting Golka's plea without advising him of the nature of the charges against him or his right to be presumed innocent. Finally, Golka alleged that sentences of life imprisonment constituted cruel and unusual punishment because of his age at the time of the crimes. The district court denied Golka's claims without an evidentiary hearing. Golka appeals, and we affirm.

STATEMENT OF FACTS

On November 17, 2004, Golka was charged by information in the district court for Sarpy County with two counts of first degree murder and two counts of use of a firearm to commit a felony. On the date of the offenses, Golka was 17 years old. On November 19, Golka was arraigned in a group arraignment. At

the arraignment, Golka was advised, inter alia, that he had the right to a jury trial, the right to a speedy and public trial, the right to counsel, and the right to confront and cross-examine witnesses, and that he would be presumed innocent. The court advised Golka, "Your presumption of innocence continues throughout the proceeding unless and until the State meets its burden of proof, and the State's burden of proof is to prove you guilty beyond a reasonable doubt before you can lose your presumption of innocence and be found guilty." The body of the information was read to Golka. The reading included identification of the victims, the location of the crime, the level of the crime, and the nature of the penalties. Golka was asked if he understood the nature of the charges and the penalties, to which Golka stated, "Yes, sir."

On March 3, 2005, an evidentiary hearing to transfer to juvenile court was conducted and the motion to transfer was denied. Also on March 3, an evidentiary hearing on Golka's motion to suppress was conducted, and the motion was denied.

On July 5, 2005, the district court held a hearing at which Golka waived his right to a jury trial. The following exchange took place:

> THE COURT: Sir, do you understand that in each of these files, that you have an absolute right to a jury trial?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Are you waiving that right at this time?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Now, sir, was any threat made to you, promise given to you, or inducement given to you to get you to waive?
>
> [Golka]: No, Your Honor.
>
> THE COURT: You're doing so freely and voluntarily?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Now, you've had discussions with your counsel about this; is that correct?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Are you satisfied with that recommendation — or the advice you've gotten?
>
> [Golka]: Yes, Your Honor.

THE COURT: He's — you had ample opportunity to talk to him about these matters?

[Golka]: Yes, Your Honor.

THE COURT: The Court at this time [finds Golka's] waiver of jury trial to be freely, voluntarily, intelligently, [and] knowingly made. The Court accepts the waivers.

A second amended information was filed on July 8, 2005, with an additional count of conspiracy to commit first degree murder, a Class II felony. On July 13, pursuant to a plea agreement, Golka pled guilty to two counts of first degree murder. In exchange for his pleas, the State agreed to dismiss both counts of use of a firearm to commit a felony and the conspiracy count. In addition, in a second case, the State agreed to dismiss a count of use of a firearm to commit a felony, and to dismiss a third case in its entirety.

At the plea hearing, the State offered a factual basis for each count of first degree murder. The district court took judicial notice of the evidence adduced at the juvenile transfer and motion to suppress hearings and the orders issued on each of those motions. There was evidence that one victim died of a gunshot wound to the head and that the other victim died from multiple gunshot wounds to the torso and head.

At the plea hearing, the following exchange took place:

THE COURT: . . . Counts I and III are two counts of murder in the first degree. The possible penalty here — the maximum possible penalty, by reason of the fact that you were under 18 years of age at the time of the commission of the offense, is — the maximum penalty is confinement with the Department of Corrections of the State of Nebraska for the term of your natural life without the possibility of parole.

Now do you understand the maximum possible penalty here?

[Golka]: Yes, Your Honor.

THE COURT: Okay.

. . . .

THE COURT: On each count. Do you understand that?

[Golka]: Yes, Your Honor.

THE COURT: Do you also understand that if I saw fit, I could make those sentences run consecutive to each other?

[Golka]: Yes, Your Honor.

Before accepting the pleas, the court also advised Golka that he had the following rights: the right to counsel, the right to a jury trial, the right to call and confront witnesses, the privilege against self-incrimination, the right to a speedy and public trial where the State would have the burden of proving him guilty beyond a reasonable doubt, and the right to appeal. Golka stated that no promises had been made to induce his plea and that he was not subjected to any threats, promises, or other inducements. Golka stated that he understood his rights and that he was pleading freely and voluntarily. The district court accepted the pleas and adjudged Golka guilty of two counts of first degree murder.

Golka was sentenced on August 19, 2005, to two consecutive terms of life imprisonment without parole. Golka appealed the convictions and sentences and, on direct appeal, claimed that the provision that his sentences be "without parole" should be vacated pursuant to *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). This court filed a memorandum opinion on September 27, 2006, in which we affirmed Golka's convictions on both counts of first degree murder but vacated the sentences of "life imprisonment without parole" and remanded the cause for resentencing.

The resentencing hearing occurred on December 1, 2006. The following exchange took place at the resentencing:

THE COURT: . . .

. . . .

Matter comes on for resentencing after remand from the Nebraska Supreme Court. . . .

. . . .

THE COURT: . . .

The Court has considered a presentence report or an evaluation that was contained in the bill of exceptions. . . .

. . . [H]as the state had an opportunity to review this?

[Prosecutor]: We have.

[Defense counsel]: I have.

THE COURT: [addressing defense counsel] [I]s there any legal reason why sentence may not be pronounced?

[Defense counsel]: No.

THE COURT: State wish to be heard?

[Prosecutor]: Your Honor, the only reason we are here, obviously, is because this comes back on remand because the court has determined that the statute under which [Golka] was initially sentenced was unconstitutional.

There has been no change in circumstance that would warrant a change in the status of the — of [Golka's] sentence; that being two consecutive life sentences. And with that, I would ask you to consider the state's previous arguments that were offered to the Court on August 19, 2005, at his original sentencing.

. . . .

[Defense counsel]: . . . We're here today to formally sentence . . . Golka pursuant to the mandate of the supreme court.

I've had an opportunity to review the presentence investigation. . . . Golka is obviously aware we're not here asking for probation. With that, we know that we are going to get two consecutive life sentences.

The — and I've talked to [Golka] for a little bit and I think he realizes that there is an opportunity, albeit slim and way down the road, for him to have his sentences commuted, and he — he is in the situation of having to be an ideal prisoner for a long time if he wants the opportunity to have his sentence commuted. It's not going to be in my lifetime, but I think he realizes that if he abides by the rules and regulations, there is a chance for him to better himself.

. . . .

THE COURT: Okay. Mr. Golka, is there anything you wish to tell me?

[Golka]: No.

THE COURT: Mr. Golka, it will be the judgment of the Court on resentencing that on each count you be sentenced to serve a term of your natural life; that you are

> — and these sentences to be served . . . consecutively with each other, . . . and it will be deemed that these sentences commenced August 19th, 2005. So the resentence is not from today.
>
> With that, he's remanded to the custody of the sheriff for transportation back to the Department of Corrections.

No appeal was taken from the resentencing. Golka was represented by the same counsel at trial, on direct appeal, and at the resentencing.

On November 8, 2007, Golka filed a pro se motion for postconviction relief and filed an amended motion on November 26, 2008, through counsel. In his amended petition, Golka claimed that he received ineffective assistance of trial and appellate counsel.

With respect to trial counsel, Golka alleged that trial counsel was ineffective when he advised Golka to waive his right to a jury trial, failed to advise him of the existence of alternate crimes and defenses that he could have asserted, and advised him to accept the plea agreement.

With respect to the plea, Golka claimed that his trial counsel was ineffective when he advised Golka to plead guilty. Golka specifically alleged that his counsel advised him that if he pled guilty to the two counts of first degree murder, "his two life sentences would be commuted to sentences of terms of years after 20 to 25 years, and he would be paroled." Golka alleged that he pled guilty based on this advice and, "[b]ut for [counsel's] advice, . . . would have exercised his right to a trial rather than entering his guilty pleas pursuant to the plea agreement."

In his motion for postconviction relief, Golka alleged that he received ineffective assistance of appellate counsel when his appellate counsel failed to assign as error that the district court had erred when it accepted his guilty plea without advising Golka of the nature of the charges against him and his right to be presumed innocent.

Finally, Golka raised a claim of cruel and unusual punishment with respect to sentencing. The district court denied Golka's claims without an evidentiary hearing in an order filed April 20, 2010. Golka appealed.

ASSIGNMENTS OF ERROR

Golka claims that the district court erred when it denied him postconviction relief without conducting an evidentiary hearing on the claims of (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, and (3) constitutionality of sentencing juveniles.

STANDARDS OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). 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. *Id*. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *Id*.

[3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

ANALYSIS

The overriding issue presented in this appeal is whether the district court erred when it denied 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. *State v. McGhee*, 280 Neb. 558, 787

N.W.2d 700 (2010). However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *Id*.

Ineffective Assistance of Counsel.

[4-6] We note that Golka was represented by the same lawyer at the time of his plea, on direct appeal, and at the resentencing, and, accordingly, this postconviction proceeding is his first opportunity to assert claims of ineffective assistance of counsel. See *State v. McKinney, supra*. In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Vo, supra*. 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, supra*, to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Vo, supra*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*. When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading. See *id*.

Ineffective Assistance of Trial Counsel: Waiver of Jury.

Golka alleged that his trial counsel was ineffective when counsel advised him to waive a jury trial. Golka alleges that trial counsel advised him that it was better to have a judge decide his case, because a judge is a professional and confusion would result if 12 people were required to decide his guilt or innocence. Golka also alleges that trial counsel failed to advise him that the jury verdict must be unanimous. Golka alleged that but for trial counsel's advice, he would have exercised his right to a jury trial. Golka claims that he was denied his right to a jury trial guaranteed by the 6th and 14th Amendments to the

U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution. We find no merit to this argument.

[7] The focus of this allegation of ineffectiveness is Golka's assertion that trial counsel's advice was so "patently unreasonable," brief for appellant at 13, as to vitiate the knowing and intelligent waiver of his right to a jury trial. In this regard, we have stated:

> The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision. . . . Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.

State v. Dean, 264 Neb. 42, 48-49, 645 N.W.2d 528, 534 (2002) (citation omitted). See, also, *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

There is nothing in the postconviction motion or record which suggests that trial counsel interfered with Golka's freedom to decide to waive a jury trial, and the colloquy in court at the jury trial waiver hearing is to the contrary. The alleged statements of trial counsel regarding the relative merits of trying a case to the court as opposed to a jury were commonplace considerations and did not constitute unreasonable advice so as to vitiate the knowing and intelligent waiver of the right to a jury trial.

The decision to waive the jury was Golka's. Trial counsel's alleged advice was not unreasonable. The allegations in the postconviction motion and the record affirmatively show that Golka was not entitled to relief on this issue, and the district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Trial Counsel: Alternate Crimes and Available Defenses.

Golka alleged that his trial counsel was ineffective because he failed to advise Golka of alternate crimes to which he would

have been subject and defenses he could have asserted. Golka claims that further advice, and inferentially no plea, would have led Golka to proceed to trial wherein he would have been convicted of second degree murder or manslaughter rather than first degree murder or acquitted based on diminished capacity or self-defense. For purposes of analysis, we assume without deciding that trial counsel failed to advise Golka regarding these matters. We conclude that no prejudice resulted, and this claim is without merit.

[8] The U.S. Supreme Court has stated: "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, similarly, *Gumangan v. U.S.*, 254 F.3d 701 (8th Cir. 2001) (stating that counsel was not ineffective for failing to advise of certain defenses, because they would not have been likely to succeed had defendant gone to trial).

Notwithstanding the fact that Golka's convictions are plea based, the record in this postconviction case is extensive. It includes the juvenile transfer hearing, the motion to suppress, and the factual bases at the plea hearing. The strength of the State's case is obvious, and Golka received benefit from the plea bargain. The allegation that Golka would have gone to trial if he had been advised of the alternate crimes and defenses is perfunctory. Given the allegations and the record, the authenticity of the allegation that Golka would have gone to trial is negated by its lack of merit. Given the lack of merit, no "rational defendant [would have] insist[ed] on going to trial" on these bases. *Roe v. Flores-Ortega*, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

[9] In order to evaluate Golka's claim regarding the existence of the alternate crimes and the availability of the defenses he now urges, we need to analyze whether the facts produce a rational basis to acquit Golka of first degree murders and instead convict him of second degree murders or manslaughters and whether the defenses likely would have succeeded at trial. We have indicated that no error occurs by not instructing the

jury regarding second degree murder and manslaughter where there is no evidence that would give a fact finder a rational basis to find the defendant guilty of second degree murder or manslaughter and acquit him or her of first degree murder. See *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009). The same reasoning applies here. Accordingly, we must review the circumstances surrounding these two murders as reflected in the record.

On October 23, 2004, in the early morning hours, Golka was hit over the head and knocked unconscious at the residence of Jay Ellis. Chunks of Golka's hair were shaved off, his hat and head were spray painted, and he was burned with a cigarette. After he regained consciousness, he went home. Golka then spent the day with his girlfriend, who took him to get his hair cut, and he slept. He went back to the Ellis residence that night and confronted Ellis with a .22-caliber rifle regarding who had assaulted him. Ellis acted as if nothing had happened, but became upset after seeing Golka had a weapon. Golka left.

Golka admitted that he planned the murder on Sunday, October 24, 2004. He planned to use his stepfather's 12 gauge shotgun and a .22-caliber rifle to kill Ellis and anyone else in the residence. He directed a 15-year-old individual, who had accompanied him, to walk to the front door to determine who was in the residence. The individual informed Golka that Ellis and Roscoe Jordan were the only ones in the residence. Golka retrieved the .22-caliber rifle from his vehicle and walked into the backyard. He knocked over a plant to cause a loud noise so that Jordan, whom Golka could see through the kitchen window, would come outside.

Once Jordan appeared, Golka stood up and fired seven rounds into Jordan's upper body and head. The first shots were heard at a little after midnight on October 25, 2004. It appeared to Golka that Jordan was trying to get back up, so he fired three more shots toward his head. Jordan did not move.

Golka then went back to the vehicle to retrieve the 12 gauge shotgun and returned to the residence. Once inside, Golka could see Ellis lying on the couch and fired one round into Ellis' head. He then exited the home and fired another round pointblank into Jordan's head.

Golka and the 15-year-old individual discussed "keep[ing] this a secret," and after dropping the individual off, Golka disposed of the .22-caliber rifle in a drainage ditch or sewer area to conceal it. He called his mother, told her what he had done, and told her that he was hearing voices in his head. Before being taken into custody, Golka parked his vehicle in the Sarpy County sheriff's office parking lot. Golka stated that he took four or five Valium pills and contemplated suicide.

Golka was described as very cooperative with law enforcement after being taken into custody. He was transported to a hospital, where he tested positive for marijuana and negative for Valium. The CAT scan of his head was negative for injuries. Golka did not indicate that he was under the influence of marijuana or any other substances other then Valium, nor did he exhibit any signs of being under the influence.

Given these facts, and the absence of allegations that put the facts in doubt, Golka's convictions of first degree murder are supported by the facts and provide no rational basis for acquittal. His alternate theories were not warranted by the evidence, and his various defense theories lack merit. Therefore, Golka suffered no prejudice and it was not ineffective of trial counsel not to have advised Golka about these matters.

[10,11] Neb. Rev. Stat. § 28-303 (Reissue 2008) provides that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice or in the commission of a felony or by administering poison. The facts show Golka killed the victims purposely, deliberately, and with premeditation. In contrast, the crime of second degree murder, found at Neb. Rev. Stat. § 28-304 (Reissue 2008), provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006). The facts show Golka killed the victims with premeditation; there is no rational basis to believe that Golka would have been acquitted of first degree murder and convicted of second degree murder.

[12] With respect to manslaughter, the material elements are an unintentional killing while in the commission of an unlawful act, *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009),

or upon sudden quarrel, *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009). See Neb. Rev. Stat. § 28-305 (Reissue 2008). The facts show the killings were intentional and not upon sudden quarrel; therefore, there is no rational basis to believe that Golka would have been acquitted of first degree murder and convicted of manslaughter.

With respect to diminished capacity, we have indicated that this defense may be available where a defendant lacked the capacity to intend the voluntary and probable consequences of his or her act. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). See, also, *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The facts show that Golka tested negative for Valium and that a CAT scan was negative. The facts show that 1½ days after the events of October 23, 2004, Golka deliberately set out to go to Ellis' house in revenge. After the killings, he hid at least one weapon and he was articulate with the authorities. It is not likely that diminished capacity would have succeeded at trial.

[13] With respect to self-defense, Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat[.]

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Where there is no present threat, a claim of self-defense is not viable. See *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The facts of the case and Golka's statements to the authorities show that self-defense was not a viable defense, because, inter alia, the unlawful force of the previous encounter had passed and Golka's use of force was not immediately necessary. It is not likely that self-defense would have succeeded at trial.

The facts show the existence of two first degree murders, and there is no rational basis to believe that Golka would have been acquitted of first degree murders and instead convicted of second degree murders or manslaughters. The alternate theories would not have been warranted by the evidence. Further, the defenses Golka claims were not communicated to him by trial counsel would have been unavailing. The allegations in the postconviction motion are not to the contrary. A rational defendant would not have insisted on going to trial. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Therefore, Golka was not prejudiced by trial counsel's alleged failure to advise him on these matters or by the entry of his pleas. The district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Trial Counsel: Improper Plea Advice.

Golka claims that he received ineffective assistance of trial counsel based on sentencing-related advice that his counsel gave him with respect to entering into a plea agreement with the State. The substance of this claim is that trial counsel allegedly assured Golka that if he accepted the plea agreement, he would be paroled, whereas, in fact, there is no basis in law or experience to expect to be paroled, and that if he had been accurately advised, he would have insisted on going to trial. Golka specifically alleges that trial counsel advised him that if he "accepted the plea agreement, his two life sentences would be commuted to sentences of terms of years after 20 to 25 years, and he would be paroled" and that "[b]ut for [trial counsel's] advice, . . . Golka would have exercised his right to a trial rather than entering his guilty pleas pursuant to the plea agreement."

In its order, the district court generally determined that even if Golka had been better apprised of the law regarding his

parole eligibility and the unlikelihood of parole, Golka could not establish that he would have insisted upon going to trial. The district court determined that Golka gained significant benefit from the plea agreement, and the court therefore found no merit to his claim regarding the alleged impropriety of pleading guilty and, thus, denied an evidentiary hearing on this issue. In the context of this postconviction action, the question presented on appeal is whether the records and files in the case affirmatively show that Golka is entitled to no relief on this issue and thus not entitled to an evidentiary hearing, as the district court determined. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

The statements Golka now attributes to his counsel of promises of parole are inconsistent with his representations to the court at the plea hearing and are contradicted by the record at the resentencing. As reflected in the record of the plea hearing, Golka specifically denied that any promises had been made to induce his plea and he indicated that he was not subjected to any threats, promises, or other inducements. He also expressed his understanding that life imprisonment was the maximum possible penalty which the court could impose.

In connection with trial counsel's advice, we refer in particular to the record at the resentencing in which counsel represented to the court a summary of his advice to Golka as follows:

> [Defense counsel:] I've had an opportunity to review the presentence investigation. . . . Golka is obviously aware we're not here asking for probation. With that, we know that we are going to get two consecutive life sentences.
>
> The — and I've talked to [Golka] for a little bit and I think he realizes that there is an opportunity, albeit slim and way down the road, for him to have his sentences commuted, and he — he is in the situation of having to be an ideal prisoner for a long time if he wants the opportunity to have his sentence commuted. It's not going to be in my lifetime, but I think he realizes that if he abides by the rules and regulations, there is a chance for him to better himself.

. . . .

THE COURT: Okay. Mr. Golka, is there anything you wish to tell me?

[Golka]: No.

These statements by counsel made before the court were not a promise of parole. These statements indicate that Golka has the opportunity for parole "albeit slim and way down the road." When invited by the court, Golka did not take issue with counsel's narrative regarding the advice he had rendered to Golka or otherwise express that counsel's advice had been to the contrary. There was no indication by Golka that he wished to withdraw his plea and insist on going to trial, an option available to him between conviction and sentencing. See *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

Golka claims that he pled guilty based on counsel's promise of parole and that but for that advice, he would have insisted on going to trial. The record is sufficient to evaluate Golka's claim. The records and files contradict this claim and affirmatively show that he is not entitled to relief, and thus no evidentiary hearing is required on this issue. Although our reasoning differs from that of the district court, the district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Appellate Counsel: Failure to Assign Errors on Appeal.

Golka alleges that he received ineffective assistance of appellate counsel because his appellate counsel did not assign as error the district court's acceptance of his pleas without properly advising him of the nature of the charges against him, his understanding thereof, and his right to be presumed innocent at trial. Because we conclude that the records and files in the case affirmatively show that Golka is entitled to no relief on his claims that he received ineffective assistance of appellate counsel, we affirm the decision of the district court which denied these claims without an evidentiary hearing.

As noted above, in order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[14] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009). In doing so, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*.

[15] Golka's appellate ineffectiveness claim under consideration is grounded in Golka's assertion that his plea was not voluntarily or intelligently entered due to purported failures of the court to advise him of the nature of the charges against him, his understanding thereof, and the presumption of innocence. To assess the strength of Golka's claim, we must begin by reviewing what the district court is required to advise a defendant when accepting a plea. We generally refer to *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), to ascertain these requirements. To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made,

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

State v. Hays, 253 Neb. 467, 471-72, 570 N.W.2d 823, 827 (1997), quoting *State v. Irish, supra*. Accord, *State v. LeGrand*,

249 Neb. 1, 541 N.W.2d 380 (1995), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990). A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

[16] With respect to the nature of the charges, we have reversed, and remanded a cause for further proceedings, where the court failed to inform a defendant of the nature of the charges and failed to examine the defendant to determine that he understood the nature of the charges at the time of entering into the plea. *State v. Ponec*, 236 Neb. 710, 463 N.W.2d 793 (1990). With respect to the presumption of innocence, we have not required the trial court to inform the defendant of the "presumption of innocence" per se, although the advisements under *Irish*, taken together, reflect the presumption. For completeness, we note that elsewhere, it has been held that the failure to advise the defendant of the presumption of innocence does not require setting aside the guilty plea. See, e.g., *People v. Saffold*, 465 Mich. 268, 631 N.W.2d 320 (2001). Finally, it is important to note that once a defendant is informed of his or her constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of those same rights. See *State v. LeGrand, supra.* See, also, *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

In this case, as we understand it, both the State and the district court refer to the following exchange at the plea hearing to support the proposition that Golka was adequately advised regarding the nature of the charges and questioned as to his understanding of the charges against him:

> THE COURT: . . . Counts I and III are two counts of murder in the first degree. The possible penalty here — the maximum possible penalty, by reason of the fact that you were under 18 years of age at the time of the commission of the offense, is — the maximum penalty is confinement with the Department of Corrections of the State of Nebraska for the term of your natural life without the possibility of parole.

> Now do you understand the maximum possible penalty here?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Okay.
>
> . . . .
>
> THE COURT: On each count. Do you understand that?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Do you also understand that if I saw fit, I could make those sentence run consecutive to each other?
>
> [Golka]: Yes, Your Honor.

We note the greater particularity at the arraignment on November 19, 2004, quoted earlier in this opinion, where the court advised Golka that counts I and III charged him with one count each of first degree murder and that the first degree murders were Class IA felonies. The court read the charging documents to Golka. The court specifically inquired if Golka understood the nature of the charges and the penalties, and Golka responded, "Yes, sir."

We have held that in a case where the defendant is represented by counsel and the court advised the defendant of the offense with which he was charged, the defendant has been adequately advised as to the nature of the offense. See *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984). The statement by the trial court at the plea hearing as to the nature of the charges was meager, but the statements by the trial court at the arraignment were ample. Although at no point in the exchange at the plea hearing did the court confirm that Golka understood the nature of the charges, the record does show that this inquiry was met at the arraignment. We believe that generally, where the defendant is properly advised of his rights during the proceedings, the plea is a voluntary and intelligent choice. See *State v. Wiley, supra.* Taking the arraignment and the plea hearing together, the record shows that Golka was properly advised of the nature of the charges and his understanding thereof.

With respect to the presumption of innocence, at the arraignment, Golka was advised that he was presumed to be innocent

and that this "presumption of innocence continues throughout the proceeding unless and until the State meets its burden of proof." This advisement goes beyond what is required in *Irish*.

Because Golka received the proper necessary advisements, appellate counsel did not fail to raise issues related thereto on appeal. The records and files in this case affirmatively show that there is no merit to Golka's claims of ineffective assistance of appellate counsel. The district court did not err when it denied relief on these issues without an evidentiary hearing.

Life Sentence for Juvenile Who Committed Homicide.

In his postconviction motion, Golka raised an issue with respect to his sentences. The allegation in his postconviction motion reads in its entirety as follows:

> 41. Mr. Golka's date of birth is November 9, 1986. The date of offense of the crimes for which he was convicted was October 24, 2004. Thus, he was 17 years old at the time the crimes were committed.
>
> 42. Sentencing children who were less than 18 years old at the time of the commission of theirs [sic] crimes constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and art. I, § 9 of the Nebraska Constitution.

Evidently, before the district court, Golka explained the import of the sentencing issue alluded to in his postconviction motion. In its order denying relief, the district court noted that Golka cited "no authority which would support this [sentencing] claim [and that] to the contrary, [the court] has located several cases in which courts of other jurisdictions have found the punishment of life in prison [for juveniles] was not cruel and unusual."

We are aware that subsequent to the filing of Golka's amended motion for postconviction relief and the court's order denying the motion, the U.S. Supreme Court issued its opinion in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). In that opinion, the Court considered the

sentencing of a juvenile nonhomicide offender and held that the Eighth Amendment to the U.S. Constitution prohibited the imposition of a life sentence without parole for the juvenile offender who did not commit homicide.

Since *Graham* and referring thereto, courts have upheld sentences of life without parole for juveniles who have committed homicides. *Jackson v. Norris*, 2011 Ark. 49, 578 S.W.3d 103 (2011); *State v. Andrews*, 329 S.W.3d 369 (Mo. 2010). The majority opinion in *Andrews* states that "the Court recognized [in *Graham*] that a line existed 'between homicide and other serious violent offenses against the individual.' . . ." 329 S.W.3d at 377. *Andrews* further states that "[b]y illustrating the differences between all other juvenile criminals and murderers, the Court implies that it remains perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder." *Id.* We agree with the reasoning of these cases.

Referring to his postconviction motion quoted above, we believe that Golka's allegations are conclusory and that he has alleged no facts in his postconviction motion upon which we could conclude that his life sentences for first degree murders constitute cruel and unusual punishment under the federal or state constitution. It is axiomatic that if a motion for postconviction relief alleges only conclusions of fact or law, no evidentiary hearing is required. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). An evidentiary hearing was not warranted on this issue, and the district court did not err when it so ruled.

CONCLUSION

The district court did not err when it denied Golka's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COMMISSION ON UNAUTHORIZED PRACTICE OF LAW, RELATOR, V. M.A. YAH, DOING BUSINESS AS PARENTAL RIGHTS, RESPONDENT.

796 N.W.2d 189

Filed April 22, 2011. No. S-10-882.

1. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.
2. ____: ____. The inherent power of the Nebraska Supreme Court to define and regulate the practice of law includes the power to prevent persons who are not attorneys admitted to practice in this state from engaging in the practice of law.
3. **Attorney and Client: Actions.** A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.
4. **Rules of the Supreme Court: Attorneys at Law.** Pursuant to its inherent authority to define and regulate the practice of law in Nebraska, the Nebraska Supreme Court has adopted rules specifically addressed to the unauthorized practice of law.

Original action. Injunction issued.

Sean J. Brennan, Special Prosecutor, for relator.

M.A. Yah, pro se.

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

PER CURIAM.

This is an original action to enjoin the unauthorized practice of law. We conclude that the injunction should issue.

BACKGROUND

On May 24, 2010, the Nebraska Supreme Court's Commission on Unauthorized Practice of Law (Commission) filed a petition for injunctive relief against M.A. Yah, doing business as Parental Rights (Respondent). The Commission alleged that it had received complaints that Respondent was engaging in the unauthorized practice of law within the State of Nebraska and that it had investigated such complaints and found them to have merit. Specifically, the Commission alleged that from June 1,

2009, until the date of the filing of the petition, Respondent had engaged in the unauthorized practice of law in that

> (A) the Respondent is giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to which it is given;
>
> (B) the Respondent has been selecting, drafting, or completing, for another entity or person, legal documents which affect the legal rights of the entity or person.

The Commission further alleged that pursuant to Neb. Ct. R. § 3-1014(F) (rev. 2008), it sent Respondent written notice of its findings and offered Respondent an opportunity to enter into a written consent agreement to refrain from engaging in the unauthorized practice of law, but he declined to enter into a consent agreement and continued to engage in the unauthorized practice of law. Based upon the allegations of the petition, the Commission requested this court to invoke the procedures set forth at Neb. Ct. R. § 3-1015(C) through (F) and enjoin Respondent "from engaging in the unauthorized practice of law in the State of Nebraska under threat of punishment pursuant to the contempt powers of this Court and assess costs of the proceedings against the Respondent."

Respondent was served with a copy of the petition and summons on June 9, 2010. He filed an answer admitting that he is a resident of Nebraska and conducts business in this State, but denying the material allegations of the petition. On the Commission's motion, this court appointed a hearing master pursuant to § 3-1015(F). On November 9, the hearing master conducted an evidentiary hearing at which Respondent appeared telephonically at Respondent's request. Following the hearing, the hearing master filed a report which included the following findings of fact (citations to the record are omitted):

> 1. Respondent is a resident of the State of Nebraska and conducts business in Douglas County, Nebraska.
>
> 2. Respondent is not licensed to practice law in the State of Nebraska.

3. At all pertinent times, up until October of 2010, the Respondent conducted business as Parental Rights at 1941 South 42nd Street, Suite 410 in Omaha, Douglas County, Nebraska. In . . . a complaint filed in a case styled *M.A. Yah, Parental Rights, Plaintiff, v. Jane Burk* [sic]*, et al.*, filed in the District Court of Douglas County, Nebraska, and found at Docket 1105 No. 408, Respondent himself alleges that he does business as Parental Rights and holds himself out as specializing in services related to domestic relations cases.

4. On or about August 28, 2009, the Respondent entered into a written agreement denominated as an "Agent/Client Agreement" with Glen Krueger under which Respondent agreed, for the sum of $1,425.00 to prepare a "Complaint for Custody" and to file the same in the District Court of Douglas County.

5. Pursuant to the "Agent/Client Agreement," the Respondent prepared what was entitled a "Complaint for Custody" and filed the same in the District Court of Douglas County, Nebraska in a case styled *Glen Krueger v. Ashley McDermott* and filed at Docket 1099 No. 165. On page three of the "Complaint for Custody" it indicates that the pleading was prepared by Parental Rights, P.O. Box 390945, Omaha, Nebraska 68139. The post office box is the same post office box listed on the business card of [Respondent], Regional Manager for Parental Rights.

6. In September of 2009, Mr. Krueger contacted Catherine Mahern, a professor of law at Creighton University and Director of the clinical program, who was volunteering at the self-help desk in the Douglas County Courthouse. Mr. Krueger stated to Ms. Mahern that [Respondent] had prepared the "Complaint for Custody" described above and provided him with legal advice on issues and process regarding the case. Mr. Krueger told Ms. Mahern that, pursuant to the "Agent/Client Agreement", he had made at least one payment in addition to the initial payment made at the time of execution of the agreement. Mr. Krueger confirmed the identity

of [Respondent] to Ms. Mahern through a review of mug shots that had been provided by the Sheriff's Department to the Douglas County District Court Clerk.

7. Respondent also drafted pleadings in a case styled *Danner v. Barnes*, in the District Court of Douglas County, Nebraska, at Docket 1101 No. 388. A "Complaint for Visitation" filed on or about November 4, 2009, in that case shows at the bottom thereof that it was prepared by Parental Rights, P.O. Box 390945, Omaha, NE 68139. Thereafter, in the same case, an "Amemded [sic] Motion for Temporary Allowance With Notice of Hearing" was likewise filed on or about the 8th day of December, 2009, with a notation that it was prepared by Parental Rights, P.O. Box 390945, Omaha, NE 68139.

8. Respondent also prepared pleadings in a case styled *State of Nebraska on behalf of itself and minor child Quartez A. Joplin, Plaintiff, v. Timothy M. Thompson, Jr., Defendant*, filed in the District Court of Lancaster County, Nebraska, as Case No. CI 05-1365. In the court file, there is a pleading entitled "Application to Modify" filed on behalf of Defendant Timothy M. Thompson, Jr., dated the 21st day of December, 2009, which contains a notation at the end to the effect that it was prepared by Parental Rights, P.O. Box 390945, Omaha, NE 68139. Thompson appeared in Court on the motion, which had not been set for a hearing, and provided to District Court Judge Karen Flowers a business card of the individual who had prepared the pleadings on his behalf. The business card is that of [Respondent], Regional Manager for Parental Rights, with the same post office box 390945 as appears at the foot of the filed "Application to Modify."

9. On at least two occasions, Respondent was identified as the individual filing pleadings on behalf of third parties. In the case of *State of Nebraska, et al., v. Lamensia Epperson*, filed in the Douglas County District Court as Case No. 1009-084, personnel at the Douglas County District Court Clerk's office, who were familiar with Respondent, confirmed that he personally filed a pleading to modify an earlier decree and award Epperson

custody of her children. Similarly, in a case styled *Butler v. Butler*, filed in the Douglas County District Court as Case No. 1091-049, personnel from the office of the Douglas County District Court Clerk confirmed that Respondent had filed an application to modify on behalf of Mr. Breyland Butler. Ms. Mahern confirmed, through conversations with Mr. Butler, that Mr. Butler learned of Respondent through an advertisement in the Thrifty Nickel, contacted Respondent, and entered into an agreement for at least $1,400.00 for which Respondent would prepare and file pleadings on his behalf in the case. Mr. Butler confirmed that Respondent prepared the pleadings and filed the same.

10. On at least two occasions, Respondent has filed actions in the Douglas County Court, Civil/Small Claims Division, seeking payment for the provision of legal services. In a case styled *M.A. Yah v. Howard W. Dial, Jr.*, filed as Case No. SC-09-1367 in the Douglas County Court, Civil/Small Claims Division, on December 2, 2009, Respondent alleged that "the Defendant promised to pay [Respondent] the sum of $1,625.00 to file a Complaint for Custody; . . ." Similarly, in a case styled *M.A. Yah v. Rosetta L. Bush*, filed as Case No. SC 09-1368 on December 14, 2009, in the Douglas County Court, Civil/Small Claims Division, Respondent alleged that "Rosetta Bush signed a contract hiring [Respondent] to prepare and file a joint custody complaint, for the sum of $1,425.00. After the complaint was filed, the Defendant made a couple of payments, then quit paying [Respondent], breaking the written contract."

11. The issue of Respondent possibly engaging in the unauthorized practice of law was brought to the attention of the [Commission] in September of 2009. On or about December 8, 2009, counsel for the [Commission] wrote to Respondent providing him a summary of the information received and requesting information on his organization so that the [Commission] could make a determination as to whether or not Respondent fell within any of the exceptions contained in the Rules on Unauthorized

> Practice of Law. By letter dated January 14, 2010, the Respondent replied, setting forth his position and contending, with arguments worthy of a true pettifogger, that his actions did not constitute the practice of law. Thereafter, on February 1, 2010, pursuant to direction of the [Commission], [the Commission's] counsel advised Respondent that [the Commission] found Respondent's actions to be in violation of the Supreme Court's Rules on the Unauthorized Practice of Law. That same letter requested Respondent to voluntarily cease his activities. Subsequent to transmittal of this letter to Respondent, [the Commission's] counsel received a phone call from Respondent who advised [the Commission's] counsel that "I ain't ceasing and desisting."
>
> 12. As recently as September 8 of 2010, Respondent prepared pleadings on behalf of a third party. In the case of *State v. Quincey Mothershed*, filed in the District Court of Douglas County, Nebraska, at Docket 1068 No. 166, the Respondent, pursuant to a written agreement with Mr. Mothershed, prepared documents to provide Mr. Mothershed with custody or access to his children.

Based upon these findings, the hearing master concluded "beyond any reasonable doubt that Respondent, who is not licensed to practice law in the state of Nebraska, has provided legal advice, drafted pleadings on behalf of others to be filed in court, and filed pleadings in courts of the state of Nebraska on behalf of third parties." The hearing master rejected Respondent's contention that he merely furnished legal forms, noting that the pleadings which Respondent prepared "were drafted for the particular circumstances of the case" and that "implicit in the drafting of these documents is the advice provided as to what pleading to use, what it should contain, where to file it and, in some instances, actual filing by the Respondent himself." The hearing master further concluded that Respondent engaged in such activities for compensation, noting that on at least two occasions, he sued his "'clients'" for failing to pay him for his preparation of pleadings.

The hearing master rejected Respondent's contention that his conduct was not specifically proscribed by the criminal

statutes pertaining to the unauthorized practice of law, noting authority from this state and elsewhere that courts have inherent power to investigate and restrain the unauthorized practice of law notwithstanding the existence of statutes which make such conduct a criminal offense. The hearing master concluded that Respondent had engaged in the unauthorized practice of law in violation of the rules promulgated by this court and recommended entry of a civil injunction pursuant to the rules of this court.

By order of this court and pursuant to Neb. Ct. R. § 3-1017, a copy of the hearing master's report was mailed to the parties and deadlines for the filing of exceptions to the report and briefs were established. These materials were mailed to Respondent at two separate addresses on file with the clerk's office. Both mailings were returned by the U.S. Postal Service marked as undeliverable and unable to forward. Respondent did not file exceptions to the report as permitted by § 3-1017(B).

On January 12, 2011, this court established a briefing schedule which was mailed to the parties. The mailings to Respondent at both of his known addresses were returned by the U.S. Postal Service marked as undeliverable and unable to forward. The Commission filed a motion requesting issuance of the injunction summarily on the basis of the existing record. Respondent did not respond to the motion, so on February 24, this court entered an order to show cause, requiring Respondent to show cause within 20 days of the order why the injunction should not issue. Respondent has not done so, and the matter is therefore ready for disposition.

DISPOSITION

[1] This court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.[1] As officers of the court, attorneys are

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[1] *State, ex rel. Hunter, v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937); *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937); *State, ex rel. Wright, v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936).

> an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.[2]

Pursuant to this inherent power, this court has adopted rules providing for an integrated bar[3] and rules establishing the standards and procedures by which attorneys may be admitted to practice before the courts of this state.[4] This court has also adopted rules establishing standards for professional conduct of attorneys[5] and rules governing the disciplinary procedures which may be invoked if an attorney violates those standards.[6] This court has also adopted rules requiring mandatory continuing legal education for attorneys who are active members of the Nebraska State Bar Association.[7]

[2,3] Our inherent power to define and regulate the practice of law includes the power to prevent persons who are not attorneys admitted to practice in this state from engaging in the practice of law.[8] This inherent power is undiminished by the fact that the Legislature has made the "[u]nauthorized practice of law" as defined by Neb. Rev. Stat. § 7-101 (Reissue 2007) a Class III misdemeanor. As we explained in *State, ex rel. Wright, v. Barlow*[9]:

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[2] *In re Integration of Nebraska State Bar Ass'n, supra* note 1, 133 Neb. at 289, 275 N.W. at 268.

[3] Neb. Ct. R. §§ 3-801 to 3-814 (rev. 2008).

[4] Neb. Ct. R. §§ 3-101 to 3-119.

[5] Neb. Ct. R. of Prof. Cond. §§ 3-501.0 to 3-508.5 (rev. 2011).

[6] Neb. Ct. R. §§ 3-301 to 3-328 (rev. 2011).

[7] Neb. Ct. R. §§ 3-401.1. to 3-402.3 (rev. 2011).

[8] See, *Cornett v. State*, 155 Neb. 766, 53 N.W.2d 747 (1952); *State, ex rel. Hunter, v. Kirk, supra* note 1; *State, ex rel. Wright, v. Barlow, supra* note 1.

[9] *State, ex rel. Wright, v. Barlow, supra* note 1, 131 Neb. at 302, 268 N.W. at 98-99.

> That an act denounced by statute as a crime may constitute a contempt of the court is beyond question, notwithstanding the offender may be prosecuted under a criminal statute. . . . This court possesses inherent power to protect itself and its officers from any unlawful interference with its functions as a court. This it may do, not only for the purpose of protecting the court and its officers, but in the interest of the public at large to prevent it from being exploited and injured by one unlawfully assuming to act as an officer of the court. There are many instances where persons' rights have been jeopardized and sacrificed because of following the counsel and advice of unlicensed persons, giving or attempting to give legal advice.

With certain very limited exceptions, our rules prohibit lawyers who are not admitted in Nebraska from practicing law here.[10] A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.[11] This is not for the benefit of lawyers admitted to practice in this state, but "'for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other . . . .'"[12]

[4] Pursuant to its inherent authority to define and regulate the practice of law in Nebraska, this court has adopted rules specifically addressed to the unauthorized practice of law.[13] In the statement of intent which precedes the rules, we stated:

> Nonlawyers may be untrained and inexperienced in the law. They are not officers of the courts, are not

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[10] See § 3-505.5(b).

[11] See, *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

[12] *Niklaus v. Abel Construction Co., supra* note 11, 164 Neb. at 852, 83 N.W.2d at 911, quoting *Bennie v. Triangle Ranch Co.*, 73 Colo. 586, 216 P. 718 (1923).

[13] Neb. Ct. R. §§ 3-1001 to 3-1021 (rev. 2008).

> accountable for their actions, and are not prevented from using the legal system for their own purposes to harm the system and those who unknowingly rely on them.
>
> . . . The purpose of the rules is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law.[14]

At the core of our rules pertaining to the unauthorized practice of law is a general prohibition: "No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule."[15] "'Nonlawyer'" is defined by the rules as "any person not duly licensed or otherwise authorized to practice law in the State of Nebraska," including "any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law."[16] The term "'practice of law'" is defined as

> the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:
>
> (A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.
>
> (B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.[17]

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[14] *Id.*

[15] § 3-1003.

[16] § 3-1002(A).

[17] § 3-1001.

Certain types of conduct on the part of nonlawyers are not prohibited by the rules, including "[n]onlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms."[18]

The unauthorized practice rules include civil enforcement procedures. The rules created the Commission, which consists of six attorneys and three laypersons appointed by the court, whose purpose is to receive and investigate complaints of unauthorized practice of law.[19] The Commission is authorized by the rules to resolve a complaint under investigation through a written consent agreement or consent decree.[20] The rules further authorize the Commission to institute civil injunction proceedings before this court,[21] as it has done in this case. When a respondent named in a petition files an answer which presents questions of fact, the rules provide that this court shall refer the matter to a hearing master for resolution.[22]

As noted, the hearing master appointed in this case filed a report which included findings of fact and a recommendation that an injunction be issued. Section 3-1018(A) provides:

> After de novo review of the proceedings before the Hearing Master, and upon consideration of any exceptions and briefs, the Supreme Court may adopt the report or modify or reject it in whole or in part and shall determine as a matter of law whether the respondent has been engaged in the unauthorized practice of law. If the Supreme Court finds that the respondent was engaged in the unauthorized practice of law, the Supreme Court may enter an order enjoining the respondent from further conduct found to constitute the unauthorized practice of law and make such further orders as it may deem appropriate, including restitution and the assessment of costs.

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[18] § 3-1004(G).

[19] §§ 3-1011 and 3-1012.

[20] § 3-1014(F).

[21] §§ 3-1014(H) and 3-1015.

[22] § 3-1015(F).

Based upon our de novo review of the record made before the hearing master, to which no exceptions were taken, and our consideration of all pleadings and reports filed herein, this court adopts the hearing master's report in its entirety. Based on the report, we conclude that Respondent is a nonlawyer who has repeatedly engaged in the practice of law as defined by § 3-1001(A) and (B). We agree with the hearing master's recommendation that injunctive relief is appropriate and necessary given Respondent's "intractable attitude" in response to the Commission's efforts to obtain his voluntary compliance with our rules prohibiting the unauthorized practice of law. The undisputed facts presented in this record clearly demonstrate a very real risk of harm to the public if Respondent's conduct is not enjoined.

Accordingly, by separate order entered on April 22, 2011, Respondent will be enjoined from engaging in the unauthorized practice of law in any manner, including but not limited to: rendering legal advice or counsel to others for compensation; selecting, drafting, or completing for another entity or person legal documents or pleadings to be filed in the courts of this state; and filing any pleadings on behalf of another entity or person in any court of this state. Noncompliance with this order of injunction shall constitute contempt punishable under this court's inherent power and § 3-1019.

INJUNCTION ISSUED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY D. RILEY II, APPELLANT.
796 N.W.2d 371

Filed April 28, 2011. No. S-09-731.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
4. **Motions for Mistrial.** Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial.
5. **Polygraph Tests: Prejudicial Statements.** Although the results of a polygraph test are not admissible in evidence, the mere mention of the word "polygraph," absent more, does not constitute prejudicial error.
6. **Constitutional Law: Criminal Law: Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
7. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded for a new trial.

Peter K. Blakeslee for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Anthony D. Riley II appeals his convictions in the district court for Lancaster County for manslaughter and three counts of attempted second degree murder. We conclude that the district court erred when it overruled Riley's motion for a mistrial based on the polygraph testimony of the alternate suspect, Terrell Jones. We reverse the convictions, and because the evidence was sufficient to support the convictions, we remand the cause for a new trial.

STATEMENT OF FACTS

This case generally involves an incident in which shots were fired from one vehicle into another vehicle, causing one death

and injuries to the occupants of the second vehicle. Riley was charged with second degree murder in connection with the August 6, 2006, shooting death of Doyle Bryant and with three counts of attempted second degree murder with regard to three other men who were in the vehicle with Doyle when he was shot. Riley was also charged with one count of unlawful discharge of a firearm at an occupied vehicle and five counts of use of a weapon to commit a felony. A jury found Riley guilty of the lesser-included offense of manslaughter and the three counts of attempted second degree murder but returned verdicts of not guilty on the unlawful discharge of a firearm and use of a weapon charges.

According to testimony at trial, on the evening of August 5, 2006, Doyle, his brother Daryl Bryant, their cousin LaRon Tolbert, and their friend Lynell Green drove from Omaha, Nebraska, to Lincoln, Nebraska, to celebrate Doyle's recent graduation and new job. Sometime near midnight, the group went to a nightclub in downtown Lincoln, where there was a line to enter the club. They waited for a time but decided they were not going to get in. Tolbert and Green left to get the car, while Doyle and Daryl waited outside the club. While waiting for Tolbert and Green to pick them up, Doyle and Daryl witnessed a fight break out on the street outside the club.

With Green driving the car, Doyle in the front passenger seat, and Daryl and Tolbert in the back seat, the men drove around downtown Lincoln. As they approached the intersection of 27th and O Streets, Green noticed the driver of another car staring at them "like he had a problem or something." After Green turned the car onto O Street, the men decided to return to Omaha. As Green headed back to North 27th Street, he saw that the car he had noticed earlier was behind them. He was surprised because the car had been headed in another direction and would have needed to turn around in order to be behind them. Green drove north on North 27th Street, and when he stopped for a light at Cornhusker Highway, he saw that the other car was directly behind them.

When the light changed, Green continued north on North 27th Street and the other car followed. Eventually, near the intersection of North 27th Street and Folkways Boulevard, the

other car sped up and began to pass the car Green was driving. As the car passed in the left lane, five or six gunshots were fired into the car driven by Green. One bullet struck Green in the upper left thigh. He tried to stop the car by braking, but lost control. The car went off the street and hit a pole. In addition to Green's being shot in the thigh, Daryl was shot through the leg, and Doyle was shot through the arm and chest. Doyle died from the gunshot wounds.

A broadcast went out to Lincoln police with a description of the car involved in the shooting and a description of the driver. At about 2:30 a.m., two police officers responded to a call regarding a loud party. As they approached the house, they noticed a car parked near the house that matched the description of the car involved in the shooting. The officers saw two men standing next to the car, and one of the men matched the description of the driver of the car from which the gunshots were fired. The man identified himself to the police as O'Dari Wiley and told them that the car was owned by his cousin, Riley. The police then spoke to Riley, who first identified himself by a false name but later admitted his true name. Riley and Wiley were taken to a police station for interviews. Both denied being involved in the shooting and provided alibis for the evening. Green arrived at the police station and identified Wiley as the driver of the car from which the shots were fired.

Further investigation led police to determine that Jones and Tramel Patterson were also occupants of Riley's car at the time gunshots were fired from Riley's car. The men initially denied being in the car or being involved in the shooting, but eventually Wiley, Jones, and Patterson admitted that they were in the car at the time of the shooting, and they each asserted that Riley had fired the shots into the car driven by Green.

According to Wiley's testimony at trial, on the night of the shooting, Wiley, Riley, Jones, and Patterson had been at the same club where Doyle and his companions had waited in line. When they left the club, they became involved in a street fight with several other people. They then got into Riley's car, with Wiley driving, Patterson in the front passenger seat, Jones in the back seat on the driver's side, and Riley in the back seat

on the passenger's side. Jones and Riley were upset about the fight and angry that they had been "jumped" outside the club. Jones saw a car driving by and said that the occupants of the car looked like the men who had jumped them. Riley said, "I want to get them. I want to kill these guys." Riley asked Wiley to stop the car and pop open the hood. Wiley did not see what Riley did, but he knew that Riley kept a gun under the hood of the car.

They began following the car near the intersection of 27th and O Streets and followed it north on North 27th Street. Riley told Wiley to catch up to the other car, and Jones said he wanted to fight the men in the car. As Wiley pulled up in the left lane with the other car in the right lane, he signaled to the men in the car that he wanted to fight. The driver of the other car gave a signal that Wiley took to mean he agreed to fight. As the cars moved, Wiley heard five or six gunshots and thought that someone from the other car was firing at them. After the shooting stopped, he looked toward the back seat and saw that Riley had a gun in his left hand. Riley yelled that he hoped one of the men in the other car was dead. Riley waved the gun and told Wiley to drive him home. Riley went into his apartment and came out with a bag containing gun shells. Riley said he needed to get rid of the shells, and he dropped them into a street drain. Wiley drove to the party where the police later found him and Riley.

Riley was arrested for the shootings. The State charged him with second degree murder, three counts of attempted second degree murder, unlawful discharge of a firearm into an occupied vehicle, and five counts of use of a weapon to commit a felony.

Prior to trial, the State filed a motion in limine seeking an order to prevent Riley from "discussing in voir dire, opening statement, [or] closing argument, or adducing any evidence regarding . . . [p]olygraph results and any reference to taking or refusing to take polygraphs of any of the State's witness[es]." In another motion in limine, the State sought an order to prevent Riley from discussing or adducing "[e]vidence of the facts or circumstances [of the] State's Witnesses' convictions or arrests beyond eliciting whether they [sic] were convictions in

the last 10 years and whether they were felonies or crimes of dishonesty." The court sustained both motions in limine.

At trial, the focus of Riley's defense was that Jones rather than Riley fired the shots into the other car. Jones testified as a witness for the State. During Riley's cross-examination of Jones, Riley questioned Jones regarding a police interview of Jones. Jones acknowledged that the police investigator had told Jones that the police suspected him of being the shooter. Riley then asked Jones whether the investigator had said that one reason he suspected Jones was because Jones had "spent time for shooting at people in a car before." The State objected to the question on the basis of hearsay and because it violated the order in limine directing Riley not to ask about the facts or circumstances of the prior convictions of the State's witnesses. The court found that the question violated its order sustaining the motion in limine, and it sustained the State's objection. Riley thereafter made an offer of proof designed to show that the current shooting was similar to a "signature crime" for which Jones had previously been convicted. See Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008). Riley continued that if allowed to testify on the matter, Jones would say, inter alia, that in 2002, while traveling on North 27th Street, he had fired a gun from one moving vehicle into another and that he had been convicted and imprisoned for that crime.

Later in Riley's cross-examination of Jones, Riley questioned Jones regarding Jones' communications with Patterson, who was Jones' brother. Riley asked whether Jones communicated regularly with Patterson after Jones' arrest in connection with the current shooting incident and asked specifically whether Jones had called Patterson to discuss what he had told the police. During this questioning, the following exchange occurred:

> Q. [Riley's attorney] Okay. You called [Patterson] yourself and told him what you'd done —
>
> A. [Jones] Yeah.
>
> Q. — as far as the proffer's concerned.
>
> A. Uh, I believe so, yeah. No, when I talked to him I told him I had took — uh — a polygraph test. That's what I told him. That's when I talked to him.

Riley immediately asked permission to approach the bench and moved for a mistrial because the order sustaining the State's motion in limine prohibited references to polygraph tests. The court released the jury in order to hear argument on the motion outside the jury's presence. Riley noted that his questions did not lead Jones to say that he had taken a polygraph test. Riley argued that after the jury heard that Jones had taken a polygraph test, because Riley and not Jones was on trial as the shooter, the only conclusion the jury could reach was that Jones had passed the polygraph test and could not be the alternate suspect as urged by Riley in his defense. Riley also advised the court that in fact Jones had failed the polygraph test.

In considering the motion for a mistrial, the court received evidence, including the results of Jones' polygraph test which indicated that Jones had failed the test and that he had reacted both when he stated that Riley had fired the shots and when he denied that he himself had fired the shots. Riley asked that if the court overruled his motion for a mistrial, he be allowed to present the polygraph test results to the jury. The court found that Jones' mention of a polygraph test was inadvertent and overruled the motion for a mistrial. The court stated that there would be no evidence put before the jury of whether or not Jones took a polygraph test or of the results. The court struck Jones' answer and instructed the jury to disregard it.

In his defense, Riley testified that Jones fired the shots into the other car. Riley testified that he was not involved in the fight outside the club but that his companions apparently got involved in the fight while he was getting the car. He also disputed testimony by the other witnesses that he was in the back seat on the passenger's side when the shooting occurred. He testified instead that he was in the back seat on the driver's side and that Jones was on the passenger's side. Riley testified that Jones was angry about being jumped outside the club and that when they spotted the other car, Riley had no reason to think the men in the car had been involved in the fight. Riley testified that he saw Jones fire shots into the other car but that before Jones fired the shots, he did not know that Jones had a gun with him.

Riley testified that he initially lied to the police about the shooting because he was scared for his life. In connection with such testimony, Riley again attempted to present evidence of the 2002 shooting by Jones. The court allowed Riley to testify to what he had learned of the prior shooting for the limited purpose of establishing that Riley feared Jones. Prior to such testimony, the court instructed the jury that the evidence was not received for the purpose of showing that Jones acted in conformity with his prior acts in this instance but instead for the limited purpose of explaining why Riley did not initially tell police that Jones fired the shots. The court instructed the jury that it must not consider the evidence for any other purpose. Riley then testified that he had heard that in 2002, Jones "got into it with somebody at [a store] on 27th Street [and] ended up firing into the car" and that Jones then "ended up in another car with somebody else driving up 27th Street, firing at the same car."

Following its receipt of evidence, the court instructed the jury on manslaughter as a lesser-included offense of second degree murder. The court instructed that one of the elements of manslaughter was that the defendant caused the death of another "unintentionally while in the commission of an unlawful act." The court did not define "unlawful act," nor did it specify the unlawful act Riley was alleged to have been committing when he caused Doyle's death. Riley did not object to the manslaughter instruction, nor did he request an instruction defining "unlawful act" or specifying the unlawful act.

The jury returned guilty verdicts for manslaughter and three counts of attempted second degree murder. The jury, however, found Riley not guilty of unlawful discharge of a firearm at an occupied vehicle and not guilty of the five counts of use of a weapon to commit a felony.

Riley moved for a new trial on various bases. The court overruled the motion and thereafter sentenced Riley to imprisonment for 20 to 20 years on the manslaughter conviction and for 8 to 15 years on each of the three attempted second degree murder convictions. The court ordered all the sentences to be served consecutive to one another.

Riley appeals his convictions.

ASSIGNMENTS OF ERROR

Riley claims that the district court erred when it (1) overruled his motion for a mistrial based on Jones' testimony that he took a polygraph test, (2) refused thereafter to allow Riley to present evidence of the results of Jones' polygraph test, (3) limited Riley's cross-examination of Jones regarding Jones' prior shooting conviction and instructing the jury to limit its use of the evidence regarding the prior shooting, (4) gave a lesser-included offense instruction on the elements of manslaughter without specifying the underlying unlawful act, and (5) overruled Riley's motion for a new trial. Riley also asserts that there was not sufficient evidence to support the verdict, that his rights to due process and a fair trial were violated when the jury returned verdicts that were inconsistent, and that the cumulative effect of various trial errors deprived him of his "right to a public trial by an impartial jury."

STANDARDS OF REVIEW

[1,2] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

The District Court Erred When It Overruled Riley's Motion for a Mistrial Based on Jones' Polygraph Testimony.

Riley claims that the district court erred when it overruled his motion for a mistrial after Jones testified that he had taken a polygraph test. We conclude that because Riley's assertion that it was Jones rather than Riley who fired the shots at the other car was central to Riley's defense, Jones' testimony that he had taken a polygraph test, accompanied by the fact that Jones was not the defendant and the implication that Jones had passed the test, were prejudicial to Riley, and the district court

erred when it denied Riley's motion for a mistrial. We reverse on this basis.

[3,4] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *Id*. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters provide examples of events which may require the granting of a mistrial. *Id*.

The basis of Riley's motion for a mistrial was Jones' testimony in response to a question on cross-examination about Jones' communications with Patterson, his brother, after Jones had been arrested in connection with the shooting. Although the question was not designed to elicit testimony regarding a polygraph test, Jones testified that "when I talked to him I told him I had took — uh — a polygraph test." Riley immediately moved for a mistrial, and the court dismissed the jury for the evening in order to hear argument from counsel and consider the motion outside the jury's presence. The court overruled the motion, and when the jury returned to the courtroom the next morning, the court instructed the jurors that "the last answer given by . . . Jones" the prior day was stricken and was to be disregarded by the jury and not considered for any purpose.

[5] We have stated that although the results of a polygraph test are not admissible in evidence, the "mere mention of the word 'polygraph,' absent more, does not constitute prejudicial error." *State v. Anderson and Hochstein*, 207 Neb. 51, 67, 296 N.W.2d 440, 451 (1980). In *State v. Beach*, 215 Neb. 213, 337 N.W.2d 772 (1983), we concluded that a reference to a polygraph test was not prejudicial and that therefore, the trial court did not err when it overruled a motion for a mistrial based on such reference. In *Beach*, we noted that the circumstances of the case were similar to those in *Anderson and Hochstein, supra*, and another case in which we had concluded that a reference to a polygraph test was not prejudicial. We noted that in all three cases, "the mention of a polygraph test was inadvertent and unrequested; the results of the tests were not

disclosed; the reference was properly objected to; and the trial court instructed the jury to disregard the references to the polygraph tests." 215 Neb. at 218, 337 N.W.2d at 776.

Although the factors in *Beach* and *Anderson and Hochstein* were also present in this case, the fact that the mention of the polygraph test was by Jones—who Riley claimed was the shooter—requires a different result. Similar to the previous cases, Jones' reference to the polygraph test was not prompted by the State, the results of the test were not disclosed, Riley objected immediately, and the court instructed the jury to disregard the answer that included the reference. However, there are other factors present in this case that lead us to conclude that Jones' reference to having taken a polygraph test was prejudicial to Riley and that therefore, the court should have granted Riley's motion for a mistrial.

Contrary to the cases noted above where we cited the fact that the polygraph test results were not disclosed as a factor tending to minimize prejudice to the defendant, in this case, the fact that the results were not disclosed to the jury increased the risk of prejudice to Riley. We note that a central part of Riley's defense was his assertion that he did not shoot into the other car and that instead it was Jones who fired the shots. Because both Riley and Jones testified at trial and accused each other of firing the shots, the relative credibility of each man's testimony was crucial to the jury's determination of whether there was a reasonable doubt whether Riley fired the shots. When Jones stated that he had taken a polygraph test, the jury could reasonably have inferred that Jones passed the polygraph test, because the State charged Riley with having fired the shots. If the jury presumed that Jones passed the polygraph test, such presumption could readily have caused the jury to find Jones' testimony more credible than Riley's. The jury's presumption that Jones passed the polygraph test could have given Jones an undeserved badge of credibility, because in fact Jones did not pass the polygraph test. In this regard, we note that in support of his motion for a mistrial, Riley presented evidence that Jones had failed the polygraph test and that Jones had specifically reacted to questions about whether he or Riley had fired the shots.

In *State v. Edwards*, 412 A.2d 983 (Me. 1980), the Supreme Judicial Court of Maine concluded that a brief mention of a lie detector test was prejudicial, because the witness who stated that she took the test was the victim of the alleged sexual misconduct and her credibility was central to the case against the defendant. The court stated:

> When the prosecutor's questioning inadvertently elicits a witness's reference to a polygraph test, there is cause for mistrial if, but only if, the reference to the test raises an inference about the result that substantially prejudices the defendant's case. . . . In deciding whether to grant or deny a defendant's motion for mistrial in such a situation, the trial court must weigh various factors bearing on the substantiality of any resulting prejudice to the defendant. Among other factors, it must determine (1) whether the inference as to the result of the test may be crucial in assessing the witness's credibility, and (2) whether "the witness's credibility play[s] a vital role in the case."

Id. at 985 (citations omitted). The court in *Edwards* concluded that the reference to the lie detector test was substantially prejudicial and required a mistrial because the victim's statement "was sufficient to inform the jury that she had taken the test, and the natural and reasonable implication of the reference was that she had passed it." *Id.* at 987.

Similarly, the Court of Appeals of Maryland in *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800 (1984), concluded that a mistrial was required when the complaining witness inadvertently testified that she had taken a lie detector test. The court reasoned, "Knowing that a witness took a lie detector test, a jury might make the unmistakable inference that the results of the test were that the witness told the truth, and is telling the truth as he [or she] testifies." *Id.* at 661, 480 A.2d at 804.

The State notes that in *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982), this court held that a mistrial was not required where an accomplice to a theft testified that he had taken a polygraph test. We noted that the reference to the polygraph test was volunteered by the witness, that the result of the test was not disclosed, that prompt objection was made to the reference, and that the court instructed the jury

to disregard the reference. The present case is distinguishable from *Vrchota* because Riley's theory of defense presents Jones as the alternate suspect for the shooting, and therefore the relative credibility of Jones' and Riley's testimony is more squarely at issue. Jones was not on trial as an accomplice. Where the witness is an accomplice, as in *Vrchota*, the evidence is that both persons took part in the crime. Where the witness is an alternate suspect, as in the present case, the witness' credibility is central to the case.

In *Hembree v. State*, 546 S.W.2d 235, 240 (Tenn. Crim. App. 1976), the court concluded that testimony a witness took a lie detector test was prejudicial and that the prejudice could not be cured by the trial court's striking the testimony, because the "proof was that either this witness or the [defendant] shot the deceased and the jury's knowledge of a successful lie detector test probably served to bolster and give greater weight to this witness's testimony." See, also, *Simeon v. State*, 520 So. 2d 81, 83 (Fla. App. 1988) (witness' reference to having taken lie detector test impermissibly bolstered his testimony and was not harmless where witness was "the defendant's primary accuser and the only alternative actual offender"); *Morris v. State*, 264 Ga. 823, 452 S.E.2d 100 (1995) (references to witness' having taken lie detector test bolstered his credibility and his testimony that he had nothing to do with murder).

We note further that the motion in limine to prevent references to polygraph tests was filed by the State, and the State had a duty to ensure that its witnesses did not make such references. In this regard, we refer to the observation of the Kansas Supreme Court which provides:

> Whether there is an order in limine or not, a prosecutor has the duty to guard against statements by his or her witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his or her examination, the prosecutor must warn the witness to refrain from making such a statement.

State v. Crume, 271 Kan. 87, 101, 22 P.3d 1057, 1068 (2001).

We agree with the reasoning of the Kansas Supreme Court and note that in preparing Jones for trial, it would have been prudent for the State to have warned Jones to refrain from

mentioning that he had taken a polygraph test. Although Jones' reference to the polygraph test was made while he was being cross-examined by Riley, Riley's question to Jones was not designed to prompt Jones to mention the polygraph test. Jones was the State's witness, and it was the responsibility of the State to instruct Jones on his obligation to comply with the order in limine.

Because of the importance of Jones as the alternate suspect, we conclude that Jones' reference to having taken a polygraph test, accompanied by the inference that he passed the test, were prejudicial to Riley's defense and that the damaging effect of the testimony could not be removed by admonition or instruction to the jury. We therefore conclude that the district court abused its discretion when it overruled Riley's motion for a mistrial based on the polygraph reference. Because the district court should have granted the motion for a mistrial, we reverse Riley's convictions for manslaughter and three counts of attempted second degree murder.

Because the Evidence Was Sufficient to Support Riley's Convictions, a New Trial May Be Held on Remand.

Having found reversible error, we must consider whether Riley can be subjected to a retrial. We conclude that with regard to the charges of which Riley was convicted—one count of manslaughter and three counts of attempted second degree murder—the evidence introduced at the trial, whether erroneously or not, was sufficient to sustain the guilty verdicts and that therefore, Riley can be retried on such charges.

[6] The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

We note first that the jury acquitted Riley of one count of unlawful discharge of a firearm at an occupied vehicle and five counts of use of a weapon to commit a felony. Therefore, Riley

may not be retried for such charges on remand. See *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009) (Double Jeopardy Clauses of both federal and Nebraska Constitutions protect against, inter alia, second prosecution for same offense after acquittal). We note also that the jury acquitted Riley of second degree murder when it found him guilty of the lesser-included offense of manslaughter; therefore, Riley cannot be retried for second degree murder on remand. See *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998) (conviction of lesser-included offense was implied acquittal of greater offense, and defendant could not be retried for greater offense).

We must then determine whether the evidence admitted by the district court in this case was sufficient to sustain guilty verdicts for one count of manslaughter and three counts of attempted second degree murder and whether Riley may therefore be retried for such crimes. The manslaughter conviction related to the shooting and death of Doyle, and the three attempted second degree murder convictions related to attempts to cause the deaths of the other three occupants of the vehicle—Daryl, Green, and Tolbert.

With regard to the three attempted second degree murder convictions, we conclude that there was sufficient evidence to support the convictions. The State needed to prove that Riley intentionally engaged in conduct that constituted a substantial step in a course of conduct intended to culminate in the commission of murder in the second degree, which is defined as causing the death of each of the victims intentionally, but without premeditation. See Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 2008). There was evidence, mainly the testimony of Wiley, Jones, and Patterson, from which the jury could have found that Riley intended to cause the deaths of all the occupants of the vehicle and that he took a substantial step in the commission of such crimes by firing a gun into the vehicle several times.

With regard to the manslaughter conviction, the court instructed the jury on second degree murder and the lesser-included offense of manslaughter. The jury rejected the second degree murder charge and found Riley guilty of manslaughter. The court instructed the jury that a conviction for manslaughter

required findings that Riley "killed Doyle . . . without malice" and that Riley "caused the death of Doyle . . . unintentionally while in the commission of an unlawful act."

We find that the evidence in this case supported the jury's verdict that Riley was guilty of manslaughter. There was evidence, including the testimony of Wiley, Jones, and Patterson, that Riley fired shots into the vehicle in which Doyle was a passenger. There was also evidence that Doyle was shot through the arm and chest and that the gunshot wounds caused his death. Therefore there was evidence from which the jury could find that Riley caused the death of Doyle. There was also evidence that the death was caused while Riley was in the commission of an unlawful act. Pursuant to Neb. Rev. Stat. § 28-1212.02 (Reissue 2008), it is a felony to "intentionally discharge[] a firearm at an . . . occupied motor vehicle." The testimony of Wiley, Jones, and Patterson supported a finding that Riley discharged a firearm at an occupied vehicle. We are not asked and we make no comment on whether there is or could be evidence of another unlawful act or acts which could serve as the unlawful act to support a manslaughter case upon retrial.

We note that Riley assigns error in this appeal to the district court's purported failure to give a jury instruction specifying the underlying unlawful act or acts or defining "unlawful act." We further note, however, that Riley failed to object to the manslaughter instruction or offer an alternate instruction at trial. Absent plain error indicative of a probable miscarriage of justice, the failure to object to a jury instruction after it has been submitted for review precludes raising an objection on appeal. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). Because we have reversed the convictions on other grounds, we need not consider whether there was plain error in the manslaughter instruction, and although the issue may recur on remand where the court will be required to instruct the jury on the elements of manslaughter, Riley will have the opportunity to object to an instruction he believes to be deficient and to propose an alternate instruction.

We also note in this regard that on remand, the trial court should consider whether the underlying unlawful act to support

a conviction for manslaughter can be unlawful discharge of a firearm at an occupied vehicle when Riley was acquitted of such charge in this trial. See *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996) (under double jeopardy principles, acquittal of felony in previous trial prevents use of same felony as underlying felony to support felony murder prosecution in retrial). Again, we are not asked and make no comment on whether there is or could be evidence of another unlawful act or acts which could serve as the unlawful act to support a manslaughter case upon retrial.

We further note that Riley claims in this appeal that his rights to due process and a fair trial were violated when the jury returned verdicts that were inconsistent. He argues that no rational fact finder could acquit him of the charge of unlawful discharge of a firearm at an occupied vehicle and the five counts of use of a weapon to commit a felony but still find him guilty of manslaughter and three counts of attempted second degree murder. We have stated that when acquittals and guilty verdicts on different counts in a multicount prosecution are asserted to be inconsistent, we cannot speculate as to the reason for a jury's verdicts and instead must consider only whether the evidence can sustain the convictions without speculating about the reason the jury acquitted the defendant of other charges. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). In addition, the U.S. Court of Appeals for the Eighth Circuit has stated that "a defendant may not challenge a conviction because it is inconsistent with another part of the jury's verdict." *U.S. v. Wisecarver*, 598 F.3d 982, 986 (8th Cir. 2010). But see *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010) (holding that in case involving conviction of compound felony, where compound felony and predicate felony are both charged, when defendant is acquitted of underlying predicate felony, conviction for compound felony cannot stand). Therefore, the fact that Riley was acquitted of one count of unlawful discharge of a firearm at an occupied vehicle and the five counts of use of a weapon to commit a felony does not change our conclusion above that the evidence in this case was sufficient to support the convictions for manslaughter and three counts of attempted second degree murder.

This Court Need Not Address Riley's Remaining Assignments of Error.

[7] Having determined that Riley's convictions should be reversed based on the polygraph issue, we need not address Riley's remaining assignments of error. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008). We discussed Riley's assignments of error with regard to the manslaughter instruction and the inconsistent verdicts to the extent necessary in connection with our review above of whether there may be a retrial on remand. We need not comment further on such issues, and we need not consider any of Riley's remaining assignments of error.

CONCLUSION

We conclude that the district court erred when it overruled Riley's motion for a mistrial based on Jones' testimony that he took a polygraph test. We therefore reverse Riley's convictions for manslaughter and three counts of attempted second degree murder. We further conclude that there was sufficient evidence to support Riley's convictions and that therefore, Riley may be retried on such charges on remand.

REVERSED AND REMANDED FOR A NEW TRIAL.

REX J. MOATS, APPELLANT, V. REPUBLICAN PARTY OF NEBRASKA, ALSO KNOWN AS THE NEBRASKA REPUBLICAN PARTY, APPELLEE.

796 N.W.2d 584

Filed April 28, 2011. No. S-09-929.

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. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Libel and Slander: Negligence.** A claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
5. **Libel and Slander: Proof: Words and Phrases.** When the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must demonstrate actual malice, which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence.
6. **Libel and Slander: Proof.** The plaintiff in a public-libel action must establish by clear and convincing evidence that the alleged statement is false.
7. **Libel and Slander: Words and Phrases.** There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and of special damages.
8. **Libel and Slander.** Whether a communication is libelous per se is a threshold question of law for the court.
9. ____. A communication is defamatory if it tends so to harm the reputation of another as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.
10. ____. Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood.
11. **Constitutional Law: Libel and Slander.** In the context of a defamation claim, the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author.
12. ____: ____. In assessing whether a statement implies a false assertion of fact or a protected opinion, a court looks at the nature and content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.
13. ____: ____. Courts applying the totality of the circumstances test in a defamation claim look to factors such as whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, whether the defendant used figurative or hyperbolic language that negates the impression, and whether the statement in question is susceptible of being proved true or false.
14. ____: ____. Publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., and, on brief, Mark D. Raffety, for appellant.

L. Steven Grasz, of Husch, Blackwell & Sanders, L.L.P., for appellee.

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

PER CURIAM.

INTRODUCTION

The appellant, Rex J. Moats, a former candidate for the Nebraska Legislature, filed a complaint in the district court for Douglas County against the appellee, the Republican Party of Nebraska, also known as the Nebraska Republican Party (Republican Party). In his complaint, Moats identified 11 numbered publications issued by the Republican Party which he alleges were actionable under various theories. With respect to each publication, except publication No. 10, Moats alleged that the publication violated his rights under Nebraska's Consumer Protection Act (CPA), see Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2010); defamed him; and amounted to an invasion of privacy by putting him in a false light in violation of Neb. Rev. Stat. § 20-204 (Reissue 2007). Moats also alleged that publication No. 10, although not defamatory, violated his rights under the CPA and amounted to an invasion of privacy by putting him in a false light.

The Republican Party filed a motion to dismiss the complaint. The district court for Douglas County dismissed Moats' complaint in its entirety under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failing to state a claim upon which relief could be granted. Moats appeals. We affirm.

FACTUAL BACKGROUND

In 2008, Moats became a candidate for the Nebraska Legislature in District 39. During the course of the election, the Republican Party paid for and distributed publications

in opposition to Moats' candidacy. Moats filed a complaint in Douglas County District Court in which he identified 11 numbered publications that he alleged were actionable. Moats claimed that 10 of these publications were actionable under three theories: violation of the CPA, defamation, and the tort of invasion of privacy by false light. In his complaint, Moats claimed that publication No. 10 was actionable only under the theories of violation of the CPA and the tort of invasion of privacy by false light. The content of publication No. 10 is not quoted in the complaint.

The relevant portions of the 11 publications are described in Moats' complaint as follows:

Publication No. 1: On or about April 20, 2008, a publication designated "NE GOP 39-001" asserted: "'*Trial attorney Rex Moats is a registered Democratic* [sic] *and the Democrat* [sic] *Party is supporting him!*'"

Publication No. 2: On May 7, 2008, an 8½- by 11-inch folder designated "NE GOP 39-003" asserted: "'*Moats received a $50,000 trust fund from the director of National Warranty*.'"

Publication No. 3: On May 5, 2008, a publication stated: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would . . .*'" This publication further stated: "'*How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well*.'"

Publication No. 4: This publication was an illustrated letter purportedly sent by Moats from the Cayman Islands to Nebraskans. On the front, it stated: "'*Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats*.'" On the back of the letter, it stated in relevant part:

> **Dear Nebraskan,**
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly — **I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.** The tax benefits sure are great out here!

> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing "just fine," but then declared bankruptcy two weeks later.

Publication No. 5: On October 2, 2008, a brochure publication designated "NE GOP 0004" asserted: "'*Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street*.'"

Publication No. 6: On October 8, 2008, a publication designated "NE GOP 002" asserted: "'*Rex Moats cannot be trusted with your money*.'" The publication further stated that Moats was a "'*trial attorney*'" and that "'*National Warranty's directors set aside $50,000 for Rex Moats*.'"

Publication No. 7: An October 20, 2008, publication asserted that Moats was sued as a defendant in litigation. According to the complaint, the publication failed to disclose that the litigation against Moats was dismissed without a trial and had no merit. The publication also asserted: "'*Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers*.'"

Publication No. 8: On October 30, 2008, a publication designated "NE GOP 009" asserted: "'*Rex Moats received a $50,000 golden parachute even though 150 Nebraskans lost their jobs*.'" On October 31, the Republican Party issued a publication which stated: "'*Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty*.'"

Publication No. 9: On November 1, 2008, a publication designated "NEB 023," exhibiting a newborn baby, asserted: "'[*A*]*ccording to his own letter to the editor of a local newspaper, Rex Moats supports using your tax dollars to fund abortions*.'"

Publication No. 10: On November 1, 2008, the Republican Party issued a publication designated "NEB-015" which, according to the complaint, asserted "false information." The

complaint does not contain the substance of the publication. Moats alleges that this publication was within the bounds of what is permissible under the law of defamation.

Publication No. 11: On November 3, 2008, the Republican Party issued a publication which asserted: "'*Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust*,'" and "'*Rex Moats supports using tax dollars to fund abortions*.'"

In his complaint, Moats claimed that each one of the above publications was false and that the statements in each of the publications were made by the Republican Party with actual malice. Moats further alleged that the actions undertaken by the Republican Party constituted "smears against . . . Moats, i.e., deliberate and unsubstantiated accusations intended to foment distrust or hatred against . . . Moats." Moats' complaint stated that he suffered actual and special damages but did not plead damages with particularity.

The Republican Party filed a motion to dismiss the complaint for failure to state a claim for relief pursuant to § 6-1112(b)(6). The court held a hearing on the matter on May 27, 2009, and filed an order granting the motion to dismiss the complaint in its entirety on September 3. Moats appeals.

ASSIGNMENTS OF ERROR

Moats claims that the district court erred in (1) dismissing Moats' complaint for failure to state any claim upon which relief could be granted; (2) failing to recognize that the 11 publications constituted a violation of the CPA by the Republican Party; (3) failing to recognize that the claims asserted by Moats constituted defamation against him; (4) failing to recognize that Moats has stated "one or more" claims for having been placed in a false light contrary to § 20-204; and (5) failing to grant Moats leave to amend his complaint to cure any technical deficiencies, such as pleading special damages with particularity.

STANDARD OF REVIEW

[1,2] 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.[1] 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.[2]

ANALYSIS

Constitutional Considerations

As an initial matter, both Moats and the Republican Party draw our attention to the fact that this case arises in the context of a political campaign and has First Amendment implications. While considering a First Amendment challenge to the constitutionality of a federal criminal statute, the U.S. Supreme Court recently summarized the historical and accepted restrictions upon the content of speech as follows:

> "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." . . . These "historic and traditional categories long familiar to the bar," . . . including obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct, . . . are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[3]

Both parties note that the First Amendment's provision of freedom of speech affords broad protection to political

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[1] *Doe v. Board of* Regents, 280 Neb. 492, 788 N.W.2d 264 (2010).

[2] *Id.*

[3] *United States v. Stevens*, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (citations omitted).

expression[4] and that free "discussions of candidates" are to be encouraged.[5] It has been said that "'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'"[6] Both parties agree that Moats is a public figure and acknowledge that in order to protect his reputation, as a former candidate, he is entitled to bring an action relative to the discourse which occurred during the campaign.[7] It is in this context that we examine the viability of the allegations in the complaint filed by Moats.

Publications Issued by Republican Party Did Not Violate CPA

Moats claims that the statements issued by the Republican Party violate the CPA, which provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."[8] Elsewhere, the CPA provides: "Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."[9]

> [The] CPA mirrors federal law. *Compare* 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") *with* Neb. Rev. Stat. § 59-1602 ("[U]nfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.") . . . the CPA is essentially the state

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[4] See *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[5] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).

[6] *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)).

[7] See *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

[8] § 59-1602.

[9] § 59-1601(2).

> version of the Sherman Antitrust Act. . . . Although the CPA provides both a private right of action and a public right, disputes that fall within the ambit of the CPA are unfair or deceptive trade practices that affect the public interest.[10]

Moats contends that the statements made by the Republican Party during the campaign were deceptive acts or practices in the conduct of the Republican Party's trade or commerce; Moats claims the trades at issue are political speech and political campaigns. We understand Moats' argument to be that because the Republican Party conducts a trade, it is subject to the provisions of the CPA. The Republican Party disagrees with Moats. It claims that the complaint involves campaign literature which is political speech and not an asset or service under § 59-1601(2) and, therefore, not covered by the CPA. The Republican Party claims that the complaint fails to allege facts actionable under the CPA and does not raise a reasonable expectation that discovery will cure the defects.

The district court concluded that this case does not fall within the ambit of the CPA because the Republican Party was not engaged in "the sale of assets or services" and therefore not engaged in "[t]rade and commerce" under the CPA.[11] The district court cited to Black's Law Dictionary which defines commerce as "[t]he exchange of goods and services."[12] The court concluded that with respect to each of the 11 publications, Moats was attempting to expand the CPA beyond that which it was intended to regulate. This ruling was not error.

On appeal, Moats claims that the Republican Party is a business and therefore subject to the CPA. Moats relies on cases and treatises noting that political parties must organize and file tax returns, and argues that such activities show that political parties conduct a "trade or commerce" for purposes

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[10] *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004).

[11] See § 59-1601(2).

[12] Black's Law Dictionary 304 (9th ed. 2009).

of § 59-1602 of the CPA.[13] Moats relies on *Grebner v. State*,[14] in which the Michigan Supreme Court considered a statute regulating balloting and indicated that a political consulting firm was a business. Moats also asserts that "'political speech'" is a "'"trade"'" and refers this court to publications indicating that large sums of money are spent on campaigns.[15] We do not find these authorities, references, or arguments to be persuasive in establishing Moats' contention that this court should read the CPA to encompass the political speech made during the campaign at issue. We also note that in his arguments, Moats has not set forth any case holding that the CPA of this state, or any other state, regulates speech used during a political campaign.

[3] In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[16]

The CPA states in § 59-1602 that it is unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade and commerce mean the sale of assets or services.[17] This case involves the propriety of the content of political speech used during a political campaign; regardless of the fact that the public was exposed to the speech and regardless of whether the Republican Party is a form of business, this case does not involve the sale of goods or services to the public. As the district court correctly concluded, the plain language of the CPA does not encompass a prohibition on the content of the campaign literature or political speech issued by the

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[13] See, e.g., 25 Am. Jur. 2d *Elections* § 197 (2004).

[14] *Grebner v. State*, 480 Mich. 939, 744 N.W.2d 123 (2007).

[15] Brief for appellant at 28.

[16] *Swift & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 773 N.W.2d 381 (2009).

[17] § 59-1601(2).

Republican Party in this case. Accordingly, we affirm the district court's ruling that none of the 11 claims made under the CPA are actionable.

Publications Are Not Defamatory

Moats claims that with the exception of publication No. 10, the publications made by the Republican Party were defamatory. Moats further contends that he should be given leave to amend his complaint to cure any technical deficiencies in the complaint. Moats argues that he has not waived his right to amend because there was no opportunity to request leave to amend, at the district court level.

The Republican Party challenges the allegations of defamation for various reasons, including that the allegations of defamation in the complaint lack contextual specificity, and asserts that even if the complaint were sufficiently pled, the publications were not defamatory because they were generally either opinion, parody, or were otherwise not actionable assertions. The Republican Party also argues that the complaint is insufficient because Moats did not plead special damages with particularity.

The district court determined that none of the statements made by the Republican Party were defamatory per se and that therefore, it was necessary for Moats to plead the defamatory nature of the language. The district court determined that because Moats failed to do so, the complaint was insufficient and dismissed the complaint.

We first address whether the contents of the publications at issue are potentially viable in defamation.

[4-6] In the ordinary case, a claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[18] However, with respect to fault, when the plaintiff in a libel action is a public figure and the speech is a matter of

[18] *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004).

public concern, the plaintiff must demonstrate "actual malice," which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence.[19] The plaintiff in a "public-libel" action must establish that the alleged statement is false by clear and convincing evidence and establish special damages.[20] In this case, the parties agree that Moats is a public figure.

[7,8] There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and the existence of special damages.[21] Whether a communication is libelous per se is a threshold question of law for the court.[22]

In *Matheson v. Stork*,[23] we stated:

> Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. . . . In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language "in its ordinary and popular sense." [However,] [w]here a communication is "ambiguous or . . . meaningless unless explained, or . . . *prima facie* innocent, but capable of defamatory meaning, it [is per quod and it] is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages." . . . Further, the circumstances under which the publication of an allegedly defamatory communication was made,

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[19] See *Hoch v. Prokop*, 244 Neb. 443, 445, 507 N.W.2d 626, 629 (1993).

[20] See *id.* See, also, *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995).

[21] *K Corporation v. Stewart, supra* note 20.

[22] *Id.*

[23] *Matheson v. Stork*, 239 Neb. 547, 553, 477 N.W.2d 156, 160-61 (1991) (citations omitted).

> the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Moats argues that the statements in publications Nos. 3 and 4 involving misleading statements made by him in an affidavit accuse him of falsifying an affidavit and were defamatory per se, because falsifying an affidavit is a crime.[24] We disagree with Moats' conclusion. A review of the language in these publications shows that the publications accused Moats of making *misleading* statements in an affidavit, not of making *false* statements in an affidavit. As such, the statements in publications Nos. 3 and 4 do not rise to the level of accusing Moats of committing any crime and therefore are not defamatory per se. Indeed, after reviewing all 10 publications, we conclude that none of the publications were defamatory per se.

Because the publications at issue were not defamatory per se, it was necessary for Moats to plead the defamatory nature of the words and special damages to properly plead his defamation per quod claims.[25] A defamation per quod claim is available within the context of a political campaign.[26] In assessing whether Moats has sufficiently pled a claim for defamation per quod, we consider that the statements at issue in this case were made in the course of a political campaign. We also acknowledge the tension between the need to protect one's reputation through a defamation action and the importance of First Amendment guarantees as they relate to political speech. Indeed, the U.S. Supreme Court noted that the First Amendment has "'"its fullest and most urgent application"'" to

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[24] See Neb. Rev. Stat. §§ 28-915 and 28-915.01 (Reissue 2008).

[25] See *K Corporation v. Stewart, supra* note 20. See, also, *Norris v. Hathaway*, 5 Neb. App. 544, 561 N.W.2d 583 (1997).

[26] See, e.g., *Maag v. Illinois Coalition for Jobs*, 368 Ill. App. 3d 844, 858 N.E.2d 967, 306 Ill. Dec. 909 (2006) (discussing defamation in connection with judicial retention campaign).

speech uttered during political campaigns.[27] The U.S. Supreme Court has pointed out the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials."[28] We have similarly observed that the "First Amendment encourages robust political debate,"[29] though we have also noted that "its protections are not absolute."[30] It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public discourse.[31]

[9,10] It is within this context that we review the defamatory nature of the statements made by the Republican Party. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[32] Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood.[33] Courts make the determination in the first instance because a jury is "'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for

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[27] See, *McIntrye v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). See, also, *Ky. Registry of Election Finance v. Blevins*, 57 S.W.3d 289 (Ky. 2001); *State v. Brookins*, 380 Md. 345, 844 A.2d 1162 (2004).

[28] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[29] *State v. Drahota*, 280 Neb. 627, 637, 788 N.W.2d 796, 804 (2010).

[30] *Id.* at 632, 788 N.W.2d at 801.

[31] *New York Times Co. v. Sullivan, supra* note 28.

[32] Restatement (Second) of Torts § 559 at 156 (1977).

[33] *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111 (5th ed. 1984). See, also, *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985); *Worley v. OPS*, 69 Or. App. 241, 686 P.2d 404 (1984); *Thomas Merton Ctr. v. Rockwell Intern. Corp.*, 497 Pa. 460, 442 A.2d 213 (1981).

the suppression of . . . "vehement, caustic, and sometimes unpleasan[t]"' expression."[34]

[11] In the context of a defamation claim, the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author.[35] Courts considering the distinction between fact and opinion have generally determined that making the distinction is a question of law to be decided by the trial judge.[36] "'While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one.'"[37] The Restatement (Second) of Torts provides that a "defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[38]

[12,13] In assessing whether a statement implies a false assertion of fact or a protected opinion, this court "looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."[39] Courts applying the totality of the circumstances test in a defamation claim look to factors such as "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether

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[34] *Snyder v. Phelps, supra* note 6, 131 S. Ct. at 1219 (quoting *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

[35] See *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

[36] *Henry v. Halliburton, supra* note 33.

[37] *Id.* at 787 (quoting *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984)).

[38] Restatement, *supra* note 32, § 566 at 170.

[39] *Wheeler v. Nebraska State Bar Assn., supra* note 35, 244 Neb. at 791, 508 N.W.2d at 921.

the statement in question is susceptible of being proved true or false."[40]

As noted above, context is important to an analysis of whether a communication expresses a fact or an opinion: "[L]iterary, public, and social contexts are a major determinant of whether an ordinary reader would view an alleged defamatory statement as constituting fact or opinion."[41] Specifically with respect to a public debate, one court has held that

> "'where potentially defamatory statements are published in a public debate . . . or in another setting in which the audience may anticipate efforts by the parties to persuade others of their positions by use of epithets, fiery rhetoric, or hyberbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'"[42]

We first consider the allegedly defamatory statements in publication No. 3, which begins by asking: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska consumers? You wouldn't. But trial attorney Rex Moats would . . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well*.'"

In examining the totality of the circumstances, we note that this statement appeared in a political campaign brochure. It was written to persuade voters to vote against Moats through the use of both rhetoric and hyberbole—namely that National Warranty was "shady" and that Moats would choose it over Nebraska consumers. And the general tone of the publication suggests that the Republican Party was not making assertions of fact and that no reasonable reader would conclude otherwise. Nor are the terms "mislead" and "doing financially well" capable of being proved true or false. These terms

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[40] *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009). See, also, *Klein v. Victor*, 903 F. Supp. 1327 (E.D. Mo. 1995).

[41] *Brennan v. Kadner*, 351 Ill. App. 3d 963, 970, 814 N.E.2d 951, 958, 286 Ill. Dec. 725, 732 (2004).

[42] *Id.*

are instead relative to the situation, and constitute opinion statements.

Given this context, we simply cannot find this statement to be reasonably susceptible of an interpretation which implies a false assertion of fact, but instead conclude that it constitutes an opinion protected by the First Amendment.

We turn next to publication No. 4, which was a letter or greeting card mailing decorated with tropical artwork, including a tiki carving. The text of the card is purportedly sent by Moats from the Cayman Islands. In this text, Moats makes comments about the great food and great weather, states that he has a "**fantastic job working for a shady insurance company**," and comments that the "tax benefits sure are great" in the Cayman Islands. The card continues with Moats' expressing concern about his company's bankruptcy and suggesting that he may have made "misleading statements in an affidavit." Included on the card is a disclaimer indicating that the mailing was paid for by the Republican Party.

As with publication No. 3, we examine the totality of the circumstances surrounding this card. It was written as if by Moats, but from the contents of the mailing, it was very clearly not written by Moats. This card includes epithets, rhetoric, and hyberbole. The general tenor of the card suggests that it was not meant to assert objective fact, and its statements could not be mistaken for ones intended as truthful. And as we found above with regard to publication No. 3, the card's reference to Moats' making "misleading statements" and claiming that his company was doing "'just fine'" are not capable of being proved true or false, and constitute opinion statements. We therefore conclude that this card, like publication No. 3, is also protected speech under the First Amendment.

Publications Issued by Republican Party Did Not Set Forth Separate Claim for Tort of Invasion of Privacy by False Light

Moats also claims that each of the publications referenced earlier in this opinion violated the tort of invasion of privacy by false light. In his complaint, Moats alleged that each of the 11 statements outlined above "were false, made knowingly or with

reckless disregard for the truth, and were made for the purpose, and with the effect, of placing . . . Moats in a false light, to create a false public persona and image of him."

Section 20-204 provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[14] Invasion of privacy as a common-law tort has evolved over the years into several separate torts, one of which is the false light privacy claim at issue here.[43] We have recognized that publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory.[44] It has been stated that "[i]n order to survive as a separate cause of action, a false light claim must allege a nondefamatory statement. If the statements alleged are defamatory, the claims would be for defamation only, not false light privacy."[45] Thus, it has been widely held that a false light invasion of privacy claim "'sufficiently duplicative of libel'" is subsumed within the defamation claim.[46] We agree with these authorities and conclude that a statement alleged to be both defamatory and a false light invasion of privacy is subsumed within the defamation claim and is not separately actionable.

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[43] William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

[44] See *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989).

[45] *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1193 n.3 (9th Cir. 1989). See *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

[46] See *Dworkin v. Hustler Magazine, supra* note 45 at 1193 n.3. See, e.g., *Rice v. Comtek Mfg. of Oregon, Inc.*, 766 F. Supp. 1539 (D. Or. 1990); *Bollea v. World Championship* Wrestling, 271 Ga. App. 555, 610 S.E.2d 92 (2005).

In this case, Moats alleged a false light claim which is duplicative of his defamation claim with respect to each publication except publication No. 10, and therefore the false light aspects of his privacy claim, with the exception of publication No. 10, are subsumed in his defamation claims. Because each allegedly defamatory publication failed to state a claim for relief under defamation, they likewise fail to state a claim for relief for false light invasion of privacy. We consider publication No. 10, "NEB-015," separately because it is alleged to be a false light invasion of privacy, but not defamatory.

Publication No. 10 is not quoted in the complaint, and the allegation in the complaint merely suggests that it is in bad taste. We therefore determine that nothing in the complaint regarding publication No. 10, even under liberal notice pleading standards, see Neb. Ct. R. Pldg. § 6-1108(a)(2), indicates that a claim for relief under false light invasion of privacy is plausible or suggests that discovery will reveal evidence of a claim regarding publication No. 10. Thus, the complaint fails to state a false light invasion of privacy claim with respect to publication No. 10.

Although our reasoning differs somewhat from that of the district court, the district court did not err when it concluded that Moats failed to state a claim for relief based on invasion of privacy by false light with respect to all publications. We affirm this ruling.

CONCLUSION

The publications issued by the Republican Party are not in violation of the CPA or the tort of invasion of privacy by false light. Nor are the publications defamatory. We therefore affirm the decision of the district court.

AFFIRMED.

WRIGHT, J., not participating.

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I concur in part in the majority opinion of the court and would affirm the district court's grant of the pretrial motion to dismiss the claims under Nebraska's Consumer Protection Act and the tort of invasion of privacy by false light. With respect to the defamation claims, I concur in affirming the dismissal

of all the claims, with the exception of allegations regarding publications Nos. 3 and 4.

I respectfully dissent in part, and would reverse the district court's grant of the pretrial motion to dismiss the defamation claims regarding publications Nos. 3 and 4, the latter of which includes the statement that Moats "made misleading statements in an affidavit." The affidavit-related statements impute that Moats committed the specific criminal act of making false statements under oath. See Neb. Rev. Stat. §§ 28-915 (felony false statement under oath) and 28-915.01 (misdemeanor false statement under oath) (Reissue 2008). Even though they were made in a political campaign, such accusations, if proved at trial to be false and made with malice, are not constitutionally protected under the First Amendment. Upon such proof, such accusations are defamatory. Charges of illegal conduct by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977). Regardless of the ultimate success of these defamation claims at trial, I conclude at this early stage of this case that they state a claim for relief and because they are plausible, should have survived the pretrial motion to dismiss.

As an initial matter, I am aware of the rough-and-tumble nature of political campaigns and that under the First Amendment, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We have recognized the foregoing, but have also noted that the First Amendment's "protections are not absolute." *State v. Drahota*, 280 Neb. 627, 632, 788 N.W.2d 796, 801 (2010). It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public disclosure. *New York Times Co. v. Sullivan, supra.*

In the present case, I emphasize that we must view Moats' claims of defamation in the procedural posture of this case.

This case was dismissed based on a pretrial motion to dismiss in which it was claimed that the complaint failed to plausibly state a claim for relief and could not be proved meritorious at trial. This case is at the early pleading stage. We have recently explained the new standard that this court has adopted in assessing when a complaint survives a motion to dismiss in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In *Doe*, we explained 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. *Id.*

Keeping these principles in mind, I have reviewed each of the 10 publications. I would conclude that given the words themselves, the context of a political campaign, the First Amendment protections afforded political speech, and the context of how information is disseminated in the course of a political campaign, the only publications that are plausibly defamation per quod that can survive the motion to dismiss are the portions of publications Nos. 3 and 4 which allege that Moats made misleading statements in an affidavit and impute that he committed a crime. At this early stage of the case, the task with respect to the misleading affidavit publications is to assess the viability of the complaint without the benefit of examining the affidavit, which is not yet in the record.

Publication No. 3 stated: "'*How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well.*'" In his complaint with respect to publication No. 3, Moats states that he did not claim in an affidavit that National Warranty was doing financially well, only to be proved false later that the company "'went bankrupt.'" Moats alleged that "[t]o the contrary, National Warranty sought, and entered into, insolvency proceedings because . . . Moats reported its condition to regulatory officials in the Cayman Islands."

Publication No. 4, a fictitious letter or greeting card purportedly authored by Moats, stated: "Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing 'just fine,' but then declared bankruptcy two weeks later." In his complaint with respect to publication No. 4 and its reference to "misleading statements in an affidavit," Moats again alleged that he "did not make misleading statements in an affidavit as outlined above."

Moats urges on appeal and I agree that the two statements to the effect that Moats made misleading statements in an affidavit not only place his reputation in disrepute, but more significantly impute commission of a crime and are susceptible of defamatory meaning. See §§ 28-915 (felony false statement under oath) and 28-915.01 (misdemeanor false statement under oath). See, also, Neb. Rev. Stat. § 7-106 (Reissue 2007) (providing for disbarment of attorney for deceit to court, judge, or party); *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997) (suspending attorney from practice of law based in part on false statements in affidavit). Even given the nature of the two affidavit-related publications as imputing commission of a crime, I am mindful that to establish their defamatory character and recover damages, Moats must also establish, inter alia, that the statements were false and were made with actual malice and that he suffered special damages. See, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993); *Woodcock v. Journal Pub. Co., Inc.*, 230 Conn. 525, 646 A.2d 92 (1994). This he may or may not be able to do.

The essence of Moats' defamation per quod claim regarding the affidavit-related statements is that the statements falsely impute that he committed the specific crime of making a false statement under oath. See §§ 28-915 and 28-915.01. Regarding public officials, it has been stated that "[n]o First Amendment protection enfolds false charges of criminal behavior," *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977), and "'a charge of criminal conduct . . . can never be irrelevant to . . . a candidate's fitness for office for purposes of application of the "knowing

falsehood or reckless diregard" rule of *New York Times Co. v. Sullivan*,'" *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 59 (2d Cir. 1980). Contemporary candidates are evidently expected to suffer insults, but under accepted jurisprudence, they are not expected to suffer false charges of criminal conduct without recourse.

As a preliminary matter, I reject the suggestion that publication No. 4 cannot be actionable because it was printed on an island-themed card and is therefore protected as parody or satire. Although the medium containing publication No. 4 is more colorful than a conventional campaign flyer, I do not accept the argument that the statement that Moats "made misleading statements in an affidavit" is immunized simply by its appearance on fanciful stationery. Compare, *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); *Garvelink v. Detroit News*, 206 Mich. App. 604, 522 N.W.2d 883 (1994) (parodies, political cartoons, and satires are generally entitled to protection). Further, although publication No. 4 is purportedly from Moats, I do not think a reasonable reader would adopt the conceit that the publication was actually sent by the candidate himself. Instead, publication No. 4 clearly states the factual assertion of the author that Moats "made misleading statements in an affidavit."

The first task regarding the affidavit-related statements in publications Nos. 3 and 4 is to inquire whether the statements are reasonably susceptible of a defamatory connotation so as to warrant submission to a fact finder to determine if in fact the defamatory connotation was conveyed. See *Cianci v. New Times Pub. Co., supra*. The statements are considered in the context in which they appear, and the words taken as they are commonly understood. See *id*. To perform this task, I would consider the words "misleading" and "affidavit."

I reject the suggestion that the word "misleading" used to describe an "affidavit" is ambiguous and is incapable of defamatory connotation. It has been stated that the plain meaning of the word "misleading" is to cause to have a false impression. *Concordia Theological Seminary, Inc. v. Hendry*, No. 1:05-CV-285-TS, 2006 WL 1408385 (N.D. Ind. May 17, 2006) (unpublished opinion). See, similarly, Merriam

Webster's Dictionary of Law 315 (1996). More particularly, the federal obstruction of justice criminal statute provides that "misleading conduct" includes making a false statement. 18 U.S.C. § 1515(a)(3) (2006). Thus, "misleading" can connote falsity and a "misleading statement" can connote a false statement.

An affidavit is a legal instrument, and "affidavit" is a word of art. "Affidavit" is defined in Nebraska statutes as follows: "An affidavit is a written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 2008). An affidavit has been described as a verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signatory. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Idaho App. 1993); 3 Am. Jur. 2d *Affidavits* § 8 (2002). Statements in affidavits are not casual musings but must set forth facts asserted to be true and show affirmatively that the affiant obtained personal knowledge of those facts. 3 Am. Jur. 2d, *supra*. We have stressed the legal significance of an affidavit and the importance that the statements in an affidavit be made under oath. See, e.g., *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008). Further, we have stated that "[d]eliberate false testimony in a court proceeding tends to destroy the integrity of the judicial system and cannot be tolerated." *State v. McCaslin*, 240 Neb. 482, 493, 482 N.W.2d 558, 566 (1992). Thus, an "affidavit" is a legally significant statement made "under oath." See § 25-1241. I would conclude that the use of the word "misleading" proximate to the word "affidavit" is reasonably susceptible of the defamatory connotation that Moats committed a crime of false statement under oath.

Next I would consider whether the affidavit-related statements were protected as an expression of opinion. Contrary to the majority's view, I would not conclude that the affidavit-related statements are mere opinion. In *Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980), the Court of Appeals for the Second Circuit provided an often-quoted summary of the law in this area, which I suggest we adopt. To distinguish between statements of fact and opinion with respect to public figures, the controlling principle is

> (1) that a pejorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct if the term could not reasonably be so understood in context; but (3) that the principle does not cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.

639 F.2d at 64. Applying the foregoing to the instant case, I would conclude that the affidavit-related statements complained of could reasonably be understood as imputing a specific criminal act by Moats; thus, the statements are assertions of fact, not opinion, and are actionable.

Numerous cases are reported which consider whether comments made against political figures suggesting a crime are actionable. For the most part, where the statement is found to be opinion, and therefore, not actionable, the statement suggesting a crime is described by the courts as hyperbole or the criminal allegation has been used in a figurative sense. See, e.g., *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977) (in advocating for judge's removal, statements claiming judge was "incompetent" are opinion, but statement claiming judge was "'probably corrupt'" was fact). Cases involving nonpolitical figures are to the same effect. *Lauderback v. American Broadcasting Companies*, 741 F.2d 193, 195 (8th Cir. 1984) (suggestion that insurance agent was "a crook and a liar" did not suggest specific criminal conduct); *Henry v. Halliburton*, 690 S.W.2d 775, 778 (Mo. 1985) (statements that insurance agent is "'a fraud and a twister'" did not suggest that agent committed specific crime).

In the instant case, the statements in publications Nos. 3 and 4 were not merely loose or figurative, nor were they limited to the suggestion that the publisher simply disagreed with Moats. The challenged statements suggest that Moats committed a specific crime as well as that he is personally dishonest. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552

P.2d 425, 131 Cal. Rptr. 641 (1976). I would conclude that the ordinary and average reader could likely understand the use of the affidavit-related words, in the context of the entire publication, as meaning that Moats had committed illegal actions. Such accusations are not constitutionally protected, and Moats' claim that such accusations are defamatory is entirely plausible. Charges of illegal conduct by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v Holt, Rinehart, supra.*

The potentially defamatory meaning of the affidavit-related statements in publications Nos. 3 and 4 can be appreciated based on the words used in the publications when combined with allegations in Moats' complaint. Notwithstanding that the affidavit-related statements were published in the context of a political campaign and giving due weight to the First Amendment concerns, I believe that Moats has alleged sufficient facts with respect to these two statements, when taken as true, to state a claim for relief of defamation per quod that is plausible on its face.

It is important to stress that my conclusion regarding the defamatory potential of portions of publications Nos. 3 and 4 is dictated by the fact that this lawsuit is at the early stage of litigation, and I, and this court, must assess the plausibility of the allegation of defamation based on the allegations in the complaint. See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In this regard, I reiterate that the affidavit in question has not yet been produced for review by the trial court or this court in the limited context of consideration of the pretrial motion to dismiss. Because the affidavit is not part of the record, I make no comment regarding the ultimate merits at trial of Moats' defamation allegations concerning making a misleading affidavit referred to in publications Nos. 3 and 4.

I agree with the majority opinion except with respect to the decision to affirm the pretrial dismissal of the defamation claims regarding publications Nos. 3 and 4. Moats alleges he was defamed in publications Nos. 3 and 4, the latter of which states that Moats "made misleading statements in an affidavit." This statement imputes that Moats committed the specific

criminal act of making false statements under oath. Even in rough-and-tumble political discourse, a charge of specific illegal conduct by a public individual, if false and made with actual malice, is not protected by the First Amendment and is defamatory. Whether these accusations are false and made with malice can only be determined by examining evidence at trial. Neither the trial court nor this court has seen the affidavit. I would conclude that the district court erred when it determined prematurely that the affidavit-related allegations in publications Nos. 3 and 4 could not succeed at trial and therefore dismissed these claims at the pretrial stage. To this limited extent, I would reverse the district court's order, permit the case to proceed solely as to the defamation claims regarding publications Nos. 3 and 4, and await the evidence.

BETTY VANDENBERG, APPELLEE, V. BUTLER COUNTY BOARD OF EQUALIZATION, APPELLANT.

796 N.W.2d 580

Filed April 28, 2011. No. S-10-783.

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.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded.

Julie L. Reiter, Butler County Attorney, for appellant.

No appearance for appellee.

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

McCormack, J.

NATURE OF CASE

The Butler County Board of Equalization (Butler County) appeals an order of the Tax Equalization and Review Commission (TERC). TERC determined that the irrigation pump at issue in this case is a fixture and should be taxed as real property. The issue on appeal is whether the irrigation pump should be classified as a fixture and taxed as real property or a trade fixture and taxed as personal property, as defined in Neb. Rev. Stat. § 77-105 (Reissue 2009). For the following reasons, we reverse TERC's determination.

BACKGROUND

Betty Vandenberg owns a parcel of land which she leases to individuals who farm the land. The parcel contains an irrigation well, a pump, a motor for the pump, a gear box attaching the motor to the pump, a pipe to carry water from the pump to a center pivot, and the center pivot, which is used to irrigate the land. The only property at issue in this appeal is the irrigation pump. The pump hangs inside a cased well and is secured to the land with a cement cap and bolts. The county assessor determined the pump was taxable as personal property. Vandenberg appealed this determination to TERC.

After a hearing, TERC reversed the assessor's determination and found that the pump qualified as a fixture. TERC relied, in part, on *Cook v. Beermann*.[1] In *Cook*, this court determined that an irrigation pump in a well was a fixture included in the sale of real property. The pump in the present case, TERC reasoned, is like the irrigation pump in *Cook* and qualifies as a fixture. TERC noted that not all fixtures are real property for purposes of taxation.[2] To determine whether the pump should be taxed as real or personal property, TERC analyzed the applicability of § 77-105. While § 77-103 provides that "fixtures" shall be taxed as real property, "trade fixtures" are taxable as personal property under § 77-105. Section 77-105 states in part: "The term tangible personal property also includes trade fixtures,

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[1] *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978).

[2] See Neb. Rev. Stat. § 77-103 (Reissue 2009).

which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." TERC noted that the pump is machinery, but is not "used in a commercial, manufacturing or processing activity." Accordingly, TERC determined that the pump was a fixture and should be taxed as real property.

Butler County appeals. No brief was filed on behalf of Vandenberg.

ASSIGNMENTS OF ERROR

Butler County assigns that TERC erred in finding that an irrigation pump is (1) a fixture and therefore real property for the purposes of taxation and (2) not "machinery and equipment" used directly in "commercial, manufacturing, or processing activities," as set forth in § 77-105.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[5]

ANALYSIS

Amendment to § 77-105

Section 77-105 states in full:

> The term tangible personal property includes all personal property possessing a physical existence, excluding money. *The term tangible personal property also includes trade fixtures, which means machinery and equipment,*

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[3] *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 786 N.W.2d 326 (2010).

[4] *Id.*

[5] *Id.*

> *regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased*. The term intangible personal property includes all other personal property, including money.

(Emphasis supplied.) The emphasized portion above was added by the passage of 2007 Neb. Laws, L.B. 334. The Committee Statement on L.B. 334 gives the purpose of the amendment:

> [T]o specifically exclude trade fixtures from the definition of real property (section 77-103), and include trade fixtures within the definition of personal property (section 77-105). Trade fixtures would be defined as machinery and equipment used directly in commercial, manufacturing, or processing activities. The degree of attachment to the real property would be irrelevant under [the amendment].[6]

The Nebraska Administrative Code also defines trade fixtures:

> Trade fixture shall mean an item of machinery or equipment, used in commercial, manufacturing, or processing activities. The degree of attachment shall have no influence towards classifying the machinery or equipment as real property. Trade fixtures are items of personal property which are placed upon or affixed to real property for the sole purpose of carrying on a trade or business.[7]

Because Vandenberg leases the land to farmers who utilize the land to obtain monetary profits, Butler County argues that the pump is a piece of machinery used in commercial activities. At the hearing before TERC, Vandenberg argued that according to the tax code, she obtains rental income from the property, not income from a trade or business. Based upon our de novo review of the record, we determine that the pump in this case qualifies as a trade fixture.

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[6] Committee Statement, L.B. 334, Revenue Committee, 100th Leg., 1st Sess. (Feb. 1, 2007).

[7] 350 Neb. Admin. Code, ch. 10, § 001.29 (2009).

The language of § 77-105 is clear: The term "tangible personal property" includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased. TERC correctly determined that the pump qualifies as machinery. The statute does not specify *who* must use the machinery so that it shall be classified as a trade fixture. The language only specifies *how* the machinery must be used to be classified as personal property—such use being commercial, manufacturing, or processing activities.

It is undisputed that the parcel of land in this case is used for farming. The Nebraska Administrative Code defines agricultural land as "a parcel of land primarily used for agricultural . . . purposes."[8] "Agricultural purposes" means "used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture."[9] Commercial production is also defined as "agricultural and horticultural products produced for the primary purpose of obtaining a monetary profit."[10] The pump is used to move water from a well to a pivot system in order to irrigate the crops produced on the parcel land. These crops are produced for the primary purpose of obtaining a monetary profit. Such use amounts to commercial production of agricultural products, which qualifies as "commercial activity" for the purposes of § 77-105.

Whether Vandenberg personally engages in commercial activities on the land is irrelevant. The statutory language clearly focuses on the activity being conducted on the land, not who is conducting that activity. The pump is used directly in commercial activity conducted on the property. The pump meets the requirements provided in § 77-105, and therefore,

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[8] 350 Neb. Admin. Code, ch. 14, § 002.05 (2009).

[9] 350 Neb. Admin. Code, ch. 10, § 001.05F (2009).

[10] 350 Neb. Admin. Code, ch. 14, § 002.58 (2009).

it should be classified as a trade fixture and taxed as personal property.

Applicability of Three-Part Test

Butler County argues that the three-part test for determining whether a fixture is real or personal property, discussed in *Cook*[11] and later approved in *Northern Natural Gas Co. v. State Bd. of Equal.*,[12] was superseded by the amendment to § 77-105. The test was articulated in *Northern Natural Gas Co.*:

> To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.[13]

The three-part test was appropriately applied in *Cook* and remains appropriate for determinations of whether fixtures should be encompassed by land sale contracts. However, § 77-105 clearly controls the issue of classifications of fixtures for taxation purposes. Accordingly, the three-part test does not apply to taxation determinations of this nature. To the extent that *Northern Natural Gas Co.*[14] holds to the contrary, it is expressly overruled.

CONCLUSION

For the foregoing reasons, we reverse TERC's determination and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded.

Wright, J., not participating.

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[11] *Cook v. Beermann, supra* note 1.

[12] *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *disapproved on other grounds, MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[13] *Id.* at 817, 443 N.W.2d at 257.

[14] *Northern Natural Gas Co. v. State Bd. of Equal., supra* note 12.

JOSEPH MANDOLFO, APPELLANT, V. MARIO MANDOLFO AND AMERICAN NATIONAL BANK, APPELLEES.

796 N.W.2d 603

Filed May 6, 2011. No. S-09-1175.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Uniform Commercial Code: Claims.** Whether common-law claims are displaced by the Uniform Commercial Code presents a question of law.
4. **Limitations of Actions.** Which statute of limitations applies is a question of law.
5. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
6. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.
7. **Uniform Commercial Code.** Often, the common law will supplement the Uniform Commercial Code.
8. ____. The common law will not supplement the Uniform Commercial Code when it is displaced by particular provisions of the code.
9. **Uniform Commercial Code: Actions.** When a provision of the Uniform Commercial Code applies, a litigant cannot rely on common-law causes of action.
10. **Uniform Commercial Code: Limitations of Actions: Conversion.** When dealing with Neb. U.C.C. § 3-420 (Reissue 2001) claims, courts generally hold that the cause of action "accrues" at the time the instrument is converted.
11. **Actions: Conversion.** Each conversion constitutes its own cause of action.
12. **Limitations of Actions: Negotiable Instruments.** The overwhelming majority rule is that the discovery rule does not apply to cases involving negotiable instruments.
13. **Uniform Commercial Code: States.** One of the purposes of the Uniform Commercial Code is to make uniform the law among the various jurisdictions.
14. **Uniform Commercial Code: Limitations of Actions: Conversion: Negotiable Instruments: Fraud.** In cases for conversion of a negotiable instrument under the Uniform Commercial Code, the plaintiff may benefit from the discovery rule when the defendant has engaged in fraudulent concealment.
15. **Appeal and Error.** A party that assigns error in a proceeding must point out the factual and legal bases that show the error.

16. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result.
17. **Motions for New Trial: Appeal and Error.** An appellate court reviews the denial of a motion for new trial or to alter or amend the judgment for an abuse of discretion.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellant.

James B. Cavanagh and Brittney J. Krause, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellees.

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

CONNOLLY, J.

Joseph Mandolfo (Joe) sued his brother Mario Mandolfo and American National Bank (ANB). Joe alleged that Mario had, with the assistance of ANB, wrongfully deposited checks into his own account. The district court granted summary judgment to Joe against Mario. The court, however, granted summary judgment to ANB, concluding that the statute of limitations barred Joe's claims. We conclude that Joe's common-law claims are displaced by the Uniform Commercial Code (U.C.C.) and are thus subject to a 3-year statute of limitations. Further, we conclude that the application of a discovery rule is inappropriate to these claims. In sum, Joe's claims against ANB were untimely. We affirm.

BACKGROUND

Joe, at one time, owned several businesses, some of which had accounts with ANB. These businesses included grocery stores and franchise restaurants. After his brother Mario lost his job as a teacher, Joe hired Mario to work for him.

Betraying his benefactor, Mario eventually opened his own accounts at ANB and began depositing checks made out to Joe or Joe's companies into these accounts. Based on the record

before us, it appears that Mario misappropriated checks from December 1995, until July 20, 2000. Joe contends that Mario embezzled about $1.2 million.

Joe did not discover Mario's misappropriations until 2003, when the Internal Revenue Service contacted him about some "irregularities" that it had uncovered. Within a year of this discovery, on March 19, 2004, Joe sued Mario and ANB. Joe alleged that Mario misappropriated checks belonging to Joe and his companies. He alleged that ANB had assisted Mario's misappropriations by failing to exercise reasonable care in allowing Mario to deposit unendorsed or improperly endorsed checks. In other words, Joe alleged that through its negligence, ANB allowed Mario to collect on checks that did not belong to him.

In October 2004, the court granted Joe summary judgment on his claims against Mario. Mario—who had asserted his Fifth Amendment right not to incriminate himself—did not deny the allegations in Joe's complaint and offered no evidence to refute Joe's claims. The court awarded Joe damages of $678,430.86. Joe's claims against Mario are not at issue in this appeal.

In April 2009, Joe moved to compel discovery for his claims against ANB. Joe had previously served requests for production and interrogatories on ANB, but ANB had not timely responded. Because ANB took more than 30 days to answer Joe's requests, the court awarded Joe attorney fees for the motion to compel as a sanction against ANB.

In May 2009, ANB moved for summary judgment. ANB argued, among other things, that Joe's claims were time barred under Neb. U.C.C. § 3-118(g) (Cum. Supp. 2010), which provides for a 3-year statute of limitations for conversion claims. Joe moved to strike ANB's summary judgment motion. In support of his motion, Joe cited ANB's alleged failures to cooperate with his discovery requests.

The court granted ANB's motion for summary judgment. The court concluded that although Joe had couched his claims against ANB in negligence, he was asserting a claim for conversion under the U.C.C.[1] Because the court concluded that

[1] See Neb. U.C.C. § 3-420 (Reissue 2001).

Joe was asserting a conversion claim, it agreed with ANB that the 3-year statute of limitations under § 3-118(g) applied. The court also concluded that the discovery rule did not apply to toll the time limit for actions for conversion under the U.C.C. Because Mario converted the last check in July 2000 and Joe did not file his complaint until March 2004, the court ruled that Joe's claims were untimely.

Joe moved for a new trial or, in the alternative, to alter or amend the judgment. His arguments mirror his arguments in his present appeal. He argued that the court erred in (1) allowing ANB to proceed to summary judgment when it had failed to comply with discovery orders, (2) concluding that Joe had alleged only U.C.C. conversion claims, and (3) applying the wrong statute of limitations. The court denied Joe's motion.

ASSIGNMENTS OF ERROR

Joe assigns, restated and renumbered, that the district court erred as follows:

(1) in granting ANB summary judgment;

(2) in failing to strike ANB's motion for summary judgment as a sanction for ANB's failure to comply with discovery orders; and

(3) in failing to grant Joe's motion for new trial or to alter or amend the judgment.

STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

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[2] See *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[3] *Id.*

[3-5] Whether common-law claims are displaced by the U.C.C. presents a question of law.[4] Which statute of limitations applies is also a question of law.[5] We reach a conclusion regarding questions of law independently of the trial court's conclusion.[6]

[6] Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.[7]

ANALYSIS

Joe's Common-Law Claims of Conversion and Negligence Are Displaced by U.C.C.

In granting ANB summary judgment, the court began by noting that Joe alleged that ANB allowed Mario to improperly deposit checks belonging to Joe and his companies into Mario's account. Joe claimed that ANB failed to exercise reasonable care in its practices, which, if exercised, would have prevented Mario's misappropriations. The court noted that although Joe tried to characterize this as negligence, what he was really asserting was a claim for conversion under § 3-420. Joe claims the court erred in this conclusion. Citing a number of our cases[8] as well as federal courts applying Nebraska law,[9] Joe argues that the court erred in concluding that the U.C.C.

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[4] See *Schlegel v. Bank of America, N.A.*, 271 Va. 542, 628 S.E.2d 362 (2006).

[5] *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

[6] See *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[7] *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

[8] *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991); *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985); *Hydroflo Corp. v. First Nat. Bank*, 217 Neb. 20, 349 N.W.2d 615 (1984); *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979).

[9] *Wymore State Bank v. Johnson Intern. Co.*, 873 F.2d 1082 (8th Cir. 1989); *Progress Rail Services v. Western Heritage Credit*, 506 F. Supp. 2d 285 (D. Neb. 2007).

displaced common-law causes of action such as conversion and negligence.

[7-9] Joe is correct in his claim that some of our earlier cases recognized that common-law claims may exist alongside U.C.C. claims. This remains true. The drafters of the U.C.C. set out to preserve and, when necessary, clarify and conform the law merchant with modern commercial practice.[10] But it does not seek to codify the entire body of law regulating commercial transactions.[11] So often, the common law will supplement the U.C.C.[12] This, however, is not so when the common law is "displaced by . . . particular provisions of the [U.C.C.]"[13] In other words, when a provision of the U.C.C. applies, a litigant cannot rely on common-law causes of action.[14] Thus, to determine whether Joe's claims of common-law conversion and negligence are displaced, we consider whether any specific provision of the U.C.C. covers those claims.

The U.C.C. has undergone substantial revision since we decided the earlier cases that Joe cites. Neb. U.C.C. § 3-419 (Reissue 1980), the previous section governing conversion of instruments, was replaced with § 3-420.[15] Section 3-420 defines conversion differently than § 3-419 did. And because § 3-420 applies in different situations than § 3-419 did, it follows that § 3-420 will displace common-law claims that § 3-419 did not. Section 3-420 provides, in relevant part:

> (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a *bank makes or obtains payment with respect to the*

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[10] *C-Wood Lumber Co. v. Wayne County Bank*, 233 S.W.3d 263 (Tenn. App. 2007).

[11] *Id.*

[12] Neb. U.C.C. § 1-103 (Reissue 2001).

[13] *Id.*

[14] See *Stefano v. First Union Nat. Bank of Virginia*, 981 F. Supp. 417 (E.D. Va. 1997).

[15] 1991 Neb. Laws, L.B. 161.

> *instrument for a person not entitled to enforce the instrument or receive payment.*

(Emphasis supplied.)

As noted, Joe's allegations are essentially that ANB allowed Mario to obtain payment on checks for which he was not entitled to receive payment. The facts that Joe alleged mirror the last clause of § 3-420. In other words, on the facts before us, a specific provision of the U.C.C. covers what would otherwise be a common-law claim for conversion or negligence. Thus, the U.C.C. displaces those claims. We conclude that Joe's allegations are claims for conversion under § 3-420. And our approach is consistent with the majority rule.[16]

Statute of Limitations

Having concluded that the U.C.C. displaces Joe's common-law claims, we now determine whether he filed his claims for conversion within the applicable statute of limitations. Section 3-118(g) sets out the statute of limitations: "Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion . . . must be commenced within three years after the cause of action accrues."

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[16] *Berhow v. The Peoples Bank*, 423 F. Supp. 2d 562 (S.D. Miss. 2006); *Metz v. Unizan Bank*, 416 F. Supp. 2d 568 (N.D. Ohio 2006); *Stefano, supra* note 14; *ASP Enterprises, Inc. v. Guillory*, 22 So. 3d 964 (La. App. 2009); *C-Wood Lumber Co., supra* note 10; *Gallagher v. Credit Union*, 132 N.M. 552, 52 P.3d 412 (N.M. App. 2002); *Halla v. Norwest Bank Minnesota, N.A.*, 601 N.W.2d 449 (Minn. App. 1999); *Orecchio v. Connecticut River Bank, N.A.*, No. 1:08-CV-164, 2009 WL 4931354 (D. Vt. Dec. 14, 2009) (unpublished opinion); *Promissor, Inc. v. Branch Bank and Trust Co.*, No. 1:08-CV-1704-BBM, 2008 WL 5549451 (N.D. Ga. Oct. 31, 2008) (unpublished opinion); *Contour Industries, Inc. v. U.S. Bancorp*, No. 2:07-CV-234, 2008 WL 2704431 (E.D. Tenn. July 3, 2008) (unpublished opinion); *Mack v. CTC Ill. Trust Co.*, No. Civ.A. 04-00083, 2004 WL 1631398 (E.D. Pa. July 20, 2004) (unpublished opinion); *Peters Family Farm, Inc. v. Sav. Bank*, No. 10CA2, 2011 WL 497476 (Ohio App. Jan. 28, 2011) (unpublished opinion); *Murphy & Maconachy, Inc. v. Preferred Bank*, No. B206784, 2009 WL 1639528 (Cal. App. June 12, 2009) (unpublished opinion); 2 James J. White & Robert S. Summers, Uniform Commercial Code § 18-4 (5th ed. 2008 & Supp. 2010). But see *Ross v. Bank of America N.A.*, 693 F. Supp. 2d 692 (S.D. Tex. 2010).

[10,11] When dealing with § 3-420 claims, courts generally hold that the cause of action "accrues" at the time the instrument is converted.[17] It follows that each of Mario's many conversions constituted its own cause of action.[18] Further, the record shows that the last check was deposited July 20, 2000. Joe filed his complaint on March 19, 2004. So Joe filed his complaint more than 3 years after Mario converted the last check. The statute of limitations thus bars his claims.

But Joe argues that the discovery rule saves his claims. The discovery rule tolls a statute of limitation when the plaintiff did not discover the injury and could not have discovered the injury within the applicable statute of limitations.[19] The reasoning behind the discovery rule is that, in some cases, the injury is not obvious and it would be unfair to allow the statute of limitations on a claim to run out before an injured party had a chance to seek relief.[20] When the discovery rule applies, the statute of limitations does not begin running until the plaintiff discovers, or reasonably should have discovered, the injury.[21] Joe claims that he did not learn of Mario's misappropriations until 2003 and that we should apply the discovery rule. We decline.

[12] Although some courts do apply the discovery rule,[22] the overwhelming majority rule is that the discovery rule

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[17] E.g., *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434 (7th Cir. 2005); *Stefano, supra* note 14; *New Jersey Lawyers' v. Pace*, 374 N.J. Super. 57, 863 A.2d 402 (2005); *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614 (Tenn. 2002).

[18] See, *Rodrigue, supra* note 17; *Copier Word Processing v. WesBanco Bank*, 220 W. Va. 39, 640 S.E.2d 102 (2006).

[19] See *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002).

[20] *Id.*

[21] *Id.*

[22] *Gallagher, supra* note 16; *Stjernholm v. Life Ins. Co. of N. Amer.*, 782 P.2d 810 (Colo. App. 1989); *Fine v. Sovereign Bank*, No. 06cv11450-NG, 2010 WL 3001194 (D. Mass. July 28, 2010) (unpublished opinion); *YF Trust v. JP Morgan Chase Bank*, No. CV 07-567-PHX-MHM, 2008 WL 4277902 (D. Ariz. Sept. 18, 2008) (unpublished opinion); *Geraldo v. First Dominion Mut. Life Ins. Co.*, No. L-01-1210, 2002 WL 31002770 (Ohio App. Sept. 6, 2002) (unpublished opinion).

does not apply to cases involving negotiable instruments.[23] That is, courts hold that the cause of action accrues and the limitations period begins running when the instruments are converted, regardless of when the plaintiff actually learns of the conversion.

In applying this majority rule, courts promote the U.C.C.'s purpose of promoting swift resolution of commercial disputes. A "discovery rule would be inimical to the underlying purposes of the [U.C.C.], including the goals of certainty of liability, finality, predictability, uniformity, and efficiency in commercial transactions."[24] Further, these courts conclude that "'[t]he finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends.'"[25]

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[23] *John Hancock Financial Servs. v. Old Kent Bank*, 346 F.3d 727 (6th Cir. 2003); *Menichini v. Grant*, 995 F.2d 1224 (3d Cir. 1993); *Kuwait Airways Corp. v. American Sec. Bank, N.A.*, 890 F.2d 456 (D.C. Cir. 1989); *Metz, supra* note 16; *Calex Exp., Inc. v. Bank of America*, 401 F. Supp. 2d 407 (M.D. Pa. 2005); *Gress v. PNC Bank, Nat. Ass'n*, 100 F. Supp. 2d 289 (E.D. Pa. 2000); *Mattlin Holdings, L.L.C. v. First City Bank*, 189 Ohio App. 3d 213, 937 N.E.2d 1087 (2010); *Peak Perfor. Phy. Therapy v. Hibernia Corp.*, 992 So. 2d 527 (La. App. 2008); *Kidney Cancer Ass'n v. North Shore Comm.*, 373 Ill. App. 3d 396, 869 N.E.2d 186, 311 Ill. Dec. 512 (2007); *AmerUS Life Ins. Co. v. Bank of America*, 143 Cal. App. 4th 631, 49 Cal. Rptr. 3d 493 (2006); *Auto-Owners Ins. Co. v. Bank One*, 852 N.E.2d 604 (Ind. App. 2006), *vacated in part on other grounds* 879 N.E.2d 1086 (Ind. 2008); *New Jersey Lawyers', supra* note 17; *Hollywood v. First Nat. Bank of Palmerton*, 859 A.2d 472 (Pa. Super. 2004); *Pero's Steak and Spaghetti House, supra* note 17; *Yarbro, Ltd. v. Missoula Fed. Credit Union*, 310 Mont. 346, 50 P.3d 158 (2002); *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144 (Miss. 1998); *Haddad's of Illinois v. Credit Union 1*, 286 Ill. App. 3d 1069, 678 N.E.2d 322, 222 Ill. Dec. 710 (1997); *Palmer Mfg. & Supply v. BancOhio Natl.*, 93 Ohio App. 3d 17, 637 N.E.2d 386 (1994); *Husker News Co. v. Mahaska State Bank*, 460 N.W.2d 476 (Iowa 1990); *Wang v. Farmers State Bank of Winner*, 447 N.W.2d 516 (S.D. 1989); *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.I. 558, 368 A.2d 1227 (1977). See, also, *Rodrigue, supra* note 17.

[24] *Rodrigue, supra* note 17, 406 F.3d at 445-46.

[25] *Haddad's of Illinois, supra* note 23, 286 Ill. App. 3d at 1075, 678 N.E.2d at 326, 222 Ill. Dec. at 714, quoting *Fuscellaro, supra* note 23.

In rejecting the discovery rule, many courts reason that the victim of conversion is often in the best position to prevent or detect the loss.[26] Watchful victims of conversion should be able to quickly realize when they have been wronged. Courts applying such a rationale believe that "the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees."[27] Joe would have discovered Mario's conversions much quicker had he not given Mario unsupervised power over the books of his companies.

[13] We agree with these courts' reasoning and add further that one of the purposes of the U.C.C. is "to make uniform the law among the various jurisdictions."[28] In the light of this policy and the almost universal consensus, we adopt the majority rule.

[14,15] We note, however, that there is one exception to this rule. The plaintiff may benefit from the discovery rule when the defendant has engaged in fraudulent concealment.[29] Joe's complaint, however, makes no allegation of fraudulent concealment by ANB that would toll the statute of limitations. Moreover, his brief before this court points to nothing that creates a genuine issue of material fact regarding fraudulent concealment. A party that assigns error in a proceeding must point out the factual and legal bases that show the error.[30] Finally, in his deposition, Joe acknowledged that he knew at the time that funds were disappearing. He stated that because he had someone he trusted, Mario, in charge of the books, he assumed the embezzlement was being perpetrated by other employees. He stated that because of the missing funds, "at least a hundred" lower employees were disciplined, by either being reported to the police or losing their jobs. So, Joe knew facts that could

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[26] See *Haddad's of Illinois, supra* note 23.

[27] *Husker News Co., supra* note 23, 460 N.W.2d at 479.

[28] Neb. U.C.C. § 1-102(1)(c) (Reissue 2001).

[29] See, e.g., *Rodrigue, supra* note 17; *Peak Perfor. Phy. Therapy, supra* note 23; *Kidney Cancer Ass'n, supra* note 23; *Pero's Steak and Spaghetti House, supra* note 17; *Haddad's of Illinois, supra* note 23.

[30] See *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

have reasonably led to the discovery of his cause of action. He cannot rely on the doctrine of fraudulent concealment.[31]

We hold that when bringing a claim for conversion of a negotiable instrument under § 3-420, a plaintiff is not entitled to the benefit of the discovery rule in the absence of fraudulent concealment. And Joe has failed to plead or create a genuine issue of fact regarding fraudulent concealment. We conclude that the U.C.C.'s 3-year statute of limitations bars Joe's claims.

Court's Failure to Strike Motion for Summary Judgment for Failing to Comply With Discovery Orders

Joe argues that the court erred in not striking ANB's motion for summary judgment for ANB's alleged failure to comply with discovery orders. Joe argues ANB withheld documents that Joe had requested and that would have helped Joe prosecute his case. ANB responds that it fully complied with the discovery orders and that, even if it did not, the court did not abuse its discretion by allowing ANB to move for summary judgment.

[16] We review the imposition of a discovery sanction for abuse of discretion.[32] A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result.[33]

Joe claims that ANB failed to comply with the court's discovery order. The only order in the record about discovery did not order ANB to comply, but, rather, made a finding that "discovery was answered." The order shows that the court did not sanction ANB at that time for not answering at all, but, rather, for answering too late, which implies that ANB did answer. Later, ANB even went further and supplemented its responses after it had moved for summary judgment.

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[31] See *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000).

[32] *Booth, supra* note 7.

[33] *Id.*

But Joe continued to insist that ANB was not complying with discovery. He moved to strike ANB's motion for summary judgment, because he believed that ANB was not complying. He attached an affidavit to his motion claiming as much.

The district court's decision acknowledged that Joe had moved to strike ANB's summary judgment motion and implicitly overruled it. Because of the court's earlier discovery order finding that "discovery was answered," albeit untimely, and ANB's subsequent supplementary responses, we conclude that the court did not abuse its discretion in failing to strike the motion for summary judgment.

Motion to Alter or Amend Judgment

[17] Finally, Joe claims that the trial court erred in denying his motion for new trial or, in the alternative, to alter or amend the judgment. We review such a denial for an abuse of discretion.[34]

Joe's argument is essentially that the lower court erred in determining that the U.C.C. displaced his common-law claims and that the statute of limitations barred his claims. We have, however, already determined that the lower court correctly concluded that the statute of limitations barred Joe's claims. Accordingly, it was not an abuse of discretion to deny Joe's motion.

CONCLUSION

We conclude that the U.C.C. displaces Joe's claims for common-law conversion and negligence. The 3-year U.C.C. statute of limitations applies. Because of the underlying policies of the U.C.C., we decline to apply the discovery rule to toll the statute of limitations. Joe's claims were thus untimely. We affirm the district court's grant of summary judgment.

Affirmed.

Wright, J., not participating.

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[34] See, *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007); *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

BROOK VALLEY LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, AND BROOK VALLEY II, LTD, A NEBRASKA LIMITED PARTNERSHIP, APPELLANTS, V. MUTUAL OF OMAHA BANK, FORMERLY KNOWN AS NEBRASKA STATE BANK OF OMAHA, A STATE BANKING INSTITUTION, AND OMAHA FINANCIAL HOLDINGS, INC., A NEBRASKA CORPORATION, SUCCESSOR TO MIDLANDS FINANCIAL SERVICES, INC., A NEBRASKA CORPORATION, APPELLEES.

797 N.W.2d 748

Filed May 6, 2011. No. S-10-043.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case.
2. **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 its conclusions independent from a trial court.
3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
5. **Parties: Standing.** Either a party or the court can raise a question of standing at any time during the proceeding.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded for further proceedings.

Michael J. Mooney and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

James B. Cavanagh, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellees.

CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN, Judge.

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellants, Brook Valley Limited Partnership (BVLP) and Brook Valley II, LTD (BVII) (collectively the Partnerships), filed suit in 2004 in the district court for Sarpy County against

Mutual of Omaha Bank, formerly known as Nebraska State Bank of Omaha, and Omaha Financial Holdings, Inc., successor to Midlands Financial Services, Inc. (collectively the Banks), for, inter alia, breach of fiduciary duty and conversion. The action stems from loans made by the Banks in July and October 2000 which were secured by partnership property. The real property was ultimately sold to cover payment on the loans.

The case was tried to the court. The agreements establishing the Partnerships (Partnership Agreements) were nearly identical. The district court determined that under the Partnership Agreements, general partners are empowered to authorize lawsuits. The district court concluded that because the general partners who succeeded the original general partner, Prime Realty, Inc., had not been duly elected, they were without power to authorize this lawsuit. The district court concluded that the Partnerships lacked standing and dismissed the case. The Partnerships appeal. We conclude that the issue of the Partnerships' standing was properly before the court and that because the successor general partners were selected pursuant to the Partnership Agreements, the Partnerships had standing. Accordingly, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

BVLP and BVII were created in 1993 and 1997 respectively. The Partnerships were created to develop real estate in Sarpy County, Nebraska. At the time they were created, the general partner for both of the Partnerships was Prime Realty. The president of Prime Realty was James McCart. Pursuant to the Partnership Agreements, as general partner, Prime Realty was responsible for the day-to-day management of the Partnerships and had authority to initiate lawsuits on behalf of the Partnerships.

In July and October 2000, McCart, on behalf of Prime Realty, obtained loans from the Banks. The loans were secured by real property belonging to the Partnerships. A loan officer from the Nebraska State Bank of Omaha testified at trial that at the time the Banks made the loans to McCart, bank representatives were aware that McCart had overdrawn his accounts by

over $2 million as a result of a check-kiting scheme. The loan officer testified that the July and October loans were made in part to assist McCart in covering his overdrafts.

A federal indictment was filed against McCart in the U.S. District Court for the District of Nebraska, based on the check-kiting scheme. Representatives from the Nebraska State Bank of Omaha participated in the prosecution of McCart, and McCart was convicted.

There was testimony at trial that in March 2002, Prime Realty and McCart declared bankruptcy. Ultimately, the Banks sold the real property owned by the Partnerships to mitigate their losses based on McCart's inability to pay back his July and October 2000 loans.

At some point, the limited partners became aware of the July and October 2000 loans, the March 2002 bankruptcy filing, and the legal issues involving McCart and Prime Realty. At meetings conducted on August 21, 2002, the limited partners of BVLP selected Harrison Street Brook Valley Limited Management Company, LLC, as general partner of BVLP and Brook Valley on Giles Road Management Company, LLC, as general partner of BVII. The Banks argued, and the district court found, that the August meetings were for the purpose of removing Prime Realty as general partner and that the removal was not effective due to insufficient notice to Prime Realty.

After the bench trial, the district court filed an opinion and order on December 14, 2009, in which it dismissed the case for lack of standing. The district court determined that Prime Realty had not been properly removed as general partner under the terms of the Partnership Agreements and that because the lawsuit had not been authorized by Prime Realty, the Partnerships lacked standing to bring the lawsuit. The Partnerships appeal.

ASSIGNMENTS OF ERROR

The Partnerships claim, restated and summarized, that (1) because the Banks are not signatories to the Partnership Agreements, they have no basis to complain about purported irregularities under the Partnership Agreements in replacing Prime Realty as general partner and (2) in any event, because

the new general partners were selected in accordance with the Partnership Agreements after Prime Realty's bankruptcy caused it to involuntarily withdraw, the district court erred when it determined that Prime Realty was improperly removed, that the lawsuit was not authorized, and that the Partnerships lacked standing.

STANDARDS OF REVIEW

[1,2] Standing is a jurisdictional component of a party's case. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Id.*

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009).

ANALYSIS

As an initial matter, the Partnerships assert that because the Banks were not signatories to the Partnership Agreements, they were not in a position to raise the issue of compliance with the Partnership Agreements in connection with the method used to select the new general partners, Harrison Street Brook Valley Limited Management Company, LLC, and Brook Valley on Giles Road Management Company, LLC. The Partnerships therefore claim that the district court erred when it examined the standing of the Partnerships at the Banks' urging. Although, for reasons explained later in this opinion, we disagree with the district court's conclusion that the Partnerships lacked standing, it was not error for the district court to examine the Partnerships' standing as a jurisdictional component of the Partnerships' case.

In support of their argument challenging the district court's consideration of the Partnerships' standing, the Partnerships rely on cases where nonpartners unsuccessfully challenged partnership agreement compliance. For example, in *Baird Ward Printing v. Great Recipes Pub. Assoc.*, 811 F.2d 305 (6th Cir.

1987), the U.S. Court of Appeals for the Sixth Circuit determined that a creditor of a limited partnership did not have standing to challenge the withdrawal and replacement of a general partner. The court stated that the creditor

> was in no position to challenge the internal operation of the limited partnership, either by reliance upon the provisions of the agreement itself or the statute. Only parties privy to the partnership agreement are in a position to bring such a challenge, since the various rights and duties created by the agreement and the statute were intended to inure only to parties to the agreement.

Id. at 309. The court in *Baird Ward Printing* continued that there are "numerous situations where parties do not have standing to claim the benefit of protections designed for others" and that "[t]he formation of the limited partnership . . . was the product of a written agreement creating rights and duties among its signator[ie]s. There is no indication in the partnership agreement of any intent to create rights in favor of third party creditors." *Id.* See, similarly, *Swain v. Wiley College*, 74 S.W.3d 143, 148 (Tex. App. 2002) (stating that it appears "settled . . . that the legality of actions taken at a shareholders' meeting is not open to collateral attack by nonshareholders on any ground of informality or irregularity").

Along with the Partnerships, we agree with the legal propositions in the foregoing opinions, but we do not agree that such authorities control this case. Specifically, we disagree with the Partnerships who claim that such authority supports their position that the district court in this case should not, at the urging of the Banks, have examined the actions of the Partnerships in connection with the selection of the successor general partners, as such selection bore a relation to the standing of the Partnerships to bring this lawsuit.

[4] The propositions on which the Partnerships rely arose in cases in which the challenge to partnership agreement compliance was made by nonpartners suing as plaintiffs. In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d

778 (2005). Generally, apart from some obvious prejudice or enforceable right to engage in the general partner selection process, collateral attacks on the operations of the partnership by nonpartners suing as plaintiffs are not allowed. There is nothing in the record which demonstrates partnership rights in favor of the Banks or a satisfactory assumption of partnership rights by the Banks which would give the Banks authority to claim the benefits of the Partnership Agreements. The Banks are not signatories of the Partnership Agreements. The Banks' commercial relationship to the Partnerships derives not from participation in the Partnerships but from the secured loans made in July and October 2000. In any event, the Banks did not initiate this lawsuit or raise the Partnerships' standing issue as plaintiffs.

In contrast to the procedural posture of the authorities on which the Partnerships rely, the standing issue was raised in the Banks' answers as a defense in an action brought by the Partnerships serving as plaintiffs. In their answers, the Banks disputed the Partnerships' entitlement to invoke the jurisdiction of the court to bring their conversion and other claims.

[5] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. See *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). The facts essential to resolution of the standing issue are not in dispute. Because standing is an aspect of jurisdiction and the challenge to the Partnerships' standing had been raised in the Banks' answers, the issue of standing of the Partnerships' suing as plaintiffs was necessarily before the district court for resolution as an initial matter at the trial. Either a party or the court can raise a question of standing at any time during the proceeding. See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010). We therefore reject the Partnerships' assignment of error in which it claimed that the district court erred when, at the urging of the Banks, it considered the standing of the Partnerships to invoke

the jurisdiction of the court to pursue their conversion and other claims.

Upon consideration of the substance of the standing issue, the district court focused on article XII of the Partnership Agreements, "Removal of General Partner," and concluded that under section 12.1, the limited partners failed to give the general partner the notice required to effectuate its removal. The district court determined that the limited partners failed to comply with the Partnership Agreements with respect to the removal and replacement of Prime Realty as the general partner; the successor general partners were not properly "elected"; and because the lawsuit was not authorized by a proper general partner, the Partnerships lacked standing. As asserted by the Banks, and as implicitly found by the district court, "Prime Realty clearly remained as general partner of each partnership after the lawsuit . . . ." Brief for appellees at 38.

In contrast to the position of the Banks and the findings of the district court, the Partnerships claim, relying on various sections of the Partnership Agreements, that the general partner was not removed under section 12.1 but, instead, because of its bankruptcy, the general partner, Prime Realty, involuntarily withdrew under section 9.2(b) and the Partnerships continued to operate after the successor general partners were properly selected under section 8.3(b). The Partnerships assert that the new general partners were authorized to initiate the lawsuit filed by the Partnerships and that the Partnerships had standing to invoke the jurisdiction of the court. We agree with the Partnerships' interpretation of the Partnership Agreements. We thus conclude that the district court's interpretation was incorrect as a matter of law and that it erred when it concluded that the Partnerships lacked standing.

Our analysis of the standing issue is made by reliance on the Partnership Agreements and undisputed facts. The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009). The sections of the Partnership Agreements that are relevant to our analysis are quoted below.

Section 2.6 defines an "'Event of Bankruptcy,'" and Prime Realty's bankruptcy was encompassed in the definition of an "'Event of Bankruptcy.'" Section 2.7 defines an "'Event of Dissolution'" as including "the dissolution and liquidation, Event of Bankruptcy, or removal of a General Partner or any successor."

Section 9.2(b) covers the "Involuntary Withdrawal or Assignment by a General Partner" and states in part:

> In the event of any other occurrence described as an Event of Dissolution applying to a General Partner, and the Partnership being continued in accordance with Section 8.3, the representative of the former General Partner shall continue to hold its or his interest in the Partnership, but forthwith shall cease to have any other rights or power as a General Partner.

Section 8.2 covers the "Termination of the Partnership" and states:

> The Partnership shall be terminated upon the happening of any of the following events, whichever shall first occur:
>
> (a) An event of dissolution with respect to any General Partner, unless upon the occurrence of any such event of dissolution the Partnership is continued in accordance with the provisions of Section 8.3 of this Agreement[.]

Section 8.3 covers "Continuation of Partnership Upon Certain Events," and section 8.3(b) states:

> Upon the occurrence of any event or events provided in Section 8.2(a) of this Agreement with respect to a sole General Partner, the Limited Partners shall have the right to continue the business of the Partnership in accordance with the terms of this Agreement and the Uniform Limited Partnership Act for the State of Nebraska upon the selection by such Limited Partners, within ninety [90] days of such occurrence, of a new General Partner and upon such new General Partner executing this Agreement and the certificate amendment and agreeing to be bound by all of the terms and provisions hereof; provided, however, that counsel to the Partnership determines that such continuation would not result in the Partnership being classified

for federal income tax purposes as an association taxable as a corporation and not as a partnership.

Reading the foregoing provisions of the Partnership Agreements together, it is clear that Prime Realty was not removed—much less improperly removed—as urged by the Banks and found by the district court. Instead, Prime Realty involuntarily withdrew as general partner due to its bankruptcy, and, pursuant to the Partnership Agreements, the successor general partners were selected. The record shows that Prime Realty was involved in a bankruptcy in March 2002, and such action was an "'Event of Bankruptcy'" as defined in section 2.6. An "'Event of Bankruptcy'" is included in the definition of an "'Event of Dissolution'" found in section 2.7. Once the general partner was involved in the bankruptcy, rather than dissolution or termination of the partnership, under section 8.3(b), the limited partners had the right to continue the business of the Partnerships upon the selection of a new general partner within 90 days. If this process is undertaken, then pursuant to section 9.2(b), the general partner is deemed to have involuntarily withdrawn and the general partner "shall cease to have any other rights or power as a General Partner."

Thus, in this case, after the general partner, Prime Realty, became involved in bankruptcy proceedings and involuntarily withdrew as general partner, the limited partners continued the Partnerships by selecting, not removing and electing, new general partners, and the process of replacing the general partner was completed pursuant to the Partnership Agreements. The new general partners had the authority to authorize the bringing of the instant lawsuit.

We note that Prime Realty's bankruptcy occurred in March 2002 and that the meeting resulting in the selection of new general partners was conducted in August. This meeting was not conducted within the 90 days specified in section 8.3(b) of the Partnership Agreements. The Banks were not prejudiced by this delay, and they are not in a position as nonshareholders to assert a collateral attack or assert procedural defects. See *Swain v. Wiley College*, 74 S.W.3d 143 (Tex. App. 2002). Similarly, the Banks are not in a position to object to a failure of timely adherence to the Partnership Agreements' requirements. See

Genet Co. v. Annheuser-Busch, Inc., 498 So. 2d. 683 (Fla. App. 1986). Under the facts of this case, we determine that exceeding the 90-day selection provision was a de minimis technical breach about which no limited partner in this case has objected and did not defeat the selection of the new general partners. See *Odmark v. Mesa Ltd. Partnership*, No. 94-10784, 1995 WL 413035 (N.D. Tex. June 19, 1995) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 59 F.3d 1241 (5th Cir. 1995)). The district court's determination that the general partner was improperly removed was error, and its decision that the Partnerships lacked standing based thereon was further error and must be reversed.

CONCLUSION

The district court properly considered the standing of the Partnerships to bring this lawsuit. The district court erred when it determined that the general partner, Prime Realty, was not properly removed and that the successor general partners could not authorize the lawsuit and thus the Partnerships lacked standing. Instead, we conclude that the limited partners effectively complied with the Partnership Agreements in selecting the new general partners after the previous general partner, Prime Realty, involuntarily withdrew due to its bankruptcy. The district court erred when it concluded that the Partnerships lacked standing and dismissed the lawsuit. Accordingly, we reverse the order of dismissal and remand the cause to the district court for a decision on the merits.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., and WRIGHT and STEPHAN, JJ., not participating.

IN RE INTEREST OF MERIDIAN H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES AND CROSS-APPELLEES, V. JEFFREY H. AND KAREN H., ON BEHALF OF DAMON H. AND ALEEAH H., MINOR CHILDREN, INTERVENORS-APPELLANTS, AND MARK H. AND TAMMY H., INTERVENORS-APPELLEES AND CROSS-APPELLANTS, AND SHANE K. AND BRANDI K., INTERVENORS-APPELLEES.

798 N.W.2d 96

Filed May 6, 2011. No. S-10-905.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **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. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **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.
5. **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.
6. **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.
7. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
8. **Child Custody.** The effect of a particular placement on a child's relationship with siblings is but one factor, albeit an important one, which a court should consider in determining whether the placement is in the child's best interests.

Appeal from the Separate Juvenile Court of Sarpy County: LINDA S. PORTER, Judge. Appeal dismissed.

Christine P. Costantakos for intervenors-appellants.

Sandra K. Markley, Deputy Sarpy County Attorney, for appellee State of Nebraska.

Carla Heathershaw Risko, Special Assistant Attorney General, for appellee Department of Health and Human Services.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for intervenors-appellees Mark H. and Tammy H.

Patrick A. Campagna and Stephanie M. Nevins, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for intervenors-appellees Shane K. and Brandi K.

Daniel J. Hill, of Stinson, Morrison & Hecker, L.L.P., and Sarah Helvey for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Ann W. Davis, P.C., guardian ad litem.

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

STEPHAN, J.

Meridian H. is a 3-year-old girl who was adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and has been in foster care in Nebraska for all but a few weeks of her life. Her presumed biological father died before she was born, and her biological mother's parental rights have been terminated. She has two older siblings, both minors, who were adopted before her birth upon relinquishment of parental rights by their biological parents. The adoptive parents, on behalf of the siblings, intervened in the juvenile court proceedings and requested that Meridian be placed in their home in the State of Minnesota. The separate juvenile court of Sarpy County denied the request, and the adoptive parents now appeal. Meridian's maternal grandparents, who also intervened in the juvenile proceedings, have filed a cross-appeal.

FACTS AND PROCEDURAL BACKGROUND

Tiffani H. is the biological mother of Damon H., born in 2002, and Aleeah H., born in 2003. Their biological father was

Isaiah J. Upon relinquishment of parental rights, Damon and Aleeah were adopted in the State of Minnesota by Jeffrey H. and Karen H. in December 2004. The family currently resides in Minnesota.

Isaiah died in June 2007. Nine days later, Tiffani gave birth to Meridian. Although Isaiah's name did not appear on the birth certificate, Tiffani "strongly believed" that he was Meridian's father. Paternity was never definitively established, but genetic testing excluded another man who thought he might be Meridian's father. For purposes of this appeal, we assume that Isaiah was Meridian's father and that Meridian, Damon, and Aleeah are full biological siblings.

Although it is unclear from the record, the parties indicate in their briefs that Tiffani resided in Nebraska at the time of Meridian's birth. When Meridian was approximately 2 weeks old, Tiffani took her to Minnesota to visit Meridian's siblings' family and Meridian's paternal grandmother.

On or about September 17, 2007, Tiffani was involved in a motor vehicle accident in Nebraska and was cited for driving under the influence and several other offenses for which she was jailed. Meridian, who was in the vehicle at the time of the accident, was initially placed with a family member. On September 20, Meridian was taken into the custody of the Nebraska Department of Health and Human Services (DHHS) and placed in a foster home. When Jeffrey and Karen learned of this development sometime during the fall of 2007, they notified DHHS that they were willing and interested in providing a foster home for Meridian.

The State initiated abuse and neglect proceedings in the separate juvenile court for Sarpy County on September 26, 2007, and on October 3, the court continued Meridian's placement in the temporary custody of DHHS and ordered that Tiffani have supervised visitation. In December 2007, the State amended its petition and Meridian was adjudicated a child pursuant to § 43-247(3)(a) based upon Tiffani's admission of the allegations of the amended petition.

After a disposition hearing on February 20, 2008, the juvenile court found that reasonable efforts had been made to eliminate the need for Meridian's removal from her home, but

that because Tiffani was incarcerated and unable to care for Meridian, returning her to the parental home at that time was contrary to her best interests. The tentative permanency plan was for eventual reunification with Tiffani. Pursuant to that plan, the court ordered Tiffani to complete a parenting program and a chemical dependency evaluation.

After a brief placement in another foster home, on March 10, 2008, DHHS placed Meridian in the foster home of Shane K. and Brandi K., who reside in La Vista, Nebraska. On April 10, noting that the tentative permanency plan was still reunification, the juvenile court ordered Tiffani to complete a specific residential chemical dependency treatment program, and it placed Meridian in Tiffani's custody at the treatment facility. On May 13, DHHS returned Meridian to the foster parents' home, and she has resided there continuously since then.

Following a hearing on July 23, 2008, the court ordered Meridian to remain in the custody of DHHS, and Tiffani was allowed supervised visitation. The court also ordered DHHS to obtain a home study of Jeffrey and Karen's home under the Interstate Compact on Placement of Children.[1] In an order entered on September 11, the court noted that the permanency plan for reunification with Tiffani continued to be appropriate because Tiffani had entered a treatment program, but it noted that the concurrent plan was adoption. The court ordered custody to remain with DHHS, and again ordered Tiffani to complete a parenting program and a residential chemical dependency treatment program.

In December 2008, Tiffani informed a DHHS case manager that she still desired reunification with Meridian. At about the same time, a man contacted DHHS and stated that he might be Meridian's biological father. On December 17, the court continued custody with DHHS and ordered it to conduct an expedited home study of Jeffrey and Karen's home in Minnesota.

In February 2009, DHHS arranged for paternity testing, which results excluded the person who had indicated that

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[1] See Neb. Rev. Stat. § 43-1101 (Reissue 2008) (repealed by 2009 Neb. Laws, L.B. 237, § 5, effective Aug. 30, 2009).

he might be Meridian's father. In the same month, Tiffani informed DHHS that she wished to relinquish parental rights with respect to Meridian. The juvenile court ordered that DHHS continue to have custody of Meridian and also ordered an evaluation to determine her best interests with respect to placement. At this point, DHHS considered both the foster parents and Jeffrey and Karen to be potential adoptive families for Meridian. In June, DHHS obtained the court-ordered home study which "highly recommended" placement of Meridian with Jeffrey and Karen.

In April 2009, DHHS retained Glenda Cottam, Ph.D., J.D., to conduct a placement suitability assessment for Meridian. Based upon this evaluation, Cottam concluded: "Although either the [foster parents'] home or [Jeffrey and Karen's] home would be an excellent adoptive home for Meridian, the undersigned psychologist believes that Meridian should grow up with the opportunity to have a close and loving relationship with her two biological siblings and extended family." Cottam noted that Meridian "could experience some difficulties in adjusting/transitioning" to Jeffrey and Karen's home, but that they appeared "able and willing" to assist Meridian with respect to "issues related to attachment problems." On June 14, DHHS advised the court that it agreed with Cottam's recommendation. It recommended that the permanency objective be changed to adoption and that Meridian be placed in Jeffrey and Karen's home. The guardian ad litem approved this plan "reluctantly," noting that Meridian was "deeply bonded" to the foster parents and that they would support an open adoption "giving Meridian an opportunity to develop a relationship with her siblings." Beginning in June, DHHS arranged for the siblings' family to visit Meridian in Nebraska.

On June 19, 2009, the court ordered DHHS to engage Nancy Thompson, M.S., to formulate a plan for Meridian to have contact with the siblings' family to determine the effect on her if there was a change of placement. Thompson, a licensed mental health practitioner, observed a visit by the siblings' family to the foster parents' home on August 1. In a report to DHHS, Thompson noted that she was "impressed with the respect and kindness both families showed to each other and

all the children." While noting that both families demonstrated "responsible parenting skills," she recommended that Meridian be allowed "to remain with her current foster family and to continue to form relationships with her biological family through visits and other appropriate communication." Thompson concluded: "While Meridian shares a common genetic makeup with the [siblings], there is no emotional bond built from early-shared experience and common caretaking. At this critical stage of brain development, creating another attachment break has significant negative implications for future emotional and cognitive development." Based in part upon Thompson's recommendations, DHHS changed its previous position and recommended that it was in Meridian's best interests to continue placement with and work toward eventual adoption by the foster parents.

The State filed a motion for termination of Tiffani's parental rights on September 15, 2009, on grounds set forth in Neb. Rev. Stat. § 43-292(4) and (7) (Cum. Supp. 2010). Several parties sought and were granted leave to intervene in the juvenile proceedings. These included Mark H. and Tammy H., Meridian's maternal grandparents; the foster parents, who claimed to stand in loco parentis to Meridian and wished to be heard on the issues of best interests and placement if termination of parental rights occurred; and Jeffrey and Karen, in their capacities as parents and guardians of Damon and Aleeah. In their complaint for leave to intervene, Jeffrey and Karen alleged that Damon and Aleeah knew and loved their sister Meridian and wished to develop their relationship with her. They alleged that Damon and Aleeah have a fundamental liberty interest in the integrity of the family unit under the Due Process Clause of the 14th Amendment to the U.S. Constitution and article I, §§ 1 and 3, of the Nebraska Constitution. They requested that they be allowed to adopt Meridian in the event of the termination of Tiffani's parental rights. Jeffrey and Karen further alleged that because Damon and Alleah were related to Meridian, they had priority with respect to placement.

After obtaining leave to intervene, Jeffrey and Karen filed a motion for change of placement in which they requested that Meridian be placed in their home so that she could reside with

her siblings. They also filed an answer alleging that intervention by the foster parents was legally improper and unnecessary because Meridian's interests in placement and eventual adoption were adequately represented by DHHS. They also filed an objection to the DHHS case plan which called for continued placement with and eventual adoption by the foster parents.

On March 15, 2010, Jeffrey and Karen filed an amended motion for change of placement in which they alleged that Tiffani, Meridian's paternal grandmother, and Meridian's maternal grandparents all favored placement of Meridian with Jeffrey and Karen so that she could reside with Damon and Aleeah. They further alleged that DHHS was engaging in "active and systematic efforts" to break up Meridian's biological family in violation of state and federal law.

A trial was then conducted. Cottam and Thompson testified regarding their opinions as previously set forth in their reports discussed above. Meridian's guardian ad litem testified that it "may not be in Meridian's best interest to be removed from the only family that she's known" and that it would be "better" to continue Meridian's placement with the foster parents. The guardian ad litem further testified that if placement remained with the foster parents, it would be important for Meridian to develop a relationship with her siblings. Based on conversations with the foster parents, she believed that they sincerely shared that view.

An employee of DHHS whose responsibilities include administration of foster care and adoption testified that under DHHS policy and regulations, siblings should be placed together whenever possible, provided such placement is in the best interests of the child. She identified a DHHS administrative memorandum dealing with actions required under the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act).[2] The administrative memorandum was received in evidence, and the court took judicial notice of the federal statute.

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[2] Pub. L. No. 110-351, 2008 U.S.C.C.A.N. (122 Stat. 3949) (codified as amended at scattered sections in title 42 of U.S. Code).

The court also received the parties' stipulation that intervenors Mark and Tammy, Meridian's maternal grandparents, have periodically visited with Meridian during the pendency of the juvenile proceedings, that they maintain contact with Damon and Aleeah, and that it is their desire that Meridian be placed with Damon and Aleeah in Jeffrey and Karen's home.

On September 1, 2010, the juvenile court entered an order overruling Jeffrey and Karen's motion for change of placement. The court first noted that in a separate order of the same date, it had found by clear and convincing evidence that Tiffani's parental rights should be terminated and that termination of parental rights was in Meridian's best interests. While the separate order is not included in the record before us, the parties do not dispute that Tiffani's parental rights have been terminated.

The juvenile court then noted that under Neb. Rev. Stat. § 43-285(2) (Reissue 2008), Jeffrey and Karen and others supporting the change of placement had the burden to prove that Meridian's current placement with the foster parents was not in her best interests. After reviewing the evidence, the court concluded that the burden had not been met. The court determined that the applicability of the federal Fostering Connections Act was "less than clear in this case" due to the fact that Meridian was born after Damon and Aleeah were adopted by Jeffrey and Karen and thus "never lived with or knew either of those children as her siblings." The court found that the "one certainty" which would accompany a change in placement "would be emotional harm to Meridian" and that whether such harm would be of long- or short-term duration was speculative. The court noted that the foster parents testified that if Meridian remained in their home, they would be willing to foster a relationship with Jeffrey and Karen so that Meridian could know her biological siblings as she grows up. The court acknowledged this testimony may not be legally binding, but found it "sincere and credible." The court concluded that while it did not doubt the motives of the grandparents or Jeffrey and Karen,

> what they are seeking is an order . . . which would remove Meridian from the only home she has known and from foster parents who have loved and cared for her as if

> she were their own child over the last two and a half years of her life. While relatives are certainly to be given due consideration in terms of placement decisions, it is not the controlling factor as to a child's best interests. The fact that the [foster parents] have cared for and loved Meridian with no certainty they would be able to keep her, with limited support from [DHHS,] and with all indications of a generous and selfless commitment to her, is something this Court cannot discount or dismiss.

Jeffrey and Karen perfected a timely appeal from this order.

ASSIGNMENTS OF ERROR

Jeffrey and Karen assign the following errors: (1) The juvenile court's order contravenes the public policy of preserving sibling relationships, state law, the federal Fostering Connections Act, and DHHS' regulations and administrative policies; (2) the juvenile court erred in overruling the placement motion and failing to order visitation between Damon and Aleeah and Meridian, as the evidence shows that it is in Meridian's best interests to be placed in the same home as her siblings and to have visitation with them; (3) the juvenile court's finding that it is certain that Meridian will be emotionally harmed if her placement is changed is not supported by any competent evidence; (4) the juvenile court erred by failing to find that Damon and Aleeah have a fundamental liberty interest in their relationship with their sister Meridian; and (5) the juvenile court abused its discretion in its finding that the foster parents stand in loco parentis in relation to Meridian.

The maternal grandparents have filed a cross-appeal, in which they assert that the juvenile court erred in (1) finding that the foster parents stand in loco parentis to Meridian, (2) failing to find that Damon and Aleeah have a fundamental liberty interest in their relationship and placement with Meridian, (3) finding that Meridian would be emotionally harmed if her placement was changed, and (4) failing to place Meridian with her siblings and failing to find that the failure to place Meridian with her siblings violated DHHS policy and state and federal law.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[3]

[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.[4]

ANALYSIS

Introduction

[3] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] Two jurisdictional issues are presented in this case. The first is whether the order denying the change in placement is a final, appealable order. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[6] The first and third types of final orders clearly are not present in this case. But the second type may be, as a proceeding before a juvenile court is a special proceeding for appellate purposes.[7] To resolve the final order issue, we must determine whether the denial of

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[3] *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009).

[4] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

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

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

[7] *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

Damon and Aleeah's motion to change placement affected their "substantial right."

[4-6] The second jurisdictional issue is whether Damon and Aleeah have standing to appeal from the placement order. 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.[8] 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.[9] The focus is on the party, not the claim itself.[10] Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.[11] Thus, both the final order issue and the standing issue require an analysis of the existence and nature of any rights which Damon and Aleeah may possess, and how such rights, if any, were affected by the placement determination. We address these questions in the context of standing.

Damon and Aleeah Have No Cognizable Rights With Respect to Meridian's Placement Arising Under Nebraska Statutes, Regulations, or Common Law

Neb. Rev. Stat. § 43-2,106.01 (Reissue 2008) provides that an appeal from a final order or judgment entered by a juvenile court may be taken by specified parties including "(a) The juvenile; (b) The guardian ad litem; (c) The juvenile's parent, custodian, or guardian . . . or (d) The county attorney or petitioner . . . ." Jeffrey and Karen acknowledge that Damon and Aleeah do not fall within any of these categories, but they

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[8] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[9] *Id.*

[10] *Id.*

[11] *Id.*

argue that the statutory list is not exclusive. They note that we have reached the merits of appeals from juvenile court orders brought by parties who are not specifically authorized by statute to appeal. In those cases, however, the issue on appeal was whether the court erred in denying leave to intervene.[12] In holding that grandparents should have been permitted to intervene in a juvenile case at a point where parental rights had not been terminated, we noted that intervention enabled interested grandparents to "receive notice and have an opportunity to be heard" with respect to actions which could affect their relationship with their grandchildren, but did not confer "any special entitlements or priorities . . . with respect to temporary custody, placement, or any other issue before the juvenile court."[13]

Here, the order from which Jeffrey and Karen seek to appeal determined that a change in Meridian's foster placement following termination of Tiffani's parental rights was not in her best interests. Assuming without deciding that a person who is not statutorily authorized to appeal from such an order could nevertheless do so, such person would be required to demonstrate a personal stake in the controversy in order to have standing necessary to invoke appellate jurisdiction.[14]

Jeffrey and Karen argue that Damon and Aleeah have standing under Nebraska's "public policy fostering the preservation of sibling relationships and the placement of siblings together, where possible."[15] They rely upon Neb. Rev. Stat. § 43-533(4)(b) (Reissue 2008), which provides that "when a child cannot remain with parents, [state agencies should] give preference to relatives as a placement resource." They also argue that preservation of a sibling relationship is implicit in

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[12] See, *In re Interest of Elias L.*, 277 Neb. 1023, 767 N.W.2d 98 (2009); *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002); *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

[13] *In re Interest of Kayle C. & Kylee C., supra* note 12, 253 Neb. at 693, 574 N.W.2d at 478.

[14] See *Central Neb. Pub. Power Dist. v. North Platte NRD, supra* note 8.

[15] Brief for intervenors-appellants at 4.

provisions of the Nebraska Juvenile Code which require that reasonable efforts be made to reunify families[16] and is explicit in DHHS administrative policies and regulations which encourage that siblings be placed together when possible.

This court stated in *In re Interest of Aaron D.*[17] and *In re Interest of L.J., J.J., and J.N.J.*[18] that juvenile courts must recognize, if possible, the interests of siblings. But we did so in the context of determining the sufficiency of the evidence to support a finding that termination of parental rights was in the best interests of the adjudicated juvenile. In both cases, we found the evidence on this issue to be insufficient. As part of the analysis in *In re Interest of Aaron D.*, we noted that there was uncontradicted testimony that the juvenile would be harmed by the termination of his relationship with his sister, which we described as "a de facto result" of termination of parental rights.[19] We have never recognized a right on the part of unadjudicated siblings to seek establishment or preservation of a claimed sibling relationship in juvenile abuse and neglect proceedings. But we have specifically held that a juvenile court lacks jurisdiction to order visitation between an adjudicated juvenile and an unadjudicated sibling against the wishes of the parent.[20]

[7] The Nebraska statutes and regulations which reflect a policy favoring preservation of a sibling relationship do so only within the context of determining the best interests of a juvenile who is subject to the jurisdiction of a juvenile court or otherwise entrusted to the custody of DHHS. To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third

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[16] See Neb. Rev. Stat. § 43-283.01(2) (Cum. Supp. 2010).

[17] *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[18] *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985).

[19] *In re Interest of Aaron D., supra* note 17, 269 Neb. at 265, 691 N.W.2d at 176.

[20] *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

parties.[21] We conclude that under Nebraska law, Damon and Aleeah have no cognizable interest in the sibling relationship separate and distinct from that of Meridian. Here, the guardian ad litem did not appeal on Meridian's behalf and has joined in the briefs of the appellees.

Damon and Aleeah Have No Constitutionally Protected Rights With Respect to Meridian's Placement

In their motion for change of placement, Jeffrey and Karen alleged that Damon and Aleeah "have a fundamental liberty interest in the integrity of the family unit," including a relationship with their biological sibling Meridian, which is protected by the Due Process Clause of the 14th Amendment to the U.S. Constitution and article I, §§ 1 and 3, of the Nebraska Constitution. Although the juvenile court did not specifically address this issue, Jeffrey and Karen and amicus curiae urge this court to recognize the existence of the claimed constitutional right as a matter of first impression. Because the issue bears directly on the question of standing, we consider it.

The U.S. Supreme Court has long held that a parent has a constitutional right to make decisions regarding custody and control of his or her child,[22] and based upon this precedent, this court has recognized that "both parents and their children have cognizable substantive due process rights to the parent-child relationship."[23] These rights "'protect[] not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.'"[24]

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[21] See *Central Neb. Pub. Power Dist. v. North Platte NRD, supra* note 8.

[22] See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

[23] *Amanda C. v. Case*, 275 Neb. 757, 766, 749 N.W.2d 429, 438 (2008).

[24] *In re Guardianship of D.J.*, 268 Neb. 239, 246, 682 N.W.2d 238, 244 (2004), quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

But here, the parent-child relationship between the siblings and their biological parents was extinguished by relinquishment in the case of Damon and Aleeah, and by termination of Tiffani's parental rights in the case of Meridian. The question presented to us is whether the constitutionally protected parent-child relationship which *once* existed between Damon and Aleeah and their biological parents and the entirely separate parent-child relationship which once existed between Meridian and her biological mother can be considered together as the basis for a *present* constitutionally protected right of Damon and Aleeah to a relationship with Meridian, with whom they have never resided.

Jeffrey and Karen acknowledge that no court has recognized a constitutionally protected right of one sibling to a relationship with another following termination or relinquishment of parental rights. In *In re Adoption of Pierce*,[25] a Massachusetts appellate court held that a half sister could request visitation with her half brother after his adoption under a state statute. But, the court found she had no constitutional right to visitation, reasoning "[t]he United States Supreme Court has never concluded that there exists a fundamental liberty interest in the sibling relationship."[26]

[8] In the absence of precedent, and given the diverse and complex nature of sibling relationships, we are not persuaded that it would be logical or prudent to conclude that a constitutionally protected sibling relationship somehow rises from the ashes of a lawfully terminated or relinquished parent-child relationship. We agree with other courts which have held that the effect of a particular placement on a child's relationship with siblings is but one factor, albeit an important one, which a court should consider in determining whether the placement is in the child's best interests.[27] We therefore conclude that Damon and Aleeah have no state or federal constitutional right which could be affected by Meridian's placement.

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[25] *In re Adoption of Pierce*, 58 Mass. App. 342, 790 N.E.2d 680 (2003).

[26] *Id.* at 347, 790 N.E.2d at 685.

[27] See, e.g., *Adoption of Hugo*, 428 Mass. 219, 700 N.E.2d 516 (1998); *State ex rel. Treadway v. McCoy*, 189 W. Va. 210, 429 S.E.2d 492 (1993).

Damon and Aleeah Have No Cognizable Rights With Respect to Meridian's Placement Arising Under Federal Fostering Connections Act

Jeffrey and Karen and amicus curiae call our attention to a specific section of the Fostering Connections Act,[28] a federal statute enacted during the pendency of this proceeding approximately 3½ years after Damon and Aleeah were adopted by Jeffrey and Karen and approximately 1 year after Meridian was removed from Tiffani's home. The specific provisions of the Fostering Connections Act they rely upon are codified at 42 U.S.C. § 671(a)(29) and (31). We note that § 671 was amended in 2010 by the Patient Protection and Affordable Care Act.[29] Recently, another provision of that statute was held unconstitutional by a U.S. district court, which also held that § 671 was not severable and was therefore unconstitutional as well.[30] This decision has been stayed pending appeal,[31] so we assume for purposes of this appeal that § 671 remains in effect.

The federal statute requires that in order for a State to be eligible for certain federal funds, it must have a plan approved by the Secretary of Health and Human Services which, inter alia, provides that within 30 days after a child is removed from a parent's custody, the state shall "exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child" of the child's removal from the parent's custody and certain other specified information.[32] The statute also requires that the state's plan provides that reasonable efforts shall be made

> (A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint

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[28] See 42 U.S.C. § 671 (Supp. III 2009).

[29] Pub. L. No. 111-148, 2010 U.S.C.C.A.N. (124 Stat. 119) (2010).

[30] *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

[31] *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, No. 3:10-cv-91-RV/EMT, 2011 WL 723117 (N.D. Fla. Mar. 3, 2011).

[32] 42 U.S.C. § 671(a)(29).

> placement would be contrary to the safety or well-being of any of the siblings; and
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> (B) in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings[.][33]

The juvenile court took judicial notice of the federal statute and received in evidence a DHHS administrative memorandum informing staff of the federal statutory requirements and requiring their implementation.

We question the applicability of the federal statute to this case, given the fact that all three children were removed from parental custody prior to its enactment. But assuming without deciding that it applies, we do not read the statute as creating any substantive rights in Damon and Aleeah which are cognizable in this proceeding. The Fostering Connections Act was intended "to connect and support relative caregivers, improve outcomes for children in foster care, provide for tribal foster care and adoption access, improve incentives for adoption, and for other purposes."[34] Neither the foster parents nor Jeffrey and Karen are "relative caregivers" of Meridian. The Fostering Connections Act places certain responsibilities on a state with respect to a child who it has removed from the custody of its parents, but says nothing about minor siblings of the child who are not in foster care. The statute requires notice to adult relatives of children removed from parental custody, but does not require notice to relatives who are minors or to the parents or custodians of such minors. We conclude that the Fostering Connections Act does not establish any legal interest on the part of Damon and Aleeah which could have been affected by the juvenile court's placement order or serve as the basis for standing.

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[33] 42 U.S.C. § 671(a)(31).

[34] Pub. L. No. 110-351, 2008 U.S.C.C.A.N. (122 Stat. 3949).

Cross-Appeal

Mark and Tammy, who were given leave to intervene in the juvenile proceedings as Meridian's maternal grandparents, have filed a cross-appeal in which they contend that the juvenile court erred in not placing Meridian with Jeffrey and Karen. However, any interest or right which Mark and Tammy may have had by virtue of their biological relationship to Meridian ceased to exist when the parental rights of their daughter, Tiffani, were terminated.[35] Accordingly, they lack standing to cross-appeal.

CONCLUSION

For the foregoing reasons, we conclude that the intervenors-appellants and cross-appellants lack standing, and we therefore dismiss the appeal and the cross-appeal.

Appeal dismissed.

Wright, J., not participating.

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[35] See, *In re Interest of Destiny S., supra* note 12; *In re Interest of Kayle C. & Kylee C., supra* note 12; *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982).

In re Interest of A.M., Jr., alleged to be a dangerous sex offender.
A.M., Jr., appellant, v. Mental Health Board of the 11th Judicial District, appellee.

797 N.W.2d 233

Filed May 13, 2011. No. S-10-320.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which the Nebraska Supreme Court resolves independently of the lower court's determination.
4. **Due Process.** Due process requires a neutral, or unbiased, adjudicatory decisionmaker.

5. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.
6. **Administrative Law: Recusal: Presumptions: Proof.** A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.
7. **Administrative Law.** Factors that may indicate partiality or bias 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.
8. **Administrative Law: Recusal: Presumptions.** An adjudicator should not hear a case 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.
9. **Administrative Law: Due Process.** Although due process requires disqualification when the administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue.
10. **Statutes: Legislature: Intent.** In construing a statute, a court determines and gives effect to the legislative intent behind the enactment.
11. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
12. **Constitutional Law: Equal Protection.** The Nebraska and federal Equal Protection Clauses grant the same level of protection. Both require the State to treat similarly situated people alike.
13. **Constitutional Law: Statutes.** The 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time.
14. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
15. **Statutes: Special Legislation.** A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
16. **Constitutional Law: Statutes: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
17. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.
18. **Constitutional Law: Special Legislation.** The general test of constitutionality for prohibitions against special legislation is reasonableness of classification and uniformity of operation.
19. ____: ____. Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears

some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.

20. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.
21. ____. The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.
22. **Administrative Law.** Administrative agencies are capable of exercising quasi-judicial functions.
23. **Criminal Law: Statutes: Legislature.** The prohibition against bills of attainder prohibits trials by the Legislature, and it forbids the imposition of punishment by the Legislature on specific persons.
24. **Criminal Law: Statutes: Words and Phrases.** A bill of attainder is a legislative act that applies to named individuals or to easily ascertained members of a group in a way that inflicts punishment on them without a judicial trial.
25. **Criminal Law: Statutes.** To constitute a bill of attainder, the law must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.
26. **Constitutional Law: Statutes: Proof.** Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.
27. **Constitutional Law.** The protection against ex post facto laws is the same under the Nebraska and federal Constitutions.
28. **Constitutional Law: Criminal Law: Statutes.** Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
29. **Constitutional Law: Criminal Law: Other Acts: Time.** It is only criminal punishment that the Ex Post Facto Clause prohibits. The retroactive application of civil disabilities and sanctions is permitted.
30. **Sentences: Statutes: Intent.** To determine whether a statute imposes criminal punishment or civil sanctions, a court applies the two-pronged intent-effects test.
31. **Convicted Sex Offender: Legislature: Intent.** The Legislature enacted the Sex Offender Registration Act to establish a civil regulatory scheme to protect the public from sex offenders.
32. **Convicted Sex Offender: Statutes: Sentences.** The Sex Offender Commitment Act does not constitute ex post facto legislation because it is not punitive in nature.
33. **Constitutional Law: Double Jeopardy.** The protections of the Double Jeopardy Clauses of the state and federal Constitutions are coextensive.
34. **Statutes: Double Jeopardy.** If a statute is not punitive, it does not violate the Double Jeopardy Clause.
35. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

36. **Ordinances: Appeal and Error.** When evaluating an ordinance for vagueness, an appellate court does not seek mathematical certainty, but, rather, flexibility and reasonable breadth.
37. **Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.
38. **Constitutional Law: Statutes.** The void-for-vagueness doctrine applies to civil as well as criminal statutes.
39. **Sentences: Prior Convictions.** A court cannot use a void conviction to enhance punishment for a later offense.
40. **Convicted Sex Offender: Sentences.** Commitment under Nebraska's Sex Offender Commitment Act is a civil restraint that does not enhance punishment.
41. **Prior Convictions: Collateral Attack.** A defendant cannot collaterally attack his or her conviction in a separate proceeding for errors stemming from *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).
42. **Due Process: Trial: Confessions.** It is a violation of the Due Process Clause to use a defendant's involuntary statement against him or her at a criminal trial.
43. **Constitutional Law: Miranda Rights.** The Fifth Amendment precludes the use of compelled testimony and goes further by requiring *Miranda* warnings for some custodial interrogations.
44. **Convicted Sex Offender: Mental Health: Evidence.** Under Neb. Rev. Stat. § 71-955 (Reissue 2009), a mental health board in a proceeding under the Sex Offender Commitment Act cannot consider any evidence that would be inadmissible in a criminal proceeding.
45. **Criminal Law: Trial: Confessions: Expert Witnesses.** In a criminal trial, the prosecution cannot use for *any* purpose a defendant's involuntary statements or any evidence that is directly or indirectly derived from them. This includes an expert's opinion based on them.
46. **Criminal Law: Prior Convictions: Confessions: Evidence.** Even after conviction, if a person in prison or on probation is compelled to make incriminating statements, those statements are inadmissible in a later criminal proceeding for any crime other than the crime for which the person has been convicted.
47. **Self-Incrimination: Time.** In most contexts, the privilege against self-incrimination is not self-executing. A person must timely invoke it, or it will be lost.
48. **Presentence Reports.** Routine presentence interviews, even if the defendant is in custody, are not normally considered coercive interrogations.
49. **Constitutional Law: Self-Incrimination: Probation and Parole.** The State cannot constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege.
50. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
51. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
52. **Rules of Evidence: Mental Health.** Mental health boards must apply the rules of evidence.

53. **Rules of Evidence: Expert Witnesses.** Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008), permits experts to base their opinions on facts that are not admissible into evidence if experts in their field reasonably rely on such facts.
54. **Convicted Sex Offender: Due Process.** Because a hearing under the Sex Offender Commitment Act may result in a serious deprivation of the defendant's interest in liberty, the State's evidence must be sufficiently reliable to comply with due process.
55. **Convicted Sex Offender: Due Process: Hearsay: Presentence Reports.** Because hearsay can permeate the evidence used to commit a sex offender, a victim's hearsay statements in police reports or presentence reports must have special indicia of reliability to satisfy due process.
56. **Constitutional Law: Convicted Sex Offender: Trial: Witnesses.** Neb. Rev. Stat. § 71-954 (Reissue 2009) gives defendants subject to the Sex Offender Commitment Act the same right to confront and cross-examine witnesses as the state and federal Constitutions.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Derek L. Mitchell, Dawson County Public Defender, for appellant.

Jon Bruning, Attorney General, and Stephanie Zeeb Caldwell for appellee.

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

CONNOLLY, J.

In the early 1990's, a jury found A.M. guilty of first degree sexual assault and the court sentenced him to prison. In 2008, shortly before his expected release, the State filed a petition under the Sex Offender Commitment Act (SOCA)[1] to have him declared a dangerous sex offender and committed to inpatient care. The Mental Health Board of the 11th Judicial District (Board) found by clear and convincing evidence that A.M. was a dangerous sex offender. It further found that neither voluntary hospitalization nor other treatment alternatives would prevent A.M. from reoffending. A.M. appealed to the district

[1] Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009).

court, asserting a litany of constitutional and evidentiary errors. The district court rejected A.M.'s claims and found that there was clear and convincing evidence to have A.M. committed. A.M. appeals.

I. BACKGROUND

A.M. was convicted of first degree sexual assault in late 1993 or early 1994. The jury found that A.M. was over the age of 19 and had sex with a 15-year-old girl, violating Neb. Rev. Stat. § 28-319 (Reissue 1989). The court sentenced him to 10 to 30 years' imprisonment.

Shortly before A.M.'s release date of September 10, 2008, the State filed a petition with the Board. The State sought a hearing to determine whether A.M. was a dangerous sex offender and whether he should be placed in the custody of the Department of Health and Human Services (DHHS).

1. Preliminary Motions

The parties filed several prehearing procedural motions. The State sought access to the inmate file that the Department of Correctional Services kept on A.M. It claimed that the file was necessary because one of the State's experts, a private psychologist, would need it to form an opinion regarding A.M. The court granted the motion. A.M. objected to the motion and moved for rehearing. After rehearing, the court affirmed its order granting the motion. It concluded that the file "may contain the only recorded evidence of [A.M.'s] recent conduct, which evidence is germane to a determination of whether the subject is a dangerous sex offender."

Before the hearings began, A.M. moved in limine to exclude evidence. A.M. sought to exclude any "statements, depositions, or any other documents, evidence etc." coming from a 1992 conviction that was later vacated. The Board overruled this motion.

A.M. also objected to the makeup of the Board. A.M. moved to have the Board members recuse themselves for various reasons. A.M. moved to have one Board member, Mark Jones, M.D., recuse himself because Jones was a member of a medical practice group that had previously treated A.M. A.M. was unhappy with his treatment and was considering a lawsuit

against Jones. Jones recused himself. The Board assigned an alternate member to complete the panel.

2. The Evidence at the Board's Hearing

The State's experts performed a psychological evaluation to determine if A.M. was a dangerous sex offender. A.M. refused to participate or be interviewed for the evaluation, so the psychologists based their findings on records of A.M.'s conviction and behavior in prison. The psychologists' report states that this is an accepted practice among mental health professionals.

The report noted that while A.M. did initially accept some general mental health treatment while in prison, he refused to participate in a program designed specifically for sex offenders. The report also stated, however, that A.M. had received some sex offender treatment ordered as a condition of probation for an earlier sexual assault that A.M. had committed before the one that sent him to prison. A.M. was dismissed from that program in April 1993 for noncompliance with treatment goals, dishonesty, and failure to complete assignments.

In addition to his 1993 conviction for first degree sexual assault, A.M. apparently also had a 1992 conviction for third degree sexual assault, although a court later vacated this conviction. This vacated conviction is a flashpoint in this appeal. Despite irregularities in the plea process, the county court sentenced A.M. to probation. During court-ordered treatment, A.M. allegedly admitted to sex offenses for which he was never charged. During the sex offender treatment, A.M. repeatedly minimized his actions. A polygraph also indicated that A.M. was likely not complying with the terms of his probation. The State's psychologists relied on these facts from the vacated conviction in forming their opinions regarding A.M., which they memorialized in their report and testified to at the commitment hearing. A.M. objected to the State's experts' reliance on these facts in their report and testimony. The Board admitted the report into evidence and allowed the experts to base their opinions on these facts.

The State called three experts to testify at the hearing. The first was Alan Levinson, Psy.D. He stated that he had based his opinion on facts that he had gathered from witnesses'

statements and the presentence investigation. He stated that these were documents that mental health professionals would consult in forming their opinions. He went further, however, and mentioned facts contained in these sources, such as the number of victims and their gender. Levinson apparently assigned importance to these facts: While he stated that A.M. met the statutory criteria for a dangerous sex offender, he conceded that if the underlying facts were not true, A.M. "cannot be diagnosed with pedophilia."

Mark Weilage, Ph.D., another of the State's experts, testified that he relied on mental health records, institutional records, and the presentence investigation. He testified that mental health experts normally rely on such documents in forming their opinions. Weilage testified that it was his opinion that A.M. was a dangerous sex offender.

The State's third expert was Mary Paine, Ph.D. Paine testified that in forming her opinion, she reviewed A.M.'s prison files, offense reports, mental health records, and the presentence investigation. Paine testified in detail about the earlier incidents and treatment, including facts from the vacated conviction. At places, it appears as if Paine was reading directly from her sources. Paine opined that A.M. met the criteria to be a dangerous sex offender and that inpatient treatment would be necessary. But she conceded that her opinion was contingent on the underlying facts being true.

A.M. made countless objections to the admission of the underlying facts. The State argued that it was not offering the statements for substantive purposes, but, rather, so that the Board could see how the experts arrived at their opinions. The Board allowed the testimony.

The State's psychologists ultimately concluded that A.M. met the statutory definition of a dangerous sex offender. The psychologists stated that A.M. had a "mental health diagnosis of Pedophilia, Sexually attracted to females, nonexclusive type." This diagnosis, the psychologists claimed, would increase his likelihood of engaging in repeat acts of sexual violence. Also factoring into the psychologists' opinions were that A.M. repeatedly minimized his actions, lacked empathy for his victims, and refused to take responsibility for his actions. The

psychologists concluded that A.M. would be unlikely to benefit from attending any type of sex offender treatment.

Unlike the State's experts, A.M.'s expert, Bruce D. Gutnik, M.D., a registered psychiatrist, interviewed A.M. Gutnik stated that if the information on which the psychologists based their opinions were indeed true, then A.M. would meet the definition of a dangerous sex offender. If, however, A.M. was truthful in his statements to Gutnik, there would be no clinical diagnosis of pedophilia. Ultimately, Gutnik was ambivalent. He stated, "I must leave it to the court to determine which historical information is accurate and therefore, whether or not [A.M.] meets the criteria of [§] 83-174.01 as a dangerous sex offender."

3. The Board's Decision

The Board found that the State proved by clear and convincing evidence that A.M. is a dangerous sex offender within the meaning of Neb. Rev. Stat. § 83-174.01(1)(a) (Reissue 2008). Namely, the Board found that A.M. suffered from a mental illness, pedophilia, that makes him likely to engage in repeat acts of sexual violence and unable to control his criminal behavior. The Board found that inpatient treatment was necessary. The Board ordered that A.M. be committed to the custody of DHHS.

4. District Court's Decision

A.M. appealed to the district court. The court affirmed the Board's decision. The court rejected A.M.'s claims that the following statutes are unconstitutional because they are bills of attainder and ex post facto laws: Neb. Rev. Stat. §§ 29-4014 (Reissue 2008), 71-916 (Reissue 2009), 71-1202 (Reissue 2009), and 83-174 (Reissue 2008). The court also found that the laws did not violate the special legislation or the equal protection clauses. Finally, the court found that the laws did not violate the separation of powers doctrine.

(a) Disposition of Procedural Issues

The district court ruled on several procedural issues. It found that the release of the inmate file was not improper. The court

found A.M.'s claim that the Board is biased because its members are trained by DHHS "is rank speculation" and without merit. The court rejected an argument that because Sherry Warner, the Dawson County District Court clerk, sat on the Board, the Board was partial and biased. Further, the court found that Warner was a "layperson" within the meaning of the statute because she was not a member of one of the listed professions in Neb. Rev. Stat. § 71-915 (Reissue 2009). The court also found that the chairperson of the Board had the authority to name an alternate member to replace Jones, who had been recused because he had previously treated A.M.

(b) Disposition of Evidentiary Issues

The court concluded that none of A.M.'s evidentiary assignments of error were meritorious. It also found that no law required the exclusion of statements that A.M. made during his probation, even if the probation was ordered as punishment for a conviction that was later vacated. The court ruled that experts could rely on the statements and other evidence uncovered during A.M.'s probation, even if the evidence would not be otherwise admissible. The court noted that Nebraska evidence law allows experts to rely on evidence that is otherwise inadmissible in forming their opinions. It stated that all that is required is that the evidence be of a type that experts typically rely on when forming opinions. The court concluded that this requirement was satisfied. Finally, the court found that the evidence was clear and convincing that A.M. was a dangerous sex offender and that involuntary commitment was the only means available that would suffice to prevent further harm to the public.

II. ASSIGNMENTS OF ERROR

A.M. assigns, restated and renumbered, that the district court erred in failing to determine the following:

(1) The makeup of the Board was improper, which deprived A.M. of an impartial adjudicator and thus violated due process.

(2) Sections 29-4014 and 71-1202 violate the Equal Protection Clauses of the state and federal Constitutions.

(3) Sections 29-4014 and 71-1202 violate the prohibition against special laws in article III, § 18, of the state Constitution.

(4) Sections 29-4014 and 71-1202 violate the separation of powers doctrine of the state Constitution.

(5) Sections 29-4014 and 71-1202 violate the prohibitions against ex post facto laws, bills of attainder, and double jeopardy found in the state and federal Constitutions.

(6) Section 83-174.01 is unconstitutionally vague.

(7) The Board's determination that A.M. was a dangerous sex offender was unsupported by clear and convincing evidence because the determination was based upon inadmissible evidence.

(8) The State's argument that A.M. is an untreated sex offender unconstitutionally shifted the burden of proof from the State to A.M.

(9) A.M. was denied his First Amendment and due process rights when a psychologist was allowed to testify regarding A.M.'s inmate file.

III. STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record.[2] In reviewing a district court's judgment, we will affirm unless we find, as a matter of law, that clear and convincing evidence does not support the judgment.[3]

[3] Whether a statute is constitutional presents a question of law, which we resolve independently of the lower court's determination.[4]

IV. ANALYSIS

1. Due Process

A.M. first argues that the Board was improperly constituted. We have grouped these arguments under the umbrella of due process. A.M. focuses on three points. First, he argues that

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[2] *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[3] *Id.*

[4] See *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009).

§ 71-916 deprives him of due process because it provides that mental health boards will be trained by DHHS, which is the agency that maintains custody of sex offenders. Second, A.M. attacks the participation of Warner, the district court clerk. A.M. claims that she is not a "layperson" within the meaning of § 71-915. He also claims that she is biased because, as district court clerk, she may have come across documents in A.M.'s earlier cases and thus had prior knowledge of the circumstances. Finally, A.M. argues that the Board was not constituted in accordance with the statutes.

(a) Alleged Bias of the Board

A.M. argues that because the Board acted in a quasi-judicial fashion, the judiciary, and not DHHS, should train board members. He contends that DHHS' training of board members renders them biased against defendants. Section 71-916 provides that DHHS "shall provide appropriate training to members and alternate members of each mental health board and shall consult with consumer and family advocacy groups in the development and presentation of such training." DHHS is also required to provide the boards with blank forms for warrants, certificates, and other documents that the boards need to carry out their duties.[5]

[4-8] We have stated that due process requires a neutral, or unbiased, adjudicatory decisionmaker.[6] Such decisionmakers serve with a presumption of honesty and integrity.[7] A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.[8] Factors that may indicate partiality or bias 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

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[5] § 71-916.

[6] See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

[7] See, *id.*; *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

[8] See *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002).

relationship.[9] An adjudicator should not hear a case 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.[10]

A.M. does not allege, much less prove, any facts that show bias. He does not allege that any Board member had a pecuniary interest in the outcome. Nor does he allege that any board member who heard the matter had a familial or adversarial relationship. And finally, he points to no specific training procedure that is prejudicial to his right to an impartial adjudicator.

It is A.M.'s burden to show bias. His baseless speculation as to collusion between DHHS and the Board members because DHHS trains the Board members fails to satisfy this burden. A.M. has failed to show that § 71-916 deprived him of his right to an unbiased adjudicator.

(b) Warner's Participation

A.M. also argues that Board member Warner, the district court clerk, is biased because she handled documents relating to A.M.'s convictions. He also claims that she is not a lay-person within the meaning of § 71-915(2).

(i) Exposure to A.M.'s Records Does Not Disqualify Warner as an Adjudicator

[9] A.M. argues that Warner had personal knowledge of the facts because she worked as the district court clerk when A.M. was the defendant in two criminal cases and that thus, she is not impartial. The same bias principles discussed above govern whether the Board was so biased as to deprive A.M. of due process, and we need not repeat them. However, more on point, we stated in *Central Platte NRD v. State of Wyoming*,[11] "Although due process requires disqualification when the

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[9] See *Murray, supra* note 6.

[10] See *Urwiller, supra* note 8.

[11] *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 466, 513 N.W.2d 847, 865 (1994).

administrative adjudicator has actually prejudged the precise facts at issue, due process does not require the disqualification of one who has merely been exposed to or investigated the facts at issue."

These criminal cases occurred in the early 1990's. Obviously, court clerks deal with hundreds if not thousands of cases a year. To claim that Warner would remember the details of any case almost 20 years later seems farfetched. But even if she did, under *Central Platte NRD*, it does not matter. Unless A.M. can show that Warner had actually prejudged the issues—a claim he does not make—her mere exposure to the facts of the case does not disqualify her as an impartial decisionmaker.

(ii) Warner Qualified as a Layperson

A.M. also argues that Warner, as the district court clerk, was not a "layperson" within the meaning of § 71-915(2). Section 71-915(2) states in part:

> Each mental health board shall consist of an attorney licensed to practice law in this state and any two of the following but not more than one from each category: A physician, a psychologist, a psychiatric social worker, a psychiatric nurse, a clinical social worker, or a layperson with a demonstrated interest in mental health and substance dependency issues.

[10,11] In construing a statute, we determine and give effect to the legislative intent behind the enactment.[12] And absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[13]

Webster's dictionary defines "layman" as "one of the laity; one who is not a clergyman or who is not a member of a specified profession, as of law, medicine, etc."[14] The professions specified by § 71-915(2) are a lawyer, a physician, a psychologist, a psychiatric social worker, a psychiatric nurse, and a clinical social worker. A.M. has not argued that Warner

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[12] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[13] *Id.*

[14] Webster's Encyclopedic Unabridged Dictionary of the English Language 813 (1994).

falls into one of these categories. Because a "layman" is one "who is not a member of a specified profession," it follows that Warner is a layperson.

(c) The Board Has Authority to Appoint an Alternate Member

A.M.'s final due process argument is that the Board chairperson lacked the authority to assign an alternate to sit on the Board after Jones was recused. A.M. argues that the statute, § 71-915(1), requires the presiding district court judge to appoint a replacement board member.

Section 71-915(1) states that the "presiding judge in each district court judicial district shall create at least one . . . mental health board[] in such district and shall appoint sufficient members and alternate members to such boards."

Section 71-915(3) states that a board "shall have the power to issue subpoenas, to administer oaths, and to do any act necessary and proper for the board to carry out its duties. No mental health board hearing shall be conducted unless three members or alternate members are present and able to vote."

Here, Jones recused himself because he had previously treated A.M. for a cardiac condition and A.M. apparently was considering a lawsuit against Jones. Although the replacement member was not originally assigned to this Board, she had previously been appointed as an alternate.

The Board has the power "to do any act necessary and proper for the board to carry out its duties." Further, the Board must have three members.[15] Assigning a previously appointed alternate member to serve so that the Board has the required three members is certainly an act "necessary and proper" for the Board to carry out its duties.

In sum, A.M.'s due process arguments have no merit.

2. Equal Protection

[12] A.M. next challenges §§ 29-4014 and 71-1202 under the Equal Protection Clauses of the state and federal Constitutions. The Nebraska and federal Equal Protection Clauses grant the

[15] § 71-915.

same level of protection. Both require the State to treat similarly situated people alike.[16]

Section 29-4014 is a statute under the Sex Offender Registration Act (SORA).[17] It requires that certain inmates undergo sex offender counseling while incarcerated. The inmates may refuse without being punished, but if they do refuse, they must undergo an evaluation before their release.

Section 71-1202 states the purpose of SOCA. Under SOCA, if a person is determined to be a dangerous sex offender, he or she may be involuntarily committed.

[13] The two statutes in question were enacted in 2006. A.M.'s argument is that the two statutes treat people differently based upon whether they were released from prison before or after the effective date of the statute. The U.S. Supreme Court, however, has said that "the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."[18] A.M.'s equal protection argument has no merit.

3. Special Legislation

A.M. also argues that §§ 29-4014 and 71-1202 constitute "special laws" that violate Neb. Const. art. III, § 18. A.M.'s special legislation argument is the same as his equal protection argument: Treating people who are still incarcerated on the effective date of the statute differently than those who were previously released is unconstitutional. We disagree.

[14,15] "The burden of establishing the unconstitutionality of a statute is on the one attacking its validity."[19] "'The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors"

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[16] See *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[17] See Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008 & Cum. Supp. 2010).

[18] *Sperry & Hutchinson Co. v. Rhodes*, 220 U.S. 502, 505, 31 S. Ct. 490, 55 L. Ed. 561 (1911).

[19] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 850, 620 N.W.2d 339, 344 (2000).

to a specific class. A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.'"[20]

[16-19] When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution. Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.[21] The analysis of a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a "substantial difference of circumstances" to suggest the expediency of diverse legislation.[22] The general test of constitutionality for prohibitions against special legislation is reasonableness of classification and uniformity of operation.[23] And classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation.[24] The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.[25]

The fact that § 29-4014 operates only on inmates still incarcerated on the operative date of the statute does not render it unconstitutional under the special legislation clause. The purpose of § 29-4014 and the rest of SORA is to protect the public from sex offenders.[26] Section § 29-4014 advances this

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[20] *Yant v. City of Grand Island*, 279 Neb. 935, 940, 784 N.W.2d 101, 106 (2010), quoting *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008). See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

[21] *Hug, supra note* 20.

[22] *Id*. at 826, 749 N.W.2d at 890.

[23] See *Bergan Mercy Health Sys., supra* note 19.

[24] *Id.*

[25] *Id.*

[26] *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

purpose by requiring incarcerated sex offenders to undergo counseling. Those who were already released from custody before the operative date would be difficult, if not impossible, to treat. After release, such inmates could have left Nebraska. Such inmates would no longer be subject to Nebraska law. Those who were still in custody, however, can be ordered to treatment. Thus, there is a "substantial difference of circumstances" between those who are still in prison and those who are not. Finally, A.M. does not argue that this statute creates a closed class.

A.M.'s challenge to § 71-1202 also fails because SOCA does not limit its application to those who are still imprisoned on its effective date; SOCA applies to anyone alleged to be a dangerous sex offender, regardless of whether they are still incarcerated. In other words, the statute does not make the classification that A.M. claims it does. Nor does the statute create a closed class. His argument that § 71-1202 violates the special legislation clause of the Nebraska Constitution fails.

4. Separation of Powers

A.M. argues that §§ 29-4014 and 71-1202 violate the separation of powers principle found in the state Constitution by "encroaching upon powers belonging to the judicial branch of government."[27] Although his argument is difficult to follow, A.M. seems to argue that the statutes impose judicial functions on the executive branch.

[20,21] Nebraska's separation of powers clause[28] prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[29] Additionally, it prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.[30]

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[27] Brief for appellant at 18.

[28] Neb. Const. art. II, § 1.

[29] *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007); *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[30] *In re Petition of Nebraska Community Corr. Council, supra* note 29.

[22] We have, however, long held that administrative agencies are capable of exercising quasi-judicial functions.[31] We previously addressed a challenge that an act of the Legislature unconstitutionally delegated judicial power to the tax commissioner.[32] In rejecting that challenge, we stated that the conferral of quasi-judicial duties upon state agencies does not conflict with the constitutional provisions relating to the judiciary. We noted that this is "particularly true where such powers and duties relate to matters which are peculiarly affected with a public interest and where provision is made for appeal from decisions of such officers or agencies to the courts."[33] In *Hadden v. Aitken*,[34] we reached a similar result and used almost identical language. Further, the Legislature bases the Administrative Procedure Act upon this very notion. A.M.'s argument that administrative agencies cannot exercise quasi-judicial powers has no merit.

5. Bills of Attainder

A.M. next argues that the challenged statutes are impermissible bills of attainder.

[23-26] The prohibition against bills of attainder "prohibits trials by a legislature, and it forbids the imposition of punishment by the legislature on specific persons."[35] A bill of attainder is a legislative act that applies to named individuals or to easily ascertained members of a group in a way that inflicts punishment on them without a judicial trial.[36] It is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by

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[31] See, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967); *Hadden v. Aitken*, 156 Neb. 215, 55 N.W.2d 620 (1952), *overruled on other grounds, Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972).

[32] *Anderson, supra* note 31.

[33] *Id.* at 403, 155 N.W.2d at 329.

[34] *Hadden, supra* note 31.

[35] *State v. Palmer*, 257 Neb. 702, 717, 600 N.W.2d 756, 770 (1999).

[36] See, *id.* See, also, *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

legislature."[37] The prohibition on bills of attainder proscribes legislation that singles out disfavored persons and carries out summary punishment for past conduct.[38] To constitute a bill of attainder, the law must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.[39] Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.[40]

Neither of the challenged statutes constitutes a bill of attainder because the Legislature has not determined guilt, it has merely imposed burdens on those whom the judicial branch has already found guilty.[41] Section 29-4014 limits its application to "[a]ny person convicted of a crime requiring registration as a sex offender," and § 71-1202 states that SOCA's purpose "is to provide for the court-ordered treatment of sex offenders *who have completed their sentences*." Obviously, for sex offenders to have been sentenced, it is necessary for them to have first been convicted by a court. In sum, because the Legislature is not the branch determining guilt, these statutes do not constitute bills of attainder.

6. Ex Post Facto

[27] A.M. next challenges §§ 29-4014 and 71-1202 under the Ex Post Facto Clauses of the state and federal Constitutions. But like many other constitutional provisions, the protections offered by each are ordinarily the same.[42] Thus, only one analysis is necessary.[43] Further, we note that

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[37] *United States v. Brown*, 381 U.S. 437, 442, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

[38] *Brown, supra* note 37.

[39] See, *id.*; *Galindo, supra* note 36.

[40] *Galindo, supra* note 36.

[41] See, *Wright v. Iowa Dept. of Corrections*, 747 N.W.2d 213 (Iowa 2008); *State v. Williams*, 88 Ohio St. 3d 513, 728 N.E.2d 342 (2000); *Com. v. Mountain*, 711 A.2d 473 (Pa. Super. 1998); *State v. Larson*, No. A05-40, 2006 WL 618857 (Minn. App. Mar. 14, 2006) (unpublished decision); *Montgomery v. Leffler*, No. H-08-011, 2008 WL 5147935 (Ohio App. Dec. 5, 2008) (unpublished decision).

[42] *Galindo, supra* note 36; *In re Interest of J.R., supra* note 4.

[43] See *Slansky, supra* note 26.

we have recently considered ex post facto challenges to our sex offender laws.[44]

[28] Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.[45]

[29] It is only criminal punishment, however, that the Ex Post Facto Clause prohibits. The retroactive application of civil disabilities and sanctions is permitted.[46] Thus, we must determine whether the statutes impose either civil disabilities or criminal punishment.

[30] To do so, we apply the two-pronged intent-effects test.[47] We must first "'ascertain whether the legislature meant the statute to establish "civil" proceedings.'"[48] This is a question of statutory construction.[49]

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[50]

Because we ordinarily defer to the Legislature's stated intent, only the clearest proof will suffice to override legislative intent

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[44] See, e.g., *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010); *In re Interest of J.R., supra* note 4; *Slansky, supra* note 26; *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[45] *Galindo, supra* note 36.

[46] See *In re Interest of J.R., supra* note 4.

[47] See *id.*

[48] *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), quoting *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

[49] *Hendricks, supra* note 48.

[50] *Smith, supra* note 48, 538 U.S. at 92, quoting *Hendricks, supra* note 48.

and transform what has been denominated a civil remedy into a criminal penalty.[51]

In determining whether the statutory scheme is so punitive that it transforms the statute from a civil statute to a criminal statute, we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*.[52] The factors are neither "'exhaustive nor dispositive.'"[53] They are "'useful guideposts.'"[54] The following seven factors serve as our guideposts:

> "'(1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."'"[55]

(a) § 29-4014

[31] We previously determined in *State v. Worm*[56] that the Legislature enacted SORA to establish a civil regulatory scheme to protect the public from sex offenders. We reaffirmed this legislative intent in *Slansky v. Nebraska State Patrol*.[57] In those cases, we analyzed SORA's notification and registration requirements. But § 29-4014 presents a different situation. It

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[51] See, *Smith, supra* note 48; *Hendricks, supra* note 48.

[52] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

[53] *Smith, supra* note 48, 538 U.S. at 97, quoting *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2635, 65 L. Ed. 2d 742 (1980).

[54] *Id.*, 538 U.S. at 97, quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

[55] *Worm, supra* note 44, 268 Neb. at 85, 680 N.W.2d at 161, quoting *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

[56] *Worm, supra* note 44.

[57] *Slansky, supra* note 26.

provides for treatment for inmates who are already imprisoned for certain offenses. Section 29-4014, however, does not impose any discipline for the refusal to participate. Instead, the inmate must merely undergo a civil commitment evaluation before his or her release. Although this statute is of a different flavor than registration and notification requirements, we still believe that the Legislature's intent was to establish a civil regulatory scheme for sex offenders. In other words, in enacting this statute, it was not the Legislature's intent to punish. Having determined that the Legislature did not intend § 29-4014 as punishment, we look to the seven *Kennedy* factors. Again, we note that only the clearest proof will suffice to overcome our view that the Legislature intended § 29-4014 to operate as a civil statute.

Section 29-4014 imposes no affirmative disability or restraint. While it does say that certain inmates shall attend treatment and counseling, it imposes no penalty on those who refuse to participate. Those who refuse only undergo an evaluation. Section 29-4014 itself does not prohibit any inmate or sex offender from doing anything he would otherwise be able to do.

Section 29-4014 does not further the traditional punitive justifications of retribution or deterrence. First, treatment may benefit the offender, thus undercutting any claim of its retributive nature. Second, § 29-4014 only applies to those who are already "committed to the Department of Correctional Services," i.e., in prison. Prison itself is already a significant deterrent. It is unlikely that § 29-4014 adds any additional deterrence.

There are alternative purposes for treatment other than punishment. Namely, the program is designed to treat sex offenders. And the statute is not excessive in the light of this alternative purpose; the statute is well tailored to further this purpose, and its burdens are not onerous.

We recognize that some of the *Kennedy* factors may cut in favor of § 29-4014 as being considered punishment. For example, it does not apply unless there has already been a criminal act. We conclude, however, that most of the factors weigh in favor of § 29-4014 being a civil statute. Certainly, the evidence to the contrary does not rise to the "clearest proof" standard.

We hold that § 29-4014 is not punitive and thus does not violate the Ex Post Facto Clause.

(b) § 71-1202

[32] We recently held that SOCA, in its entirety, does not constitute ex post facto legislation because it is not punitive in nature.[58] Accordingly, A.M.'s argument that § 71-1202, which is a part of SOCA, is ex post facto is without merit.

7. Double Jeopardy

[33,34] A.M. next argues that the challenged statutes violate the Double Jeopardy Clauses of the state and federal Constitutions, whose protections are coextensive.[59] But because we determined in our ex post facto analysis that neither statute is punitive, neither statute can violate the Double Jeopardy Clause.[60]

8. Vagueness of § 83-174.01

A.M. argues that § 83-174.01(1) and (2) are vague and thus unconstitutional. The challenged subsections read in their entirety:

> (1) Dangerous sex offender means (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.
>
> (2) Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public.

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[58] *In re Interest of J.R., supra* note 4.

[59] See *id.*

[60] *Slansky, supra note* 26.

Specifically, A.M. alleges that the term "sexual violence" in subsection (1) and the terms "serious harm" and "pose a menace" used in subsection (2) are unconstitutionally vague.

[35-38] "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[61] In brief, a statute must not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.[62] "[W]hen evaluating an ordinance for vagueness, we do not seek mathematical certainty, but, rather, flexibility and reasonable breadth. Moreover, a statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding."[63] The void-for-vagueness doctrine applies to civil as well as criminal statutes.[64]

The first phrase that A.M. argues is vague, "sexual violence," is actually part of a larger phrase that is defined in subsection (2) of the statute. We believe that the definition is adequate. Secondly, A.M. argues that "serious harm" is impermissibly vague. While it would be difficult to state precisely at what point harm becomes "serious," we do not require mathematical certainty in a statute. We require that the statute be specific enough so that it put people of ordinary intelligence on notice of what is forbidden and prohibit arbitrary enforcement. We believe that the phrase "serious harm," when considered within the larger phrase "sex offenses resulting in serious harm to others," does so sufficiently.

Finally, A.M. attacks the phrase "pose a menace." "Menace," in its noun form, means "something that threatens to cause evil,

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[61] *State v. Rung*, 278 Neb. 855, 866, 774 N.W.2d 621, 632 (2009).

[62] *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

[63] *Maxon v. City of Grand Island*, 273 Neb. 647, 654, 731 N.W.2d 882, 888 (2007).

[64] See *Agena, supra* note 62.

harm, injury, etc; a threat."[65] Again, the meaning here is clear. In stating, "to pose a menace to the health and safety of the public," the Legislature is talking about those who threaten the health and safety of the public.

Summing up A.M.'s constitutional arguments, A.M. has thrown a constitutional paintball at an appellate canvas. He missed.

9. Admissibility of Experts' Opinions

A.M. next contends that the district court erred in upholding the Board's conclusion that A.M. is a dangerous sex offender. He argues the State's experts considered evidence that violated his constitutional rights or the Nebraska Evidence Rules. Specifically, he contends that the evidence relied on by the State's experts violated his due process rights, his Fifth Amendment privilege against self-incrimination, and his right to confront witnesses under Neb. Rev. Stat. § 71-954 (Reissue 2009). He argues that the hearing was fundamentally unfair because the experts relied on unsubstantiated and untested hearsay statements made many years earlier. And he argues that the Board should not have considered, as fruit of the poisonous tree, any evidence obtained as a result of his vacated 1992 conviction.

(a) County Court's 1992 Errors Do Not Require Exclusion of A.M.'s Statements or Information Gathered in Presentence Investigation

The issue is whether a mental health board must exclude a defendant's incriminating statements made in a presentence investigation or court-ordered counseling when a court has vacated the defendant's conviction for *Boykin*[66] errors. The parties have not cited, and our research has not uncovered, any cases directly on point. But we believe that the district court reached the correct conclusion.

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[65] Webster's, *supra* note 14 at 894.

[66] *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

Here, the record includes a 2003 postconviction order in which the district court vacated A.M.'s 1992 conviction in county court. The district court concluded that while A.M. had agreed with his attorney's statement of the plea agreement, the county court had failed to ensure A.M.'s plea was voluntary.

The record from the 1992 plea hearing was not made part of this record. But the district court found that A.M. had signed the county court judge's journal entry and order that recited A.M.'s plea of no contest and set his conditions for probation. It also stated that A.M. had signed an amended order reciting his conditions for probation. A.M. does not challenge these findings. The district court further determined that the Board's record showed that the State's experts had not relied upon the fact of A.M.'s 1992 conviction or the predicate facts for that conviction. It concluded that the vacation of his conviction did not require the exclusion of A.M.'s statements during treatment on probation or any information gathered during the 1992 presentence investigation. We agree.

[39-41] A court cannot use a void conviction to enhance punishment for a later offense.[67] But commitment under Nebraska's SOCA is a civil restraint that does not enhance punishment.[68] Further, the facts recited by the district court show *Boykin* errors, and we do not permit a defendant to collaterally attack his or her conviction in a separate proceeding for such errors.[69] So we do not believe that the 2003 postconviction order precluded the use of evidence that resulted from A.M.'s 1992 conviction.

However, we also do not believe that the State could use evidence obtained through official or judicial misconduct to deprive a defendant of his or her liberty at a subsequent trial.[70] This includes a state expert's opinion relying on such

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[67] See, e.g., *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

[68] See *In re Interest of J.R., supra* note 4.

[69] See *State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000).

[70] See, *Harrison v. United States*, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

evidence.[71] But this record fails to show any misconduct that would warrant applying an exclusionary rule. If A.M. had appealed from his 1992 conviction, we would have reversed his conviction for the *Boykin* errors cited by the district court. But the county court's errors did not rise to misconduct that would have tainted A.M.'s subsequent statements made during his presentence investigation or court-ordered treatment. We conclude that the 2003 district court order vacating A.M.'s 1992 conviction did not require the Board to exclude any expert opinion relying on his statements.

(b) The Board Erred in Failing to Determine Whether the State's Experts Relied on A.M.'s Compelled Statements

[42-44] Next, we consider whether the use of A.M.'s statements by the State's experts violated his due process rights or his privilege against self-incrimination under the Fifth Amendment.[72] It is a violation of the Due Process Clause to use a defendant's involuntary statement against him or her at a criminal trial.[73] The Fifth Amendment similarly precludes the use of compelled testimony and goes further by requiring *Miranda* warnings for some custodial interrogations. Thus, both the Fifth Amendment and Due Process Clause prohibit the use of a person's involuntary statements at a later criminal trial.[74] And under Neb. Rev. Stat. § 71-955 (Reissue 2009), a mental health board in a SOCA proceeding cannot

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[71] See *Harrison, supra* note 70. See, also, 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6273 (1997 & Supp. 2010).

[72] See *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

[73] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[74] See, *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), citing *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897). See, also, *New Jersey v. Portash*, 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979); 1 Wayne R. LaFave et al., Criminal Procedure § 2.10(b) (3d ed. 2007).

consider any evidence that would be inadmissible in a criminal proceeding.

[45] In a criminal trial, the prosecution cannot use for *any* purpose a defendant's involuntary statements or any evidence that is directly or indirectly derived from them.[75] This includes an expert's opinion based on them.[76] So we consider whether A.M.'s statements were compelled, which would preclude an expert's opinion based on them in a criminal trial.

[46,47] Even after conviction, if a person in prison or on probation is compelled to make incriminating statements, those statements are inadmissible in a later criminal proceeding for any crime other than the crime for which the person has been convicted.[77] But in most contexts, the privilege against self-incrimination is not self-executing. A person must timely invoke it, or it will be lost.[78] There are, however, limited exceptions. For example, under *Miranda*, custodial police interrogations are an exception because courts consider them inherently coercive.[79] An exception also exists when remaining silent is threatened by punishment or consequences significant enough to compel a person to make incriminating statements.[80]

But we do not believe that A.M. has shown coercive official conduct merely by claiming that he made incriminating statements during a presentence investigation. If a court officer interviewed A.M., such an interview would be closer to the

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[75] See, *Portash, supra* note 74; *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972).

[76] See, *People v Tyson*, 423 Mich. 357, 377 N.W.2d 738 (1985); *In re Commitment of Mark*, 308 Wis. 2d 191, 747 N.W.2d 727 (2008).

[77] See *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

[78] See, *id.*; *Roberts v. United States*, 445 U.S. 552, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980); *Garner v. United States*, 424 U.S. 648, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976); *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975).

[79] See *Murphy, supra* note 77.

[80] See, *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002); *Murphy, supra* note 77.

probation interview that the U.S. Supreme Court considered in *Minnesota v. Murphy*.[81] There, the Court distinguished a mandatory interview with a probation officer from the coercion inherent in a custodial police interrogation. And it held that *Miranda* warnings were not required. Because the defendant "revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations."[82]

The Court also rejected the defendant's argument that he was compelled to make incriminating statements by the penalty of having his probation revoked if he was untruthful. It noted that the statute requiring the defendant to answer a probation officer's questions truthfully did not condition his probation on waiving his Fifth Amendment privilege. Also, "no direct evidence [showed] that [the defendant] confessed because he feared that his probation would be revoked if he remained silent."[83] Because the defendant could not have reasonably believed that invoking the privilege would lead to revocation, his failure to invoke the privilege was not excused and his statements were voluntary.

[48] Here, we assume from the experts' opinions that A.M. made incriminating statements that were included in the presentence investigation. But the record does not contain the report or any evidence that reveals to whom A.M. allegedly made incriminating statements. Routine presentence interviews, even if the defendant is in custody, are not normally considered coercive interrogations.[84] And A.M. does not claim that any state officer threatened him with punishment if he refused to make incriminating statements. Thus, he has failed to show that his statements made in the presentence investigation were compelled.[85]

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[81] *Murphy, supra* note 77.

[82] *Id.*, 465 U.S. at 440.

[83] *Id.*, 465 U.S. at 437.

[84] See, *U.S. v. Jones*, 266 F.3d 804 (8th Cir. 2001); *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982).

[85] See, e.g., *People v. Goodner*, 7 Cal. App. 4th 1324, 9 Cal. Rptr. 2d 543 (1992).

[49] But in *Murphy*, the Court also clarified that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege."[86] A "classic penalty situation" arises "if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation."[87] In that circumstance, a probationer's "failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution."[88]

Under this reasoning, many courts have held that sex offender treatment programs that required a defendant to complete the program as a condition of probation explicitly or implicitly threatened the probationer with punishment—revocation of probation—if the probationer fails to admit to sexual conduct.[89] Thus, the offender's compelled, incriminating statements cannot be used against him in a subsequent criminal trial.[90]

We agree with these courts. If A.M. made incriminating statements under the explicit or implicit threat that the court would revoke his probation if he failed to comply with sex offender treatment, then his failure to invoke his privilege against self-incrimination would be excused. And his statements would be inadmissible against him in a criminal trial. Further, because any use of his statements in a criminal trial would violate his Fifth Amendment privilege, an expert for the State could not base an opinion on them. Section 71-955 applies these rules to a SOCA hearing. But while A.M. raised this issue, the Board failed to consider whether the experts relied on any incriminating statements that A.M. made under

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[86] *Murphy, supra* note 77, 465 U.S. at 438.

[87] *Id*., 465 U.S. at 435.

[88] *Id*.

[89] See, *Mace v. Amestoy*, 765 F. Supp. 847 (D. Vt. 1991); *State v. Eccles*, 179 Ariz. 226, 877 P.2d 799 (1994) (en banc); *People v. Elsbach*, 934 P.2d 877 (Colo. App. 1997); *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991); *State v. Kaquatosh*, 600 N.W.2d 153 (Minn. App. 1999); *State v. Fuller*, 276 Mont. 155, 915 P.2d 809 (1996). See, also, *Gyles v. State*, 901 P.2d 1143 (Alaska App. 1995).

[90] See, *Elsbach, supra* note 89; *Fuller, supra* note 89.

the explicit or implicit threat of revocation. We therefore reverse the order of commitment and remand the cause for a determination of this issue.

[50] In addition, because the issues are likely to recur on remand, we address A.M.'s argument that the State's experts' opinions were unreliable and violated his right to confront witnesses. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[91]

(c) Reliability of Experts' Opinions

A.M. contends that the district court erred in upholding the Board's conclusion that he is a dangerous sex offender. He argues that the Board based its conclusion on expert testimony that was unreliable.

[51-53] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.[92] Mental health boards must apply the rules of evidence.[93] Neb. Evid. R. 703[94] permits experts to base their opinions on facts that are not admissible into evidence if experts in their field reasonably rely on such facts. The State's experts all testified that experts in their field generally rely on the presentence investigation, offense reports, and other sources that they consulted.

[54] Rule 703 was designed to promote efficiency.[95] It was intended to reduce the time spent to introduce into evidence a factual basis for the expert's opinion when the expert has relied upon data produced by others.[96] We recognize that other courts have held that experts who testify in mental health and sex offender commitment hearings can rely on police reports and

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[91] *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

[92] *Liberty Dev. Corp. v. Metropolitan Util. Dist. of Omaha*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[93] See § 71-955.

[94] Neb. Rev. Stat. § 27-703 (Reissue 2008).

[95] 29 Wright & Gold, *supra* note 71, § 6272.

[96] *Id.*

sentencing reports.[97] But because a SOCA hearing may result in a serious deprivation of the defendant's interest in liberty, the State's evidence must be sufficiently reliable to comply with due process.[98]

[55] Obviously, an expert's opinion based on inadmissible evidence is only as reliable as the evidence on which it is based. This is because an expert who "relies on an out-of-court statement in reaching an opinion . . . has inferred that the facts asserted in it are true."[99] Further, in sex offender commitment cases, if the underlying facts of an expert's opinion are unreliable, "a significant portion of the foundation of the resulting [dangerousness] finding is suspect."[100] Other courts have concluded that because hearsay can permeate the evidence used to commit a sex offender, a victim's hearsay statements in police reports or presentence reports must have special indicia of reliability to satisfy due process.[101] We agree.

We do not attempt to set out every indicia of reliability for hearsay statements in these reports. But we agree that whether a defendant pleaded guilty or was found guilty of the crime for which the reports were created is a critical consideration for determining the reliability of a victim's unsworn accusations in such reports: "As a result of such a conviction, some portion, if not all, of the alleged conduct will have been already either admitted in a plea or found true by a trier of fact after trial."[102] Courts may also consider trial transcripts and

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[97] See, e.g., *U.S. v. LeClair*, 338 F.3d 882 (8th Cir. 2003); *In re Williams*, 841 So. 2d 531 (Fla. App. 2003), *overruled on other grounds, In re Commitment of Debolt*, 19 So. 3d 335 (Fla. App. 2009); *Com. v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009); *In re Civil Commitment of R.S.*, No. SVP 450-07, 2008 WL 5194450 (N.J. App. Dec. 12, 2008) (unpublished decision).

[98] See, e.g., *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[99] 29 Wright & Gold, *supra* note 71, § 6273 at 320.

[100] See *People v. Otto*, 26 Cal. 4th 200, 210-11, 26 P.3d 1061, 1068, 109 Cal. Rptr. 2d 327, 335 (2001).

[101] See, *id.*; *Jenkins v. State*, 803 So. 2d 783 (Fla. App. 2001).

[102] See *Otto, supra* note 100, 26 Cal. 4th at 211, 26 P.3d at 1068, 109 Cal. Rptr. 2d at 336.

whether the defendant challenged the use of a victim's hearsay statements.[103]

Because evidence underlying an expert's opinion need not, indeed in some cases should not, be admitted into evidence, the Board's focus should be on the reliability of the out-of-court declarant's hearsay statement and not on the statement's "fit" within any hearsay exception. All that is required is that the underlying facts bear sufficient reliability so that due process is not violated. Thus, if the Board finds that any of A.M.'s hearsay statements were voluntary, they would be reliable as a statement against interest.[104]

(d) Right to Confront Witnesses

[56] Finally, A.M. argues that the Board's admission of these experts' opinions violated his right to confront witnesses. It is true that § 71-954 gives SOCA defendants the same right to confront and cross-examine witnesses as the state and federal Constitutions. But federal courts have held that because the expert is the only witness testifying against the defendant, the defendant's ability to cross-examine the expert satisfies the requirement of the Confrontation Clause so long as the underlying statements are not relayed to the jury.[105]

But when an expert testifies to out-of-court accusations or other testimonial statements, both hearsay and Confrontation Clause issues are presented.[106] So we agree with A.M. that the Board should not have permitted the experts to testify about the underlying statements they relied on.

V. CONCLUSION

We conclude the following:

• A.M.'s arguments as to the bias and composition of the Board fail.

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[103] See *id.*

[104] See *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[105] See, e.g., *U.S. v. Pablo*, 625 F.3d 1285 (10th Cir. 2010); *U.S. v. Lombardozzi*, 491 F.3d 61 (2d Cir. 2007). See, also, 29 Wright & Gold, *supra* note 71, § 6275 n.24.

[106] See, *Jenkins, supra* note 101; *People v. Jensen*, No. 235372, 2004 WL 2533270 (Mich. App. Nov. 9, 2004) (unpublished decision).

• A.M.'s equal protection challenges are meritless.

• The challenged statutes do not violate the special legislation clause.

• A.M.'s separation of powers argument is without merit.

• The challenged statutes are not bills of attainder.

• Because the challenged statutes do not inflict punishment, they do not violate the Ex Post Facto or Double Jeopardy Clauses.

• Section 83-174.01 is not unconstitutionally vague.

• The evidentiary issues present require remand.

• On remand, the Board must determine if A.M. was compelled to make the incriminating statements.

• The Board must also ensure that the facts underlying the experts' opinions are sufficiently reliable.

• And the Board must prohibit the experts from introducing the underlying facts through their testimony because such a practice violates A.M.'s right to confrontation.

• We have considered A.M.'s other assignments of error and conclude that none of those issues warrant discussion.

We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE VILLAGE OF HALLAM, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE, V. L.G. BARCUS & SONS, INC., A KANSAS CORPORATION, APPELLANT.

798 N.W.2d 109

Filed May 13, 2011. No. S-10-406.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **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.
5. ____: ____: ____: ____. When possible, an appellate court determines the legislative intent from the language of the statute itself.
6. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
7. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question.
8. **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.
9. **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 Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

William H. Selde, of Sodoro, Daly & Sodoro, P.C., for appellant.

Neal E. Stenberg, of Stenberg Law Office, and Steven J. Reisdorff, of The Law Office, P.C., for appellee.

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

STEPHAN, J.

L.G. Barcus & Sons, Inc. (Barcus), was held liable to the Village of Hallam under the One-Call Notification System Act (the Act)[1] for damage to Hallam's sanitary sewer system

[1] Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 2009).

caused by an excavation. The Act establishes a one-call notification center (one-call center) so that excavators can learn of any underground facilities in the area where excavation is planned.[2] Among the issues raised by Barcus' appeal are (1) whether an operator of an underground facility which has not complied with the provisions of the Act has a remedy against an excavator for an alleged violation of the Act and (2) whether the excavator may delegate its duties under the Act to another party and thereby avoid liability.

I. FACTS AND PROCEDURAL BACKGROUND

Hallam is a village incorporated under Nebraska law. It operates a sanitary sewer system within its boundaries. On May 22, 2004, a tornado destroyed more than 150 homes and businesses in Hallam, including grain storage facilities owned by Farmers Cooperative, Inc. (Farmers).

After the tornado and before Farmers began rebuilding its facilities, Hallam hired a company to inspect its sanitary sewer system and determine whether it had been damaged by the tornado. The company lowered a video camera into manholes throughout the village and produced videotapes showing the interior of all sewer lines owned and operated by the village. The inspection was completed on June 26, 2004. Tyler L. Hevlin, a civil engineer, reviewed the inspection video and advised Hallam that the portion of its sewer which lay beneath the Farmers property was unobstructed and not in need of repair.

In June or July 2004, Farmers entered into separate contracts with McPherson Concrete Storage Systems, Inc. (McPherson), and Frisbie Construction Co., Inc. (Frisbie), to construct two cylindrical concrete grain storage bins and related structures. Under the contracts, McPherson was responsible for the concrete construction and Frisbie was responsible for the "millwright work," which included metal legs and other structures attached and adjacent to the concrete structures. Hallam issued a building permit for the construction of the bins.

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[2] See §§ 76-2302(1) and 76-2316.

In mid-June 2004, a firm identified in the record as "Terracon" conducted soil testing for the project through a series of soil "borings." The president and chief executive officer of Farmers testified that Terracon notified the one-call center before performing the borings, and Frisbie's operations manager believed that the people conducting the soil boring would have called the one-call center, but he had no personal knowledge on this point. The record provides no other information regarding communication between Terracon and the one-call center.

McPherson entered into a subcontract with Barcus to install an "AugerPile" foundation for the grain bins. The subcontract stated that Barcus' prices did not include the cost of

> location, removal, protection or relocation of any underground or overhead obstructions or utilities which interfere with our work . . . special protection of existing structures, utilities or equipment . . . . Our sole responsibility for pile location will be to accurately spot the auger on the stakes that you provide and drill the pile using our normal care.

An AugerPile foundation is constructed using an auger to drill a hole in the ground, and then the hole is filled with grout as the auger is withdrawn. The grout used in this process is a substance similar to concrete but does not contain rock. The "augered cast pile[s]" (AugerPiles) were separately numbered so that Barcus could maintain a record of its work. On the Farmers project, Barcus was to install a total of 204 AugerPiles, each 16 inches in diameter. Two hundred of the AugerPiles were to serve as the foundation for the grain bins, and four were to be the foundation for a "bulkweigher," which is used to load grain into railcars. Frisbie was to construct the bulkweigher for Farmers at an unspecified future date. Barcus' role in the project was limited to installation of the AugerPile foundation.

Frisbie's work on the project included construction of a pit in which grain would be dumped and then elevated for loading at the top of the bins. The pit was to be located between and slightly to the east of the bins. Frisbie's operations manager called the one-call center on July 1, 2004, to provide notification that Frisbie would be constructing the pit. He advised

the one-call center that the maximum depth of the excavation would be 14 feet. Frisbie began work on the pit during the first week of July. No underground facilities were marked in the vicinity of the pit when excavation commenced. No sewer pipe was encountered during the excavation for the pit, which was completed in less than 1 day. The concrete floor of the pit was completed approximately 3 days after excavation began. Frisbie did no other excavation on the project.

Barcus arrived at the jobsite on July 20, 2004, and began installing AugerPiles on July 23. McPherson marked the locations for the 200 AugerPiles which would form the foundations of the bins, and a Frisbie employee marked the locations for the four AugerPiles which would form the foundation for the bulkweigher. Barcus employees did not notify the one-call center before commencing installation of the AugerPiles, because they did not consider such notification to be within the scope of their work. Rather, they considered such notification to be the responsibility of the general contractor, which in this case was McPherson. The Barcus foreman testified that he had "no idea" whether any other contractor notified the one-call center, but he observed no markings indicating the existence of underground facilities in the area where the AugerPiles were to be driven.

Barcus installed the four AugerPiles for the bulkweigher on July 30, 2004. Each of the four AugerPiles was 72 feet long and placed in a hole drilled to a depth of 73 feet, so that the top of each of the AugerPiles was beneath the surface of the ground. Barcus completed its work on the project and left the jobsite on August 10. Barcus' foreman recalled that one of the AugerPiles on the Farmers project required more grout than usual, but he testified that this was not uncommon and could have been caused by several factors.

On or about August 23, 2004, Hallam began receiving reports that sewage was backing up into homes and businesses located west of the Farmers site. An attempt to clear the sewer obstruction with water jet flushing was unsuccessful, so a camera inspection was undertaken. The inspection video revealed that the blockage was caused by concrete and broken sewer pipe.

Hallam then consulted Hevlin's firm, an engineering and architectural consulting group, to develop a plan for repairing or replacing the damaged portion of the sewer line. Hevlin determined and advised Hallam that because of the nature and extent of the blockage, the sewer line could not be repaired and would need to be rerouted. Hallam accepted Hevlin's advice and rerouted the sewer system based upon plans and specifications developed by Hevlin. Hallam incurred fair and reasonable costs in the amount of $96,007.74 as a consequence of the damage to its sanitary sewer.

Hallam filed suit to recover these costs against Farmers, McPherson, Barcus, and Frisbie in the district court for Lancaster County. It alleged that all four of the defendants were negligent and that Barcus and McPherson were strictly liable under the Act because they failed to notify the one-call center before installing the AugerPile foundation. In its answer, Barcus denied any liability on its part and affirmatively alleged that Hallam was contributorily negligent in several respects, including failure to comply with provisions of the Act that require operators of underground facilities to furnish certain information to the one-call center.

Hallam retained Hevlin as an expert witness regarding the cause of the obstruction of its sanitary sewer in 2004. Based upon excavations undertaken in 2008, Hevlin determined the location of the four AugerPiles installed by Barcus as the foundation for the bulkweigher, the location of the pit constructed by Frisbie, and the location of the sewer line as it existed in 2004. Drawings prepared under Hevlin's supervision show two of the AugerPiles and one corner of the pit near the underlying sewer line. Based upon this information and his review of discovery documents from the litigation, Hevlin opined to "a reasonable degree of certainty as a professional engineer" that the auger used by Barcus during the installation of the AugerPiles damaged the sewer line and introduced grout which caused the obstruction. Hevlin further opined, to the same degree of certainty, that Frisbie's construction of the pit did not cause the damage, because the elevation of the bottom of the pit was higher than the sewer line.

Hallam moved for summary judgment on its strict liability claim against Barcus. The motion was supported by Hevlin's affidavit stating the opinions summarized above and other affidavits, depositions, and documents produced during discovery. The district court sustained the motion and entered judgment against Barcus in the amount of $96,007.74. The court determined that Barcus was an "excavator" as defined by the Act and that its installation of the AugerPiles constituted an "excavation" as defined by the Act.[3] The court further determined that Hallam was an "operator" of an underground facility as defined by the Act.[4] The court reasoned that the fact that Hallam had not become a member of and had not participated in the one-call center was not a defense to its strict liability claim based upon Barcus' failure to call the one-call center before commencing excavation.[5] The court concluded that Barcus, not McPherson or Frisbie, was obligated to give the notice required by the Act; that it was "clear . . . that the excavation engaged in by Barcus resulted in damage to . . . Hallam's sewer line"; and that there was no factual dispute as to the amount of the damages. The district court directed entry of a final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008).

The Nebraska Court of Appeals dismissed Barcus' appeal from the district court's order, and this court denied a petition for further review. Following remand, the action was dismissed as to Farmers, McPherson, and Frisbie pursuant to a stipulation. Subsequently, the district court determined that Hallam's damages were subject to pro tanto reduction in the amount of $30,000, and it entered final judgment against Barcus in the amount of $66,007.74. Barcus appealed, and we granted its petition to bypass.

II. ASSIGNMENTS OF ERROR

Barcus assigns, summarized and restated, that the district court erred in (1) its construction and application of the Act,

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[3] See §§ 76-2308 and 76-2309.

[4] See § 76-2313.

[5] See § 76-2324.

(2) not concluding that Hallam was barred as a matter of law from asserting a remedy through its own noncompliance with the Act, (3) receiving Hevlin's affidavit without sufficient foundation, and (4) concluding that there was no genuine issue of material fact regarding the proximate cause of Hallam's claimed damages.

III. 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.[6] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[7]

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[8]

A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.[9]

IV. ANALYSIS

1. Statutory Liability

(a) Effect of Hallam's Noncompliance With the Act

[4,5] Barcus argues that Hallam had no remedy under the Act as a matter of law, because it had not complied with the provisions of the Act applicable to operators of underground

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[6] *Tolbert v. Jamison, ante* p. 206, 794 N.W.2d 877 (2011).

[7] *Id.*

[8] *Shepherd v. Chambers, ante* p. 57, 794 N.W.2d 678 (2011); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[9] *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010); *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

facilities. Familiar general principles guide our analysis of this issue. Statutory language is to be given its plain and ordinary meaning, 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.[10] When possible, an appellate court determines the legislative intent from the language of the statute itself.[11]

The Act states that it was intended "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation."[12] The stated purpose of the Act is "to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from accidents caused by damage to underground facilities."[13]

The Act defines "excavator" as "a person who engages in excavation in this state."[14] "Excavation" is defined in the Act as "any activity in which earth, rock, or other material in or on the ground is moved or otherwise displaced by means of tools, equipment, or explosives and shall include . . . drilling [and] augering."[15] It is undisputed that Barcus used an auger to drill the holes in the ground in which the AugerPiles were placed. Barcus was an "excavator" within the meaning of the Act.

The Act defines "underground facility" as "any item of personal property buried or placed below ground for use in connection with the storage or conveyance of . . . sewage, . . .

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[10] See, *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010); *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[11] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., ante* p. 93, 798 N.W.2d 823 (2011).

[12] § 76-2302(1). Accord *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[13] § 76-2302(2). Accord, *Hughes v. Omaha Pub. Power Dist., supra* note 12; *Galaxy Telecom v. J.P. Theisen & Sons*, 265 Neb. 270, 656 N.W.2d 444 (2003).

[14] § 76-2309.

[15] § 76-2308.

including . . . sewers."[16] An "operator" is "a person who manages or controls the functions of an underground facility."[17] It is beyond question that Hallam's sanitary sewer system was an underground facility and that the village was its operator as those terms are defined by the Act. The Act requires that "[o]perators of underground facilities shall become members of and participate in the statewide one-call . . . center"[18] and provide information regarding the location of underground facilities.[19] There is no evidence that Hallam complied with these provisions.

Persons are required by the Act to give notice to the one-call center at least 2 full business days but no more than 10 business days before commencing any excavation, and such notice "shall be deemed notice to all operators."[20] This triggers a process by which the one-call center informs operators of underground facilities in the vicinity of the proposed excavation, and the operators in turn advise the excavator of the approximate location of the facilities by the use of marking devices.[21] It is undisputed that Barcus did not notify the one-call center before commencing excavation.

The liability provisions of the Act pertinent to this case are set forth in the first two sentences of § 76-2324:

> An excavator who fails to give notice of an excavation pursuant to section 76-2321 and who damages an underground facility by such excavation shall be strictly liable to the operator of the underground facility for the cost of all repairs to the underground facility. An excavator who gives the notice and who damages an underground facility shall be liable to the operator for the cost of all repairs to the underground facility unless the damage to

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[16] § 76-2317.

[17] § 76-2313.

[18] § 76-2318.

[19] See § 76-2320.

[20] § 76-2321(1).

[21] See §§ 76-2322 and 76-2323.

the underground facility was due to the operator's failure to comply with section 76-2323.

Barcus argues that Hallam cannot be considered an "operator" within the meaning of these provisions, because it had not complied with the provisions of the Act requiring operators of underground facilities to "become members of and participate in the statewide one-call . . . center."[22] But we find no language in § 76-2324 or the statutory definition of "operator" in § 76-2313 which could be read in the manner that Barcus urges. We agree with the reasoning of the district court that Hallam's right to recover under § 76-2324 depends on its status as an "operator" of an underground facility, not on whether it has taken steps to become a "member" of the one-call center. The uncontroverted facts are that Barcus was an "excavator" and that Hallam was an "operator" as defined by the Act, but neither complied with its substantive provisions. The question of law before us is how the liability provisions of § 76-2324 should be applied in this circumstance.

The answer is apparent from the plain language of § 76-2324. The first sentence unambiguously states that an excavator who does not give notice of an excavation as required by § 76-2321 is strictly liable for damage to an underground facility caused by the excavation. The second sentence states that an excavator who gives the required notice of an excavation *may* be liable for damage to an underground facility, unless the damage was due to the operator's failure to identify and mark the underground facility. Thus, the statute provides a defense based upon the facility operator's failure to comply with § 76-2323. Reading these two sentences together, it is clear that an operator's noncompliance with § 76-2323 is a defense available to an excavator who gives the required notification, but not to the excavator who fails to give notice required by § 76-2321.

This construction is entirely consistent with the Legislature's intent "to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate

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[22] § 76-2318.

the underground facilities prior to excavation."[23] Had the Legislature intended to excuse noncomplying excavators from liability based upon the failure of a facility operator to identify and mark the underground facilities, it could have placed language in the first sentence of § 76-2324 similar to that used in the second sentence. The fact that it did not do so leads to only one possible conclusion: The Legislature intended to hold an excavator who does not give the required notification strictly liable for any damage it causes to an underground facility without regard to the conduct of the facility operator.

(b) Delegation of Duty

Barcus also argues that in accordance with "the custom and practice of the construction industry," it complied with the Act by delegating its duty to notify the one-call center of its proposed excavation to others.[24] In their depositions, the vice president of Barcus' pile division and Barcus' foreman on the Farmers project testified that under their understanding of their standard subcontract, it was the responsibility of the general contractor, in this case McPherson, to notify the one-call center regarding the installation of piles. In a subsequent affidavit, the Barcus foreman took a more expansive position, stating that according to the custom and practice of the industry, the obligation fell on the "general contractor or general contractors," and that Barcus relied "on its co-worker Frisbie . . . to perform all necessary notification, permitting, or contact with Local or State authorities." From this, Barcus argues in its brief that Barcus and Frisbie acted "in a joint fashion to meet all requirements of the One-Call statute."[25]

Barcus provides no authority for its premise that a party can avoid a statutory duty by delegating it to another in accordance with the custom and practice of an industry. But even if the premise is sound, an issue we do not decide, it is clear from the record that Frisbie's actions did not satisfy Barcus' duty under the Act. Frisbie clearly was not acting on behalf

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[23] § 76-2302(1).

[24] Brief for appellant at 23.

[25] *Id.* at 14.

of Barcus when it notified the one-call center of its plans to excavate for the pit. Barcus contracted with McPherson; there was no contract between McPherson and Frisbie or Barcus and Frisbie. Frisbie's operations manager called the one-call center on July 1, 2004, more than 10 days before Barcus commenced installation of the AugerPiles. This call would not have been timely notice of the AugerPile excavation even if otherwise sufficient.[26] A review of the recording of the conversation and the written record made by the one-call center shows that Frisbie gave notice of its proposed excavation for the 14-foot-deep pit, but made no mention of Barcus or the work which it was to perform under its subcontract with McPherson. And Frisbie's operations manager testified unequivocally that he never contacted the one-call center on behalf of Barcus or McPherson.

The Act places the duty to notify the one-call center squarely on the "excavator" whose work could damage an underground facility. Frisbie was the excavator of the pit, and Barcus was the excavator with respect to the AugerPiles. Barcus cannot rely on Frisbie's compliance with the Act to excuse its own noncompliance.

2. Expert Opinion

At the summary judgment hearing, Hallam offered the affidavit of Hevlin, an engineer who had provided professional services to Hallam since 1998. Barcus objected to paragraph 21 of the affidavit as an opinion for which there was insufficient foundation. In that paragraph, Hevlin stated:

> It is my opinion, based on a reasonable degree of certainty as a professional engineer, that the auger used during the construction of the concrete auger piles by [Barcus] did damage to the sewer line . . . and, when installing the concrete (also referred to as "grout") for the pile, concrete was introduced into the sewer line and created the blockage.

The district court took the objection under advisement. Although we find no subsequent ruling on the objection, the

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[26] See, § 76-2321(1); *Galaxy Telecom v. J.P. Theisen & Sons, supra* note 13.

district court referred to the substance of the opinion in its order, noting that the affidavit included "detailed statements regarding the information which [Hevlin] relied on in forming his opinion, and the basis for his opinion." We therefore assume that the district court overruled the objection and received the opinion, and we turn to Barcus' argument that the court abused its discretion in doing so.

[6,7] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.[27] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question.[28]

Hevlin is a professional civil engineer licensed in Nebraska and several other states. He had provided engineering services to Hallam since 1998 and provided technical assistance to Hallam to locate obstructions in the sewer and to determine the nature and extent of damage to the sewer system as a consequence of the 2004 tornado. His opinion regarding causation was stated with "a reasonable degree of certainty as a professional engineer" and was based upon his professional training and experience, his knowledge of Hallam's sewer system, his review of documents produced in discovery by Barcus and McPherson, his review of depositions taken in this case, and his own efforts to determine the precise location of various structures in relation to the sanitary sewer.

Barcus did not assert a *Daubert*/*Schafersman*[29] objection in the district court.[30] Its foundational objection was based upon an assertion that Hevlin lacked "any special knowledge about

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[27] *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[28] *Liberty Dev. Corp. v. Metropolitan Util. Dist., supra* note 9.

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

[30] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

grout or hydraulic concrete" and that he did not have "any special training in auger bore, pile formation or construction practices." Hevlin stated in his affidavit that after he was retained by the village to determine the cause of the obstruction in the sewer system, he supervised excavations to determine the precise locations of the AugerPiles installed by Barcus and the pit constructed by Frisbie in relation to the sewer system. He learned the depth of the AugerPiles from discovery documents which were provided to him. Thus, Hevlin undertook what was essentially a series of measurements to determine the relative locations of the AugerPiles, the pit, and the sewer line, from which he concluded that the sewer line was damaged during the installation of the AugerPiles, not during the construction of the pit. This methodology did not require any specialized knowledge regarding the technology of installing AugerPiles other than what was set forth in the documents produced by Barcus and others, which documents Hevlin reviewed in formulating his opinion. There was sufficient foundation for Hevlin to express a causation opinion based upon such measurements, and the district court did not abuse its discretion in overruling Barcus' foundational objection.

3. Existence of Genuine Issue of Material Fact

[8,9] Barcus contends that there was a genuine issue of material fact as to the cause of the obstruction. 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.[31] 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.[32]

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[31] *Tolbert v. Jamison, supra* note 6.

[32] *Id.*

The evidence reflects that the damage to the sanitary sewer occurred sometime between June 26, 2004, when the inspection revealed that the sewer in the vicinity of the Farmers property was unobstructed, and August 23, when a similar inspection disclosed the obstruction. Terracon conducted its soil borings between June 15 and 17, more than 1 week before the first inspection disclosed that the sewer was unobstructed. Frisbie's excavation of the pit occurred during the first week of July. Its employee testified that the sewer line was not encountered during the excavation, and there is evidence that the pit excavation did not reach the depth of the sewer line. Barcus conducted the AugerPile excavations between July 23 and August 10. The sewer obstruction was discovered on August 23. These facts together with Hevlin's expert opinion are sufficient to create a reasonable inference that the Barcus excavation struck and damaged the sewer. There is no basis for a reasonable inference that some other instrumentality caused the damage.

Barcus argues that an inference can be drawn that Frisbie was negligent in marking the location of the AugerPiles for the bulkweigher. Assuming that is so, it does not negate the evidence showing that Barcus' excavation damaged the sewer line, which is all that is necessary to establish liability under the Act where the excavator has not given the required notification prior to commencing excavation. Barcus also argues that it could not have caused the damage to the sewer, based upon the distance between the AugerPile excavations and the point at which the obstruction was eventually discovered. But even if we accept Barcus' calculations as to this distance, there is no evidence regarding its significance to the issue of causation. On this record, we agree with the district court that there is no genuine issue of material fact as to the cause of the damage to the sewer line.

V. CONCLUSION

For the reasons discussed, we find no merit in any of the assignments of error and therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

DARLINE LIDDELL-TONEY, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

797 N.W.2d 28

Filed May 13, 2011. No. S-10-527.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Administrative Law: Appeal and Error.** An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.
5. **Administrative Law: Statutes: Public Assistance: Medical Assistance: Time.** Pursuant to 468 Neb. Admin. Code, ch. 2, § 020.02(2)(b) (2009), a cash benefit recipient under the Welfare Reform Act, Neb. Rev. Stat. § 68-1708 et seq. (Reissue 2009), is exempt from Employment First participation if the recipient is incapacitated with a medically determinable physical impairment which prevents the individual from entering employment for a period exceeding 3 months.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded with directions.

Scott M. Mertz, of Legal Aid of Nebraska, for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

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

GERRARD, J.

The Nebraska Department of Health and Human Services (DHHS) determined that Darline Liddell-Toney was required

to participate in a self-sufficiency program in order to receive cash assistance benefits under the Welfare Reform Act, despite her documented disability. The district court affirmed the determination of DHHS, and Liddell-Toney timely appeals. For the following reasons, we reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

Liddell-Toney is a 36-year-old single mother who is disabled by degenerative disk disease. Liddell-Toney receives cash assistance benefits pursuant to the Welfare Reform Act (hereinafter the Act).[1] Under the Act, families in which at least one adult has the capacity to work must participate in the Employment First self-sufficiency program, pursuant to a "self-sufficiency contract" which sets forth certain approved work-related activities in which recipients must engage.[2] Liddell-Toney received cash assistance benefits from the Aid to Dependent Children program and applied for an exemption from Employment First because of her medical condition. Pending determination of whether Liddell-Toney was exempt from participating in Employment First, DHHS granted Liddell-Toney a temporary exemption in April 2009.

Before the DHHS state review team, Liddell-Toney presented a physician's confidential report as evidence of her inability to enter the workforce. The report stated that Liddell-Toney suffered from degenerative disk disease, first onset in 2006, and had a reduced range of motion, a loss of normal curvature of her spine, and bilateral neuropathy of her lower extremities. The report also stated that the disease was anticipated to be of lifetime duration; that the prognosis, including rehabilitation potential, was "[p]oor"; that Liddell-Toney was unable to walk without a cane and was restricted to limited standing and walking, and that Liddell-Toney was unable to work due to the disease. The report also noted that Liddell-Toney was prescribed numerous medications, which included morphine, hydrocodone, and oxycodone. Nonetheless, the state review

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[1] Neb. Rev. Stat. § 68-1708 et seq. (Reissue 2009).

[2] See §§ 68-1719 and 68-1723.

team denied Liddell-Toney's request for an Employment First exemption on June 18, 2009, finding that Liddell-Toney was not incapacitated and could participate in the Employment First program.

Liddell-Toney then requested a hearing, wherein DHHS received other evidence of Liddell-Toney's degenerative disk disease. This evidence included a supplement to the physician's confidential report, in which her treating physician indicated that in his professional judgment, Liddell-Toney was currently able to participate in work or job readiness activities for 0 hours per week. However, he indicated that Liddell-Toney was able to participate in some job search skills training, such as resume writing, learning to complete an application, and interview training. Her physician noted that Liddell-Toney would require more than 6 months of treatment before she could complete the work requirements of the Employment First program. Also received into evidence were radiology reports from a medical center in Omaha, Nebraska, indicating that Liddell-Toney suffered degenerative disk disease and noting various abnormalities in regard to Liddell-Toney's spine. In the margins of the reports are handwritten notes which read "Mild DDD." Also received at hearing was a medication profile for Liddell-Toney for June 2009. The profile lists Liddell-Toney's medications as including Cymbalta, diazepam, Lidoderm, nortriptyline, hydroxyzine, morphine, oxycodone, and cyclobenzaprine.

After the hearing, DHHS affirmed the state review team's denial of the Employment First exemption, noting that though Liddell-Toney had physical impairments, those impairments did not prevent her from participating in the Employment First program. DHHS noted that the Nebraska Administrative Code provides that an individual is not required to participate in Employment First component activities if that individual

> [i]s incapacitated with a medically determinable physical or mental impairment which, by itself or in conjunction with age, prevents the individual from entering employment or participating in another [Employment First] component activity(ies) and which is expected to exist for a continuous period exceeding three months. The incapacity

must be evaluated in the context of activities available through the Employment First program.[3]

DHHS found that the evidence presented by Liddell-Toney did not indicate "objective signs or symptoms to support the allegation that . . . Liddell-Toney is unable to participate in any component of [Employment First]." DHHS also noted that though Liddell-Toney's physician indicated that Liddell-Toney had severe degenerative disk disease, the radiology reports only noted "mild degenerative disc disease." DHHS determined that Liddell-Toney was not incapacitated for the purposes of an Employment First exemption under § 020.02(2)(b).

Liddell-Toney petitioned for judicial review. The district court, citing evidence that Liddell-Toney was participating in another rehabilitation program at the time she requested an exemption from the Employment First program, inferred that if Liddell-Toney was able to participate in one vocational rehabilitation program, she was also able to participate in Employment First. The district court found that Liddell-Toney was not so limited or incapacitated that she was physically precluded from engaging in Employment First program activities.

Though the district court recognized that § 020.02(2)(b) provides an exception to participating in the Employment First program where an individual is unable to engage in employment or participate in some Employment First component activities, the court found that the evidence supported the finding that Liddell-Toney was able to participate in some Employment First component activities and that this evidence was a sufficient basis for denying Liddell-Toney an Employment First exemption. Liddell-Toney appeals.

ASSIGNMENTS OF ERROR

Liddell-Toney assigns that the district court erred in finding that (1) DHHS can deny an exemption from participation in the Employment First program even if the person requesting the exemption demonstrates that he or she is unable to engage in employment and (2) DHHS presented sufficient evidence to

[3] 468 Neb. Admin. Code, ch. 2, § 020.02(2)(b) (2009).

find that Liddell-Toney is not entitled to an exemption from participation in the Employment First program.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[4] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[5] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[6]

[3,4] 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.[7] An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.[8]

ANALYSIS

[5] As noted above, under the Act, families "with at least one adult with the capacity to work" must participate in an Employment First self-sufficiency contract "as a condition of receiving cash assistance."[9] Accordingly, § 020.02(2)(b) allows an Employment First exemption for a recipient whose

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[4] *Travelers Indem. Co. v. Gridiron Mgmt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

[5] *Id.*

[6] *Id.*

[7] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[8] *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

[9] § 68-1723(2).

impairment "prevents the individual from entering employment *or* participating in another [Employment First] component activity(ies)."[10] Liddell-Toney argues that the plain language of the regulation, consistent with the statutory requirement of an adult "with the capacity to work," allows an exception to Employment First participation if a recipient's impairment *either* prevents the recipient from entering employment *or* prevents them from participating in an Employment First component activity. We agree with this commonsense reading of the regulation.

The word "or," when used properly, is disjunctive.[11] If a recipient's impairment prevents him or her from entering the workforce, the first exemption contained in § 020.02(2)(b) is satisfied and the recipient need not establish that he or she also cannot participate in Employment First component activities. Contrary to DHHS' determination, Liddell-Toney was not required to establish that she was incapable of participating in all components of Employment First to be granted an exemption. Instead, presenting uncontroverted evidence that the impairment prevented her from entering employment sufficed, as it should, to qualify her for an Employment First exception under the first condition of § 020.02(2)(b).

The evidence clearly indicates that Liddell-Toney is prevented from entering employment for a substantial period of time, if at all, due to her disability. Her treating physician determined that Liddell-Toney's degenerative disk disease reduced her range of motion and restricted her to limited standing and walking, which required the use of a cane. Her treating physician also noted that the disease would be of lifetime duration, that the prognosis and rehabilitation potential were poor, and that Liddell-Toney was able to participate in work or job readiness activities for 0 hours per week. And though the radiology reports contained handwritten notes of "Mild DDD" in the margins, even assuming that Liddell-Toney's degenerative disk

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[10] See § 020.02(2)(b) (emphasis supplied).

[11] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

disease is "mild," the record contains no evidence which would indicate that Liddell-Toney is able to enter the workforce in the reasonably foreseeable future. In fact, the evidence in the record which indicates that Liddell-Toney is unable to enter the workforce is uncontroverted. Liddell-Toney therefore has met the requirements for an exemption under § 020.02(2)(b), and the district court erred when it affirmed DHHS' determination that Liddell-Toney failed to meet the requirements for an exemption under DHHS regulations.

The district court noted that Liddell-Toney's ability to participate in some Employment First component activities was a sufficient basis for denying her an Employment First exemption. DHHS argues that an individualized Employment First program contract could be formulated which would be tailored to fit Liddell-Toney's physical limitations and notes that Liddell-Toney was engaged in workplace training around the time she requested an Employment First exemption.

However, because the uncontroverted evidence indicates that Liddell-Toney's impairment prevents her from entering employment, she meets the first exemption under the plain language of § 020.02(2)(b), and the question whether she is able to perform some Employment First activities under the second exemption contained within § 020.02(2)(b) becomes moot. Because DHHS' interpretation of § 020.02(2)(b) is inconsistent with the plain language of the regulation, we do not accord that interpretation deference. The uncontroverted evidence in the record indicates that Liddell-Toney is presently unable to enter the workforce for a substantial period of time, if at all, and as such, she is entitled to an Employment First exemption under § 020.02(2)(b) as a matter of law.

At oral argument in this appeal, DHHS conceded that if Liddell-Toney was permanently unable to work, she would be entitled to an Employment First exemption. And this certainly makes sense. It would seem absurd to require an individual to participate in resume writing and interview training activities if that individual is incapable of entering the workforce at the conclusion of the training sessions. At argument, DHHS merely asserted that the evidence was not sufficient to establish the potential duration of Liddell-Toney's disability. But the record

simply does not support DHHS' argument. Liddell-Toney's evidence established that her condition was disabling and that her prognoses for rehabilitation and recovery were poor. There is no reasonable interpretation of the record under which Liddell-Toney did not establish that her condition "prevents [her] from entering employment" and "is expected to exist for a continuous period exceeding three months."[12]

CONCLUSION

The district court erred when it affirmed DHHS' determination that Liddell-Toney did not qualify for an exemption from participating in the Employment First program. The evidence clearly indicates that Liddell-Toney's impairment prevents her from entering employment for a period exceeding 3 months, if at all, and she therefore qualifies for an exemption to the Employment First program under § 020.02(2)(b). The judgment of the district court is reversed, and the cause remanded with directions to reverse the determination made by DHHS.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., participating on briefs.

WRIGHT, J., not participating.

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[12] See § 020.02(2)(b).

J.M., AS GUARDIAN AND CONSERVATOR FOR HIS MINOR CHILD, C.M., APPELLANT, V. BILLY L. HOBBS, APPELLEE.

797 N.W.2d 227

Filed May 13, 2011. No. S-10-600.

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. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
3. ____. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Victor E. Covalt III and John W. Ballew, Jr., of Ballew Covalt, P.C., L.L.O., for appellant.

Dana M. London for appellee.

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

GERRARD, J.

Nebraska law provides that a court may order any property of a judgment debtor, not exempted by law, in the hands of either the debtor or any other person or corporation, or due to the debtor, to be applied toward the satisfaction of the judgment.[1] But the Nebraska State Patrol Retirement Act (the Act)[2] provides, as relevant, that annuities or benefits "which any person shall be entitled to receive under" the Act are not subject to garnishment, attachment, levy, or any other process of law.[3] The question presented in this case is whether a plaintiff who wins a civil judgment against a former state trooper can obtain an order in aid of execution against the trooper's State Patrol retirement benefits.

BACKGROUND

The plaintiff in this case, J.M., is the guardian and conservator for his minor child, C.M. In 1999, when C.M. was 7 years old, her mother married the defendant, Billy L. Hobbs. C.M. lived with her mother and Hobbs. Hobbs sexually assaulted C.M. while she was between 12 and 14 years old. In 2006, Hobbs was convicted of first degree sexual assault of a child and sentenced to 25 to 30 years' imprisonment. And J.M. sued Hobbs on C.M.'s behalf and won a judgment of $325,000.

J.M. filed a motion for an order in aid of execution, alleging that Hobbs was a judgment creditor and, although incarcerated, was receiving a retirement pension from the State Patrol. J.M. requested that Hobbs be asked to pay all nonexempt property and funds that came into his hands on a recurring basis

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[1] Neb. Rev. Stat. § 25-1572 (Reissue 2008).

[2] Neb. Rev. Stat. §§ 81-2014 to 81-2041 (Reissue 2008).

[3] § 81-2032.

toward satisfaction of the judgment. J.M. also moved for the appointment of a receiver to take control of Hobbs' assets in the event that Hobbs did not comply. Hobbs objected, alleging that his State Patrol retirement benefits were exempt from execution and that the order sought by J.M. would effectively subject his retirement benefits to process of law in violation of § 81-2032. The district court agreed and denied J.M.'s motion. J.M. appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

J.M. assigns that the district court erred in (1) finding that Hobbs' pension benefits are exempt from his collection efforts, (2) denying his motion for an order in aid of execution, and (3) failing to appoint a receiver.

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

As noted above, § 25-1572 provides that in aid of execution of a judgment, a court "may order any property of the judgment debtor, not exempt by law, in the hands of either himself or any other person or corporation, or due to the judgment debtor, to be applied towards the satisfaction of the judgment." The question in this case is whether Hobbs' State Patrol retirement funds are "exempt by law." J.M. argues that the applicable statute here is Neb. Rev. Stat. § 25-1563.01 (Reissue 2008), which provides as relevant that "an interest held under a stock bonus, pension, profit-sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service" is generally exempt from process "[t]o the extent reasonably necessary for the support of the debtor and any dependent of the debtor." J.M. argues that because Hobbs is imprisoned, he does not need his retirement funds for support, so they are available to satisfy C.M.'s judgment.

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[4] *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010).

But Hobbs relies on § 81-2032, which provides:

> All annuities or benefits which any person shall be entitled to receive under [the Act] shall not be subject to garnishment, attachment, levy, the operation of bankruptcy or insolvency laws, or any other process of law whatsoever and shall not be assignable except to the extent that such annuities or benefits are subject to a qualified domestic relations order under the Spousal Pension Rights Act.[5]

Hobbs contends that this provision creates a legal exemption from execution for the funds he receives under the Act. We agree with the district court that § 81-2032 precludes J.M. from obtaining the relief requested in this proceeding.

J.M. attempts to draw a distinction between the funds that Hobbs "shall be entitled to receive," as specified by § 81-2032, and the funds that Hobbs already *has* received and which are in his possession. J.M. contends that the words "annuities" and "benefits" in § 81-2032 refer to a right to payment, not to the payment or proceeds themselves. So, J.M. claims, § 81-2032 is actually intended not to protect the money received by a beneficiary of the Act, but simply to protect the Nebraska State Patrol Retirement System from having to deal with the administrative burdens of execution and garnishment. But J.M.'s argument is inconsistent with the language of the Act and the weight of authority applying similar anti-attachment provisions.

[2] To begin with, we have often said that absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[6] The words "annuity" and "benefit" are often used to refer, respectively, to "[a] fixed sum of money payable periodically"[7] and "a cash payment or service provided for under an annuity, pension plan, or insurance policy."[8] And those ordinary meanings for "annuity" and "benefit" are

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[5] Neb. Rev. Stat. §§ 42-1101 to 42-1113 (Reissue 2008).

[6] *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

[7] Black's Law Dictionary 105 (9th ed. 2009).

[8] Webster's Third New International Dictionary of the English Language, Unabridged 204 (1981).

clearly how the terms are used in the Act. For example, the Act describes the authority of the Public Employees Retirement Board to "require repayment of benefits paid" or "offset future benefit payments" in the event of "an overpayment of a benefit," and to compensate a beneficiary in the event of "an underpayment of a benefit."[9] And the Act explains how an officer who has reached retirement age or is disabled is entitled to receive "a monthly annuity" for the remainder of his or her life or disability.[10] There is simply no merit to J.M.'s argument that "annuities" and "benefits" in § 81-2032 refer to something other than payments of money.

Nor are we persuaded that § 81-2032 no longer applies when the money is paid to the beneficiary. The language of § 81-2032 mirrors that of anti-attachment provisions that generally have been held to protect benefits such as those provided under the Act from being used by judgment creditors to satisfy private obligations.[11] J.M. argues that the statutes at issue in those cases are distinguishable, because they contained express language that more clearly applies to, for instance, money "'either before or after receipt by the beneficiary.'"[12] But this distinction has been consistently rejected by courts discussing statutes, such as § 81-2032, that do not contain such language.[13] The language of

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[9] See § 81-2019.01(1).

[10] See § 81-2026(1)(a). Accord § 81-2026(2).

[11] See, generally, *In re Interest of Battiato*, 259 Neb. 829, 613 N.W.2d 12 (2000); *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988). See, e.g., *Bennett v. Arkansas*, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988); *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973); *Porter v. Aetna Casualty Co.*, 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962).

[12] See, e.g., *Bennett, supra* note 11, 485 U.S. at 397. Accord *Porter, supra* note 11.

[13] See, *Tom v. First American Credit Union*, 151 F.3d 1289 (10th Cir. 1998); *Broward v. Jacksonville Medical Center*, 690 So. 2d 589 (Fla. 1997); *Waggoner v. Game Sales Co.*, 288 Ark. 179, 702 S.W.2d 808 (1986); *Surace v. Danna*, 248 N.Y. 18, 161 N.E. 315 (1928); *State ex rel. Nixon v. McClure*, 969 S.W.2d 801 (Mo. App. 1998); *Sears, Roebuck and Co. v. Harris*, 854 P.2d 921 (Okla. App. 1993). Cf. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

§ 81-2032 is still clearly intended to protect benefits under the Act from legal process.[14]

As Chief Justice Cardozo explained, when addressing whether payments "'due'" were limited to compensation owing and unpaid, "'due,' like words generally . . . , has a color and a content that can vary with the setting. Compensation due under an act may be a payment presently owing, or one to become due in the future, or one already made, but made because due, *i. e.*, required or commanded."[15] And the 10th Circuit, in addressing a provision of the Civil Service Retirement Act that exempted only "money mentioned by this subchapter,"[16] concluded that although the statutory language was "not as precisely drafted"[17] as the provision of the Social Security Act that the U.S. Supreme Court had previously addressed,[18] "the broad language of [the statute] offers no hint that its protections are any narrower than those afforded to Social Security payments or that Congress intended to treat future payments any differently than payments already received."[19] Accordingly, the 10th Circuit concluded that the same protection extended to payments that had already been received.[20]

The same is true here. Although we recognize that the result may often seem inequitable, courts have held that anti-attachment provisions are to be given effect even where a creditor is attempting to collect restitution for a criminal act, or a tort judgment.[21] As the Kansas Supreme Court said, in a case involving strikingly similar facts:

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[14] See *Harris, supra* note 13.

[15] *Surace, supra* note 13, 248 N.Y. at 21, 161 N.E. at 316.

[16] See 5 U.S.C. § 8346(a) (2006).

[17] *Tom, supra* note 13, 151 F.3d at 1293.

[18] See *Philpott, supra* note 11.

[19] *Tom, supra* note 13, 151 F.3d at 1293-94.

[20] See *id.*

[21] See, *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990) (superseded by statute as stated in *U.S. v. Irving*, 452 F.3d 110 (2d Cir. 2006)); *Higgins v. Beyer*, 293 F.3d 683 (3d Cir. 2002); *E.W. v. Hall*, 260 Kan. 99, 917 P.2d 854 (1996); *Younger v. Mitchell*, 245 Kan. 204, 777 P.2d 789 (1989).

> If we were free to decide the case on public policy or equitable consideration, there could be no strong reason asserted for not permitting the attachment. The language of the relevant federal statutes and the United States Supreme Court decision make it clear that we do not have the luxury of deciding the case on the basis of what is the "right" or desirable result. Plaintiff herein is a judgment creditor. . . . We find no legal basis for holding the funds are not exempt due to some implied exception.[22]

And as the U.S. Supreme Court has more generally explained, it is not appropriate for a court to approve any generalized equitable exception to an antigarnishment provision, even for criminal misconduct, despite a "natural distaste for the result."[23] An antigarnishment provision

> reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule

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[22] *E.W., supra* note 21, 260 Kan. at 104, 917 P.2d at 858.

[23] See *Guidry, supra* note 21, 493 U.S. at 377.

> in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.[24]

[3] We agree with the Court's reasoning, and we likewise find that if an exception to § 81-2032 is to be created for circumstances such as these, it is a matter for the Legislature to undertake. But as it stands, § 81-2032 clearly provides greater protection to benefits under the Act than does the general pension exemption set forth in § 25-1563.01. And it is well established that where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.[25] The district court was correct in relying upon this principle to conclude that Hobbs' retirement benefits, even in his possession, are exempted from execution by § 81-2032.

This conclusion disposes of J.M.'s first assignment of error. J.M. seems to suggest, in support of his remaining assignments of error, that the court should nonetheless have ordered Hobbs to pay the judgment and appointed a receiver to take control of Hobbs' assets.[26] Although J.M. implies that the court's contempt power could be used to force Hobbs to pay, the use of a court's contempt power to compel payment from assets that are protected by an anti-assignment provision is limited to narrow exceptions that are not applicable here.[27] Simply put, we do not read these arguments as providing any basis for superseding the exemption provided by § 81-2032; nor has J.M. alleged that any assets other than Hobbs' retirement benefits are at issue. Therefore, we also find no merit to J.M.'s remaining assignments of error.

For the sake of completeness, we note that Hobbs could, obviously, voluntarily pay his retirement funds toward C.M.'s

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[24] *Id.* at 376-77.

[25] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009). See, also, *Guidry, supra* note 21.

[26] See § 25-1572 and Neb. Rev. Stat. § 25-1573 (Reissue 2008).

[27] See, *Bennett, supra* note 11; *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987); *Younger, supra* note 21.

judgment if he chose to do so[28] and that his willingness (or unwillingness) to do so could be seen as relevant to many of the factors that the Board of Parole is instructed to take into account when making a determination regarding a committed offender's release on parole.[29] We also note that although this opinion addresses the general applicability of § 81-2032, we make no comment on the extent to which the exempt status of Hobbs' retirement funds might be affected by any transformation in their character, such as through spending or investment.[30] And, as suggested above, nothing in this opinion should be construed to comment on whether the Legislature, if it chose to do so, could amend the scope of § 81-2032.

CONCLUSION

The district court correctly concluded that § 81-2032 foreclosed the relief J.M. sought in this proceeding. The court's judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[28] See *In re Interest of Battiato, supra* note 11.

[29] See Neb. Rev. Stat. § 83-1,114 (Reissue 2008).

[30] See, e.g., *Porter, supra* note 11; *Trotter v. Tennessee*, 290 U.S. 354, 54 S. Ct. 138, 78 L. Ed. 358 (1933); *In re Smith*, 242 B.R. 427 (E.D. Tenn. 1999); *E.W., supra* note 21; *Younger, supra* note 21.

STATE OF NEBRASKA ON BEHALF OF VANESSA I. MARTINEZ MAYORGA, APPELLANT, V. WILBERTH MARTINEZ-IBARRA, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND PATRICIA R. MAYORGA, THIRD-PARTY DEFENDANT, APPELLEES.

797 N.W.2d 222

Filed May 13, 2011. No. S-10-750.

1. **Child Support: Child Custody: Appeal and Error.** As it does with child support and child custody determinations, the Nebraska Supreme Court reviews the award of cash medical support de novo on the record, with the decision of the trial court affirmed in the absence of an abuse of discretion.

2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Statutes.** Statutory interpretation is a question of law.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded.

Jessica J. Rasmussen and Julie Fowler, of Child Support Enforcement Office, for appellant.

No appearance for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Wilberth Martinez-Ibarra was found to be the biological father of a minor child born to Patricia R. Mayorga in 2007. Martinez-Ibarra and Mayorga entered into a parenting plan, and Martinez-Ibarra was ordered to pay child support and cash medical support. The State appeals from the order of the district court regarding the amount of cash medical support awarded. We reverse the decision of the district court and remand the cause for reconsideration of child support and cash medical support.

FACTUAL BACKGROUND

On January 26, 2009, the State filed a paternity and support action against Martinez-Ibarra. That complaint asked for a finding that Martinez-Ibarra was the biological father of the minor child, born in 2007, and requested that Martinez-Ibarra be ordered to pay child support and provide medical support. The State filed the petition because the minor child was receiving services under title IV-D of the federal Social Security Act.

Martinez-Ibarra filed an answer and cross-complaint against Mayorga. In that complaint, Martinez-Ibarra requested joint custody. Mayorga then filed her own cross-complaint against Martinez-Ibarra for paternity and custody.

At trial held June 24, 2010, the parties stipulated to a parenting plan which granted Mayorga sole physical custody. Both child support and health insurance were at issue. Because neither party was employed full time, no health insurance was available for the minor child. The State asked that Martinez-Ibarra be ordered to pay $472.97 per month in child support, and an additional $77 per month as a cash medical support payment. The district court ordered child support in the amount of $472.97 and, after granting a credit to Martinez-Ibarra for $480, ordered cash medical support of $37 per month. Because the State provides title IV-D services, it has a right, by either subrogation or assignment of rights, to certain support payments awarded to Mayorga.[1]

The State appeals. Neither Martinez-Ibarra nor Mayorga have appeared on appeal.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in giving Martinez-Ibarra a $480 credit when calculating the amount of cash medical support to be ordered or, in the alternative, erred by not reducing the deduction for cash medical support when calculating the child support order.

STANDARD OF REVIEW

[1] As this court does with child support and child custody determinations, we review the award of cash medical support de novo on the record, with the decision of the trial court affirmed in the absence of an abuse of discretion.[2]

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

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[1] See Neb. Rev. Stat. § 43-512.07 (Cum. Supp. 2010).

[2] See, e.g., *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009); *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[3] *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010).

[4] *Id.*

ANALYSIS

Error in Giving Credit.

In its first assignment of error, the State argues that the district court erred when it credited Martinez-Ibarra $480 when calculating the amount of cash medical support due.

Cash medical support payments are authorized by Neb. Rev. Stat. § 42-369 (Cum. Supp. 2010). In particular, § 42-369(2)(a) states that health insurance, where available, should be provided by a minor child's parents. Section 42-369(2)(a) further notes that the availability of health insurance is dependent upon its accessibility, in that the health insurance must provide coverage in the area in which the minor child resides, and notes that it must be available at a reasonable cost. The statute then provides:

> If health care coverage is not available or is inaccessible and one or more of the parties are receiving Title IV-D services, then cash medical support shall be ordered. Cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the party responsible for providing medical support does not exceed three percent of his or her gross income. In applying the three-percent standard, the cost is the cost of adding the children to existing health care coverage or the difference between self-only and family health care coverage.[5]

Health care coverage is defined to include private health insurance, but not "public medical assistance programs."[6] And cash medical support is defined as "an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise or for other medical costs not covered by insurance."[7]

Also relevant are the Nebraska Child Support Guidelines. Neb. Ct. R. § 4-215 (rev. 2009) provides as follows:

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[5] § 42-369(2)(a).

[6] Neb. Rev. Stat. § 44-3,144(5) (Reissue 2010). See § 42-369(2)(b)(i).

[7] § 42-369(2)(b)(ii).

The child support order shall address how the parents will provide for the child(ren)'s health care needs through health insurance as well as the nonreimbursed reasonable and necessary child(ren)'s health care costs that are not included in table 1 that are provided for in § 4-215(B).

(A) Health Insurance. The increased cost to the parent for health insurance for the child(ren) of the parent shall be prorated between the parents. When worksheet 1 is used, it shall be added to the monthly support from line 7, then prorated between the parents to arrive at each party's share of monthly support on line 10 of worksheet 1. The parent requesting an adjustment for health insurance premiums must submit proof of the cost for health insurance coverage of the child(ren). The parent paying the premium receives a credit against his or her share of the monthly support.

(B) Health Care. Children's health care expenses are specifically included in the guidelines amount of up to $480 per child per year. Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law. All nonreimbursed reasonable and necessary children's health care costs in excess of $480 per child per year shall be allocated to the obligor parent as determined by the court . . . .

(C) Cash Medical Support and Health Care Costs for Title IV-D Cases Only. All child support orders in the Title IV-D program must address how the parties will provide for the child(ren)'s health care needs through health care coverage and/or through cash medical support. Cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the party responsible for providing medical support for the child(ren) does not exceed 3 percent of his or her gross income. In applying the 3-percent standard, the cost is the cost of adding the child(ren) to existing health care coverage or the difference between self-only and family health care coverage. Cash medical support payment shall not be ordered if, at the time that the order is issued or modified,

> the responsible party's income is, or such expense would reduce the responsible party's net income, below the basic subsistence limitation provided in § 4-218.

In this case, the State introduced a child support worksheet, requesting child support in the amount of $472.97 per month and an additional $77 per month for cash medical support. The district court adopted the worksheet, but noted the decree provided that Mayorga was responsible for the first $480 of nonreimbursed medical expenses. The district court reasoned that because the minor child was receiving public medical assistance, Mayorga would have very few nonreimbursed expenses. As such, the district court concluded that Martinez-Ibarra was entitled to a $480 credit to the yearly amount of cash medical support due under § 42-369. The State appeals, arguing that the credit was erroneous. We agree that the district court erred in giving Martinez-Ibarra the $480 credit.

Section 4-215(B) of the child support guidelines provides for nonreimbursed medical expenses and specifically notes that "[c]hildren's health care expenses are specifically included in the guidelines amount of up to $480 per child per year." As such, the guidelines estimate $480 as an ordinary amount of such nonreimbursed medical expenses, and that figure is then subsumed within the amount of child support that is ordered. Any nonreimbursed expenses exceeding $480 are prorated between the parties.

As applied to this case, and many similar cases, this means that while Mayorga has been ordered to pay the first $480 in nonreimbursed medical expenses, in essence this $480 has already been paid in by both parents. In paying the first $480 in nonreimbursed medical expenses, the responsible parent, here Mayorga, is essentially paying out funds previously set aside for this purpose. Thus, by giving Martinez-Ibarra a $480 credit, the district court has simply undone what was intended to be accomplished by the child support guidelines. Nor is there any authority in the guidelines or otherwise for the giving of a credit in this situation.

Moreover, these nonreimbursed medical expenses are intended to be separate from health insurance or cash medical support payments. The two types of medical costs are governed

by different subsections of the child support guidelines. Section 4-215(B) of the guidelines provides specifically for nonreimbursed medical expenses, while § 4-215(A) and (C) set forth the guidelines with respect to health insurance and cash medical support.

Also, the plain language of § 4-215(C) of the guidelines, as well as of § 42-369(2)(a), indicates that cash medical support is intended as a substitute for health insurance in situations in which health insurance is unavailable. And health insurance is the ultimate example of a *reimbursed* medical expense, as opposed to those *nonreimbursed* medical expenses envisioned by § 4-215(B). This is reinforced when considering the statutory definition of cash medical support: the payment of "an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment."[8]

We conclude that the district court erred when it gave Martinez-Ibarra a credit when calculating the amount of cash medical support owed. We reverse the decision of the district court and remand this cause with instructions to recalculate the amount of cash medical support and child support owed by Martinez-Ibarra.

Cash Medical Support as Deduction on Worksheet 1.

In addition, we note that the State's child support calculation worksheet, which was largely adopted by the district court, provided Martinez-Ibarra with a deduction against his income for the cash medical support he owes. We also note that this is not a deduction provided for by the guidelines[9] or the worksheet itself, and we could find no authority for it in statute. A district court may, of course, deviate from the guidelines in certain instances.[10] However, the guidelines state that "[i]n the event of a deviation, the reason for the deviation shall be contained in the findings portion of the decree or order, or worksheet 5 should be completed by the court and filed in the

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[8] *Id.*

[9] See Neb. Ct. R. § 4-205.

[10] Neb. Ct. R. § 4-203.

court file."[11] But in this case, no such reason was contained in our record.

Therefore, on remand, we encourage the district court to also review the deductions on worksheet 1 of the child support guidelines to determine whether a deviation for Martinez-Ibarra's cash medical support payment would be appropriate.

CONCLUSION

The decision of the district court is reversed, and the cause remanded for a redetermination of cash medical support and child support.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

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[11] *Id.*

IN RE INTEREST OF D.H., ALLEGED TO BE A DANGEROUS SEX OFFENDER. D.H., APPELLANT, V. LANCASTER COUNTY MENTAL HEALTH BOARD, APPELLEE.

797 N.W.2d 263

Filed May 20, 2011. No. S-10-617.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Mental Health: Judgments: Appeal and Error.** In reviewing a district court's judgment upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. ____: ____. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
5. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

6. **Res Judicata: Appeal and Error.** The applicability of the doctrine of res judicata is a question of law, as to which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Criminal Law: Mental Health.** The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Todd Molvar, and Andrew J. Conroy, Senior Certified Law Student, for appellant.

Bruce J. Prenda and Maureen Hannon Lamski, Deputy Lancaster County Attorneys, and Meagan Deichert, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

The Lancaster County Mental Health Board (the Board) determined that D.H. is a "dangerous sex offender" within the meaning of the Sex Offender Commitment Act (SOCA)[1] and should be committed for inpatient treatment. The determination was affirmed on appeal to the district court for Lancaster County. D.H. appeals to this court, contending that the district court erred in affirming the order of the Board for several reasons. We find no error and affirm.

I. FACTS AND PROCEDURAL BACKGROUND

D.H. was convicted of first degree sexual assault on November 26, 1991, and was sentenced to a term of 16 to 35 years in prison. The sexual assault occurred when D.H. entered a woman's apartment after seeing her sunbathing on her apartment balcony.

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

Prior to D.H.'s scheduled release from prison, the Nebraska Department of Correctional Services (DCS) ordered an evaluation pursuant to Neb. Rev. Stat. § 83-174.02 (Reissue 2008) in order to determine whether D.H. was a dangerous sex offender. The evaluation was performed by Stephanie Bruhn, Ph.D., a licensed psychologist employed by DCS. Bruhn prepared a written report of her evaluation dated March 13, 2009.

On April 10, 2009, the Lancaster County Attorney filed a petition pursuant to SOCA alleging that D.H. was a dangerous sex offender who had a mental illness which made him likely to engage in repeat acts of sexual violence. A copy of Bruhn's report was attached to the petition along with Bruhn's affidavit stating her opinion that D.H. was a dangerous sex offender as defined in Neb. Rev. Stat. § 83-174.01 (Reissue 2008). The petition alleged that D.H. was "substantially unable to control his criminal behavior" and that neither voluntary hospitalization nor other less restrictive treatment alternatives were available or would suffice to prevent the harm described in § 83-174.01.

D.H. filed a motion to dismiss the petition on the ground that DCS had failed to order the evaluation within the timeframe stated in § 83-174.02(2). The Board overruled the motion. D.H. then filed a motion to dismiss the petition on constitutional grounds and a motion to dismiss the petition on principles of res judicata. These motions were overruled by the Board.

The Board then conducted a hearing on the petition. The hearing was continued several times at the request of D.H. Bruhn testified that to a reasonable degree of psychological certainty, she diagnosed D.H. with (1) "paraphilia, not otherwise specified, non-consent," and (2) antisocial personality disorder. She testified that in her opinion, D.H. was a dangerous sex offender. Another psychologist, Mary Paine, Ph.D., also testified that she had evaluated D.H. and, to a reasonable degree of psychological certainty, diagnosed him with (1) paraphilia not otherwise specified, nonconsent; (2) alcohol abuse by history, in remission in a controlled setting; and (3) antisocial personality disorder. Both Bruhn and Paine testified that D.H. was at high risk to reoffend upon release and that he

needed further sex offender treatment. Paine testified that in her opinion, inpatient treatment was the least restrictive environment in which such treatment could be safely provided. Two of D.H.'s relatives testified that if he were released, he could live with them and they would assist him with transportation and employment. The evidentiary record will be discussed in more detail below.

Following the hearing, the Board entered an order in which it found clear and convincing evidence that the allegations in the petition were true. The Board specifically found that D.H. suffers from paraphilia not otherwise specified, an "Axis I" mental illness, and that as a result of that mental illness, he is substantially unable to control his criminal behavior and poses a high risk to sexually reoffend. The Board also found that inpatient treatment was the least restrictive alternative which would meet D.H.'s needs and protect the community. The Board ordered D.H. committed to the Nebraska Department of Health and Human Services for inpatient sex offender treatment pursuant to an individualized treatment plan.

D.H. appealed the Board's order to the district court, which affirmed the Board's decision. The court found no merit to D.H.'s claims that SOCA is unconstitutional, that the Board's order was barred by res judicata, or that the proceeding should have been dismissed on the ground that the initial psychological evaluation was not ordered within the time periods specified in § 83-174.02(2). The court found clear and convincing evidence to support both the Board's finding that D.H. is a dangerous sex offender within the meaning of SOCA and its finding that inpatient involuntary treatment is the least restrictive treatment alternative. D.H. perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

D.H. assigns (1) that the Board erred in overruling his motion to dismiss based on DCS' failure to comply with § 83-174.02(2); (2) that the Board erred in overruling his motion to dismiss based on res judicata; (3) that there was insufficient evidence to support the decision of the Board to deem D.H. a dangerous sex offender and commit him to inpatient, sex-offender-specific treatment with the Department of

Health and Human Services; and (4) that SOCA violates the Ex Post Facto and Double Jeopardy Clauses of the state and federal Constitutions.

III. STANDARD OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record.[2] In reviewing a district court's judgment upon review of a mental health board determination, an appellate court will affirm the judgment unless it finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.[3]

IV. ANALYSIS

1. Jurisdiction

Following the submission of appellate briefs but prior to oral argument, D.H. filed a motion to dismiss the appeal for lack of jurisdiction. He contends that the Board, the district court, and this court lack jurisdiction over the cause because his conviction occurred prior to January 1, 1997, and that he therefore does not meet SOCA's definition of a dangerous sex offender.

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[5]

Section 71-1203(1) of SOCA incorporates the definition of "[d]angerous sex offender" found in § 83-174.01(1), which includes a requirement that the person "has been convicted of one or more sex offenses." "Sex offense" is defined in § 83-174.01(5) as "any of the offenses listed in [Neb. Rev. Stat. §] 29-4003 for which registration as a sex offender is required." Section 29-4003 is part of the Sex Offender Registration

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[2] *In re Interest of G.H.*, 279 Neb. 708, 781 N.W.2d 438 (2010).

[3] *Id.*

[4] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[5] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

Act (SORA),[6] under which persons convicted of certain sex offenses must register with local law enforcement agencies.[7] Section 29-4003(1) provides that SORA applies to "any person who on or after January 1, 1997: (a) [p]leads guilty to or is found guilty of" any of 14 enumerated sex offenses, which include first degree sexual assault.[8] D.H. argues that because his offense and conviction occurred before January 1, 1997, he is not required to register under SORA, and that therefore, the crime for which he was convicted and sentenced in 1991 is not a "sex offense" under § 83-174.01(5) and he is not a "dangerous sex offender" under § 83-174.01(1).

It is true that D.H.'s crime occurred, and he was convicted, in 1991, and therefore, § 29-4003(1)(a) does not apply to him. But § 29-4003(1)(c) does. That portion of § 29-4003 states that SORA applies to any person who on or after January 1, 1997,

> [i]s incarcerated in a jail, a penal or correctional facility, or any other public or private institution or is under probation or parole as a result of pleading guilty to or being found guilty of a registrable offense under subdivision (1)(a) or (b) of this section prior to January 1, 1997[.][9]

On and after January 1, 1997, D.H. was incarcerated in a correctional facility as a result of his conviction for an offense registrable under SORA. Accordingly, he committed a "sex offense" as defined by § 83-174.01(5) and incorporated in SOCA. We find no merit to D.H.'s jurisdictional argument and overrule his motion to dismiss the appeal.

2. Timeliness of Mental Health Evaluation

D.H. argues that the district court erred in affirming the Board's decision to overrule his motion to dismiss based on the failure of DCS to comply with § 83-174.02. That statute directs DCS to order a mental health evaluation of certain sex offenders, including those convicted of sexual assault in the

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[6] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008).

[7] See § 29-4002.

[8] § 29-4003(1)(a)(iii).

[9] § 29-4003(1)(c).

first degree, in order to determine whether the individual is a dangerous sex offender.[10] D.H. focuses on that part of the statute which provides:

> The evaluation required by this section shall be ordered at least one hundred eighty days before the scheduled release of the individual. Upon completion of the evaluation, and not later than one hundred fifty days prior to the scheduled release of the individual, [DCS] shall send written notice to the Attorney General, the county attorney of the county where the offender is incarcerated, and the prosecuting county attorney. The notice shall contain an affidavit of the mental health professional describing his or her findings with respect to whether or not the individual is a dangerous sex offender.[11]

The psychological evaluation relied upon by the State in this case was dated March 13, 2009. D.H. was released from incarceration on April 14, 2009. Due to the filing of the petition alleging him to be a dangerous sex offender, he was then taken into emergency protective custody during the pendency of the proceedings before the Board.[12] He argues that he was forced to serve additional prison time as a result of the delay in the evaluation and that his due process rights were violated because he was not given proper notice of the evaluation and was denied time to obtain voluntary treatment and an independent evaluation. He also alleges that the State's failure to comply with the statute divested the Board of jurisdiction under SOCA.

The issues raised involve statutory interpretation, a question of law which we resolve independently of the lower court.[13] Section 83-174.02 is not a part of SOCA. It makes no reference to mental health boards or their statutory powers. Although a county attorney may elect to file a petition under SOCA based upon the results of the evaluation required by § 83-174.02, the

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[10] § 83-174.02(1)(a).

[11] § 83-174.02(2).

[12] See § 71-1206.

[13] See, *State v. State Code Agencies Teachers Assn., supra* note 5; *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

statute does not place any time limitation on such filing. We find no language in § 83-174.02 which would be jurisdictional with respect to a proceeding under SOCA.

The time periods mentioned in § 83-174.02(2) designate when DCS shall provide information to prosecutors, but the statute does not prescribe any type of notice to the offender. We conclude that § 83-174.02 provides a mechanism for identifying potentially dangerous sex offenders prior to their release from incarceration and for notifying prosecuting authorities so that they will have adequate time to determine whether to file a petition under SOCA before the offender's release date. But the statute does not create any substantive or procedural rights in the offender who is the subject of the mental health evaluation. We note that contrary to his argument, D.H. served no additional prison time based on the timing of the filing of the petition. The district court did not err in affirming the Board's overruling of the motion to dismiss based upon an alleged failure to comply with § 83-174.02(2).

3. Res Judicata

When he was sentenced in 1991, D.H. was found not to be a mentally disordered sexual offender (MDSO). He contends that this 1991 determination is a bar to the 2010 proceedings, in which he was found to be a dangerous sex offender under SOCA, based upon res judicata.

[5,6] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[14] The applicability of the doctrine of res judicata is a question of law, as to which we are obligated to reach a conclusion independent of the determination reached by the court below.[15]

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[14] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

[15] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

Prior to 1992, Nebraska defined a "mentally disordered sex offender" as "any person who has a mental disorder and who, because of the mental disorder, has been determined to be disposed to repeated commission of sexual offenses which are likely to cause substantial injury to the health of others."[16] If an offender met this definition at the time of sentencing and it was determined that the disorder was treatable, the offender was immediately committed to a regional center for treatment before serving a sentence of incarceration.[17] After receiving the maximum benefit of treatment, the offender was returned for further disposition by the sentencing court, with credit given for time spent in treatment.[18]

In rejecting D.H.'s claim that the 1991 MDSO determination operated as a bar to the 2010 SOCA proceeding, the district court reasoned that the issue before the Board was D.H.'s current mental health diagnosis and its effect upon his ability to control his criminal behavior in 2010, which is a different issue from that which was decided in 1991. The court found persuasive the reasoning of *People v. Carmony*,[19] in which a California appellate court held that a 1982 determination that a convicted defendant was not an MDSO did not operate as a bar to a proceeding initiated approximately 20 years later, shortly before the defendant's release on parole, to determine if he was a "sexually violent predator" who posed a danger to others and should be civilly committed for treatment. Under California's formulation of the doctrine of collateral estoppel, "an issue tried and determined in one proceeding is given conclusive effect in subsequent litigation between the same parties or their privies."[20] The California court determined that the doctrine did

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[16] Neb. Rev. Stat. § 29-2911(2) (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[17] Neb. Rev. Stat. § 29-2915 (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[18] Neb. Rev. Stat. § 29-2919 (Reissue 1989) (repealed by 1992 Neb. Laws, L.B. 523, § 18).

[19] *People v. Carmony*, 99 Cal. App. 4th 317, 325, 120 Cal. Rptr. 2d 896, 901 (2002).

[20] *Id.* at 322, 120 Cal. Rptr. 2d at 899.

not bar the subsequent proceedings because they involved the individual's mental health at the time of parole, not at the time of conviction. The court reasoned:

> Some issues are not static, that is, they are not fixed and permanent in their nature. When a fact, condition, status, right, or title is not fixed and permanent in nature, then an adjudication is conclusive as to the issue at the time of its rendition, but is not conclusive as to that issue at some later time.[21]

The court concluded that collateral estoppel did not apply in "light of the changeable nature of a person's mental health and dangerousness."[22]

D.H. argues that we should not follow the reasoning in *Carmony* because there has been no material change in the facts between the time of his 1991 MDSO determination and the current SOCA proceeding. The *Carmony* court cited a 1931 California case for the proposition that claim preclusion did not apply where "'the facts have materially changed or new facts have occurred'" in the interval between the two proceedings.[23] Nebraska law is similar.[24]

We do not read *Carmony* to focus on changes in factual circumstances. Rather, the court's focus was on the differing purposes of the two statutes in question and the changeable *nature* of an individual's mental health. The mental health determination under California's MDSO statute occurred before the criminal sentence was served, as was true under Nebraska's former MDSO statutes. But the mental health determination under California's subsequent statute focused on the offender's mental health and dangerousness immediately prior to his or her release from incarceration, and it was intended by the California Legislature as a means of protecting the public from those sex offenders who are determined to be at high risk to

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[21] *Id.*

[22] *Id.* at 323, 120 Cal. Rptr. 2d at 900.

[23] *Id.* at 322, 120 Cal. Rptr. 2d at 900, quoting *Hurd v. Albert*, 214 Cal. 15, 3 P.2d 545 (1931).

[24] See, *Ichtertz v. Orthopaedic Specialists of Neb., supra* note 15; *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

reoffend.[25] Similarly, the purpose of SOCA "is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others."[26]

Nor are we persuaded by D.H.'s argument that we should follow the reasoning of the Kansas Supreme Court in *In re Care and Treatment of Sporn*,[27] which held that a proceeding initiated under Kansas' Sexually Violent Predator Act in 2007 was barred by a 2006 finding in a proceeding under the same statute where the State had failed to prove that the offender's mental status and risk assessment had changed in the interim. Unlike *In re Care and Treatment of Sporn*, the case at bar involves mental health adjudications under different statutes and separated by a period of years.

We agree with the district court that the reasoning of *Carmony* is applicable to this case. Nebraska's former MDSO statutes and its current SOCA statutes provide for assessment of an offender's mental health and risk of recidivism at different times and for different purposes. While the MDSO determination may be relevant to the subsequent SOCA issue, it is not conclusive. In addition to the information available to the sentencing court at the time of the 1991 MDSO determination, the Board in this SOCA proceeding had evidence of D.H.'s sexual misconduct while in prison, discussed in more detail below. While D.H. would minimize the significance of this evidence, it is not our role to reweigh the evidence. We conclude that the issue presented in this SOCA proceeding was not and could not have been litigated at the time of the MDSO determination in 1991 and that the doctrine of res judicata is therefore inapplicable.

4. Sufficiency of Evidence

We turn to the argument made by D.H. that the evidence before the Board was insufficient to support its finding that he is a dangerous sex offender who should be committed for

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[25] *People v. Carmony, supra* note 19.

[26] § 71-1202.

[27] *In re Care and Treatment of Sporn*, 289 Kan. 681, 215 P.3d 615 (2009).

inpatient treatment. In its de novo review, the district court found the evidence to be sufficient to support the findings and actions of the Board under SOCA. Our standard of review requires that we affirm unless we can conclude, as a matter of law, that the judgment is not supported by clear and convincing evidence.[28]

In order for an individual to be considered a dangerous sex offender, the State has the burden to prove by clear and convincing evidence that (1) the subject is a dangerous sex offender and (2) neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the Board are available or would suffice to prevent the harm described in § 83-174.01(1).[29]

(a) Dangerous Sex Offender

As used in SOCA, the phrase "dangerous sex offender" means

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.[30]

(i) Mental Illness or Personality Disorder

Bruhn diagnosed D.H. as having both paraphilia not otherwise specified, nonconsent, and antisocial personality disorder. The former is an Axis I mental illness under the "DSM-IV." Paine also diagnosed D.H. as having (1) paraphilia not otherwise specified, nonconsent; (2) alcohol abuse by history, in remission in a controlled setting; and (3) antisocial personality

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[28] *In re Interest of G.H., supra* note 2.

[29] § 71-1209(1).

[30] § 83-174.01(1).

disorder. There was no expert testimony to the contrary. The expert testimony of Bruhn and Paine supports the finding that D.H. has a mental illness.

(ii) Likely to Engage in Repeat Acts of Sexual Violence

The phrase "likely to engage in repeat acts of sexual violence" in § 83-174.01(2) means that a "'person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public.'"[31]

The record shows that D.H. was given 68 misconduct reports while incarcerated. Four of them involved his sexual activities of making sexual comments to a female correctional officer, exposing himself to a female staff member, and masturbating in view of female staff members. D.H. was in segregation from 2004 until his discharge for various reasons, including threatening staff members, sexual activities, misconduct reports, and assault on a staff member.

In addition, Bruhn and Paine administered several assessment instruments to D.H. On the "Psychopathy Checklist Revised, 2nd Edition" instrument, which is designed to assess personality traits and behaviors characteristic of psychopathy, D.H. scored a 28. Individuals with scores between 25 and 29 are considered possibly psychopathic. On the "Static-99" instrument, which is designed to estimate the risk of sexual recidivism among sex offenders, D.H. scored in the high risk category, relative to other adult male sex offenders, for committing a future sex offense. Of those with the same Static-99 score as D.H., 27.7 percent sexually reoffended within 5 years and 37.3 percent sexually reoffended within 10 years.

The "Stable 2007" instrument is designed to assess change in intermediate-term risk status, assess treatment needs, and help predict recidivism in sexual offenders. D.H. scored 21 out of 26 points, which placed him in the high needs category on that instrument and indicated that he had a high chance of

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[31] *In re Interest of J.R.*, 277 Neb. 362, 386, 762 N.W.2d 305, 324-25 (2009), quoting § 83-174.01(2).

recidivism. A composite score of the Static 99 and Stable 2007 placed D.H. in a very high category for recidivism relative to other sexual offenders.

Bruhn also administered the "Sex Offender Risk Appraisal Guide," which is an instrument intended to estimate the risk of violent recidivism among adult male sex offenders. D.H. scored in the highest category. Individuals with similar scores have a "1.00" probability of violent recidivism within 7 years and a "1.00" probability of violent recidivism within 10 years. Bruhn stated D.H.'s mental illness makes it likely that he will reoffend sexually and likely that he will engage in repeat acts of sexual violence.

Paine also determined that D.H. scored in the highest risk category for sexual reoffense on the Static 99. On the Stable 2007 administered by Paine, D.H. scored 18 out of 24 possible points. Combining the scores on both instruments, Paine said D.H. is at very high risk to sexually reoffend. Among individuals with the same scores, sexual recidivism occurs at a rate of 14.3 percent at 1 year and at a rate of 26 percent at 4 years. In terms of violent recidivism, the rates are 20.4 percent at 1 year and 42 percent at 4 years.

This evidence supports the Board's finding that D.H. is likely to engage in repeat acts of sexual violence.

(iii) Convicted of One or More Sex Offenses

This requirement was met by proof that D.H. was convicted of sexual assault in the first degree in 1991, for which he was incarcerated until 2009.

(iv) Substantially Unable to Control Criminal Behavior

The phrase "substantially unable to control his or her criminal behavior" means that the person has "serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[32]

The assessment tools administered by Bruhn and Paine demonstrated that D.H. is at high risk for committing a future

[32] § 83-174.01(6).

sex offense when compared with other adult male sex offenders. On the Sex Offender Risk Appraisal Guide, he scored in the highest category, representing a high risk of violent reoffense.

Based on the mental illness diagnosis and the record of D.H.'s acting out sexually in a structured environment, Bruhn opined to a reasonable degree of psychological certainty that D.H. is substantially unable to control his criminal behavior. And Paine believed, to a reasonable degree of psychological certainty, that D.H. would pose a substantial risk of harm, specifically to adult females, if he were released.

The evidence was sufficient to support a finding that D.H. is a dangerous sex offender under the definition stated in § 83-174.01. We next consider whether the State demonstrated the level of treatment necessary.

(b) No Less Restrictive Treatment

Under § 71-1209(1)(b), the State must demonstrate that "neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the [Board] are available or would suffice to prevent the harm described" in § 83-174.01(1). For D.H., the Board determined that the least restrictive treatment available to prevent the harm described in § 83-174.01 is inpatient commitment for sex offender treatment.

The evidence showed that D.H. participated in but did not successfully complete sex offender treatment while incarcerated. Specifically, he participated in an inpatient sex offender program for a short period of time and then went to the Lincoln Regional Center for sex offender treatment from December 1997 to September 1998. D.H. never progressed beyond the initial treatment level at the regional center and was given a negative recommendation. D.H. told Bruhn he believed there was bias in the regional center treatment program. D.H. was recommended for participation in another sex offender treatment program in June 2007, but he was never transferred to the program because he was in segregation.

D.H. completed three levels of a generic mental health program and a 10-week anger and stress management program

while incarcerated. D.H. also attended 3 of 10 sessions of a domestic violence group and was described as an active participant of that group, although he had to be given cues not to dominate the group.

Bruhn stated that D.H. presented himself as someone who had worked through his treatment issues. He became defensive when he was given feedback and became loud and verbally aggressive when confronted about current or past behaviors. D.H. avoided taking responsibility for behavioral problems and was told to find less aggressive ways to express his anger and other emotions.

Bruhn expressed concern about D.H.'s ability to comply with treatment because he told her he thought that the mental health system was corrupt and that the evaluation process was a "witch hunt" for sex offenders. He also indicated he did not need treatment. To a reasonable degree of psychological certainty, Bruhn believed D.H. would pose a danger to the community based on his previous offense against an adult female using force, his acting out sexually in a structured setting, and his not successfully completing any sex offender treatment.

Paine testified that D.H. had not yet checked on whether there were any restrictions on where he could live after his release. He believed he could get work with relatives, and he planned to take a correspondence course in paralegal studies. D.H. said his primary means of avoiding relapse would be to remain sober, but he was unable to identify any warning signs that might indicate he was "in trouble." He did not see himself as being at risk to reoffend. Paine said that individuals who do not view themselves to be at risk to reoffend are less likely to take steps to prevent it, are less likely to avoid situations that might create problems, and are likely to fail to recognize the need for advance intervention to prevent reoffending.

D.H. did not identify a need for any type of treatment and said that he would keep himself from reoffending by working out at a gym. Bruhn found this comment of concern because if D.H. encountered an adult woman at a gym, he might be tempted to engage in sexual behavior with her. Paine testified

D.H. had said that Lincoln Regional Center staff played favorites and that he did not make progress in treatment there for racial reasons.

Paine asked D.H. his thoughts about relationships with women when he is released. D.H. said he planned to write to women in magazines to ask them to have sexual relationships. He said he "needs sex," "wants it upfront," and does not want to have to deal with women who "play[] games." Paine said D.H.'s attitudes toward women were cause for concern because they indicated cognitive distortions about women that are common in rapists. Paine opined that D.H. is in need of further sex offender treatment and that the least restrictive environment in which that could safely be provided would be an inpatient program.

This evidence supports the Board's finding that commitment for inpatient sex offender treatment was the least restrictive alternative which would provide D.H. with the treatment he required and which would protect the community.

(c) Summary

[7] "The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others."[33] The evidence summarized above provided a sufficient factual basis for the Board and the district court to conclude that the State had met its burden of proof under SOCA by clear and convincing evidence.

5. Constitutionality of SOCA

Finally, D.H. asserts that the Board erred in overruling his motion to dismiss the petition because SOCA is unconstitutional. D.H. claims that SOCA is an ex post facto law because it is punitive in nature and retroactive in its application, therefore violating the prohibition against such laws found in U.S. Const. art. I, § 9, and Neb. Const. art. I, § 16. D.H. also argues that SOCA places him twice in jeopardy for the same offense,

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[33] *In re Interest of J.R., supra* note 31, 277 Neb. at 386, 762 N.W.2d at 365.

in violation of the Fifth Amendment to the U.S. Constitution and Neb. Const. art. I, § 12.

In *In re Interest of J.R.*,[34] we held that SOCA does not constitute ex post facto legislation because it is not punitive in nature. We are not persuaded by the argument that we should reconsider this holding. Indeed, we recently reaffirmed it in *In re Interest of A.M.*,[35] where we also held that because SOCA is not punitive in nature, it cannot violate the coextensive protections afforded by the Double Jeopardy clauses of the state and federal Constitutions. Accordingly, we conclude that the district court did not err in overruling D.H.'s motion to dismiss the petition on constitutional grounds.

V. CONCLUSION

For the reasons discussed above, we overrule D.H.'s motion to dismiss the appeal and affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[34] *Id.*

[35] *In re Interest of A.M., ante* p. 482, 797 N.W.2d 233 (2011).

STATE OF NEBRASKA, APPELLEE, V.
ROY L. ELLIS, APPELLANT.
799 N.W.2d 267

Filed May 27, 2011. No. S-09-148.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: 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.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.

4. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith; or, stated another way, the rule prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.
5. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
6. ____: ____. In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
7. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
8. **Motions for Mistrial.** The decision to grant a motion for mistrial is within the trial court's discretion.
9. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
10. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
11. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
12. **Trial: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), framework, once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue.
13. ____: ____. A general foundational objection is insufficient to preserve an issue under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
14. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.

15. **Judgments: Appeal and Error.** When 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.
16. **Sentences: Death Penalty.** That a method of execution is cruel and unusual punishment bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself.
17. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, an appellate court is obligated to reach a conclusion independent of the decision reached by the court below.
18. **Constitutional Law: Statutes.** A grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.
19. **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.
20. **Constitutional Law: Legislature.** Although 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, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.
21. **Legislature.** Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.
22. **Constitutional Law: Sentences: Death Penalty: Jurors.** In death penalty cases, an eligibility or selection factor is not unconstitutional if it has some commonsense core of meaning that a juror can understand.
23. **Constitutional Law: Sentences: Death Penalty: Appeal and Error.** Because the proper degree of definition of eligibility and selection factors in death penalty cases often is not susceptible of mathematical precision, a vagueness review is quite deferential.
24. **Homicide: Aggravating and Mitigating Circumstances.** "Exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (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.
25. **Sentences: Aggravating and Mitigating Circumstances: Juries.** Mitigating circumstances, and the "weight" to be assigned to the aggravating and mitigating circumstances, are relevant only to the sentencing panel's exercise of its discretion to decide which statutorily authorized sentence to impose and do not require determination by a jury.
26. **Federal Acts: Actions.** Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.
27. ____: ____. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Without it, a cause of action does not exist and courts may not

create one, no matter how desirable that might be as a policy matter or how compatible with the statute.

28. **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.
29. **Trial: Witnesses: Juries.** The credibility of witnesses is for the jury, and a jury's findings may be based upon the uncorroborated testimony of a single witness.
30. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** A capital sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by the Nebraska Supreme Court.
31. **Sentences: Aggravating and Mitigating Circumstances: Proof.** While there is no burden of proof with regard to mitigating circumstances, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.
32. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.
33. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
34. ____: ____: ____: ____. The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty. The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.
35. ____: ____: ____: ____. The Nebraska Supreme Court's proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires the court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

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

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

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

GERRARD, J.

Roy L. Ellis was convicted of first degree murder in connection with the killing of 12-year-old Amber Harris and sentenced to death. This is Ellis' automatic direct appeal from his conviction and sentence.[1] Although many issues are presented on appeal, the primary issue we must decide is whether the trial court erred in admitting evidence of prior bad acts committed by Ellis and whether Ellis was prejudiced by that evidence. We conclude that Ellis was not prejudiced by admission of the evidence and find no merit to his other assignments of error.

I. BACKGROUND

Amber disappeared on November 29, 2005, after she was dropped off by her school bus about five blocks from her North Omaha, Nebraska, home. A few weeks later, Ellis was arrested and incarcerated in the Douglas County Correctional Center on unrelated charges. Several witnesses reported that while in jail, before Amber's body was found or Ellis was a suspect in her killing, he made a number of remarks suggesting that he was involved in Amber's disappearance.

To begin with, Ellis made telephone calls from jail suggesting that he needed to get out of jail to take care of some things and "find some stuff." Ellis had lived in a boarding house on Lake Street, although he moved to another residence nearby before Amber disappeared. While in jail, Ellis called his former neighbors, asking repeatedly about any activity at the boarding house. But no more of those calls were made after February 14, 2006, when Amber's bookbag was found in a large trash storage container behind the boarding house. Although Ellis continued to call his former neighbor after the bag was found, he no longer asked about the boarding house.

While he was incarcerated during early 2006, Ellis also repeatedly asked Terrelle Smith, a Douglas County corrections officer, for information regarding Amber's case. Because Smith

[1] See Neb. Rev. Stat. § 29-2525 (Reissue 2008).

was studying criminal justice, Ellis also asked him questions about criminal investigation, regarding subjects such as fingerprint identification and the decomposition of buried bodies. Ellis asked Smith whether blood or semen left outside would be contaminated by the elements and how long it would take before contaminated semen would no longer be considered relevant evidence. And Ellis asked Smith for books on forensics and DNA examination. Ellis also asked Brandon Clark, another corrections officer, about how long semen would last inside a dead body and in a forested, rural area and asked Clark to perform Internet research for him on the subject.

Ellis also asked Darryl Chambers, a fellow inmate, if he knew how long semen would last inside a decomposed body. And another inmate, Clarence Dennis, heard Ellis asking other inmates questions about how long blood and semen would last when exposed to the elements and what was necessary to keep dirt from subsiding above a buried body. Clenix Martin, another inmate, said Ellis had asked him about the persistence of DNA left outside, whether DNA could be traced after a body had decomposed, and how long it took a body to decompose.

Ellis also made more particular statements that foreshadowed what would be discovered about the circumstances of Amber's disappearance after her body was found. Dennis heard Ellis say that he had previously taken women to Hummel Park, in a rural area north of Omaha, and forced them to have sex with him by threatening to leave them in the park alone at night. Smith overheard Ellis saying that if a woman did not do what he wanted, "[h]e would just hit them upside their heads." Ellis told Chambers that he liked underage girls. Ellis told his cellmate, David Shaffer, that he had sexually molested underage girls, some of them at Hummel Park.

Shaffer said that Ellis expressed an unusual interest in Amber's disappearance and cut out newspaper articles about the case. Ellis told Martin that he had sexually assaulted a young girl and strangled her. When Shaffer mentioned to Ellis that it was "crazy what happened to that Amber Harris girl," Ellis replied, "that's why I got to get out and cover my tracks." And both Dennis and Chambers said Ellis had admitted to sexually assaulting Amber and striking her in the head.

According to Dennis, Ellis said he hit Amber in the head with a hammer.

Finally, on May 11, 2006, Amber's decomposed body was discovered by passers-by, covered with a mound of soil, in a secluded, wooded area of Hummel Park. Amber had been killed by blunt force trauma to the skull, resulting from at least two blows to the head with a blunt object. Because of decomposition, it was impossible to tell whether Amber had also been choked or strangled. Although Amber's sweater was still on, her jeans and underwear had been removed. Amber's jacket, jeans, and bra had been found in her bookbag. Amber's blood was on the jacket and jeans, and DNA was found on the jeans, in a shape resembling a handprint, in a mixture from which Ellis could not be excluded as a contributor.

Ellis was charged with first degree murder on theories of both premeditated murder and felony murder, for which the predicate felony was sexual assault. Over Ellis' objection, in addition to the evidence described above, the State adduced evidence that Ellis had sexually assaulted his former stepdaughters when they were between 12 and 15 years old. The jury found Ellis guilty of first degree murder, and an aggravation hearing was held at which the jury found two aggravating circumstances to exist. A three-judge sentencing panel sentenced Ellis to death.

More specific details will be set forth below as they relate to some of Ellis' separate arguments.

II. ANALYSIS

Ellis' assignments of error can be separated into two broad categories: issues relating to evidence at trial and issues arising out of the capital sentencing proceedings.

1. Evidentiary Issues

(a) Rule 404 Evidence

(i) Background

The State, over Ellis' objection, presented testimony from Ellis' former stepdaughters that Ellis had sexually assaulted them during a 3-year period from 1993 to 1995. Ellis' first assignment of error takes issue with that evidence.

The State argued that the evidence was relevant to the issues of motive, identity, intent, and opportunity. The district court agreed in part, finding that the crimes were sufficiently similar to help establish the identity of Amber's killer. The court reasoned that Amber was of a similar age to Ellis' stepdaughters and also noted that when Ellis had first assaulted one of the girls, he removed her pants but left her shirt on, similar to the condition in which Amber's body had been discovered. And one of the girls testified that Ellis struck her in the head with his fist. The court also found that the prior assaults were relevant to prove that Ellis acted intentionally for the purpose of forced sexual penetration.

However, the court rejected the State's contention that the prior bad acts were relevant to motive, reasoning that the State's argument on motive actually went to Ellis' propensity to commit such acts. And the court found that the assaults did nothing to show Ellis' opportunity to attack Amber.

Nonetheless, the court found that the probative value of the evidence outweighed its potential for unfair prejudice, and admitted it subject to an instruction to the jury to consider the evidence only as relevant to identity and intent. And in opening and closing arguments, the State argued that the prior assaults tended to prove that Ellis was the killer and that he acted intentionally. Ellis moved for a mistrial during the State's closing argument, asserting that the State was using the evidence to prove Ellis' propensity to act. But that motion was overruled.

(ii) Assignments of Error

Ellis assigns that the district court committed reversible error in admitting evidence of the prior sexual assaults on Ellis' stepdaughters, because intent and identity were not proper purposes for receipt of said evidence, and abused its discretion in denying two mistrial requests due to prosecutorial misconduct where the State argued propensity in context of the evidence admitted pursuant to Neb. Evid. R. 404.

(iii) Standard of Review

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the

Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[2] 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),[3] and the trial court's decision will not be reversed absent an abuse of discretion.[4] The decision whether to grant a motion for mistrial is also within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[5]

(iv) Analysis

Ellis argues that the district court's rulings were erroneous. The State continues to argue that the evidence was relevant to prove Ellis' identity and intent.

Rule 404(2) provides that 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. Such evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. We note that rule 404 has been amended to permit the admission, in a criminal case in which the defendant is accused of a sexual assault, of evidence of another offense of sexual assault.[6] Those amendments were not in effect at the time of trial in this case and do not affect our analysis in this appeal.

[4] Rule 404(2) prohibits the admissibility of relevant evidence for the purpose of proving the character of a person in order to show that he or she acted in conformity therewith; or, stated another way, the rule prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[7] The difficulty with the State's argument that Ellis' assaults on his stepdaughters were

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[2] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[3] Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008).

[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

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

[6] See Neb. Rev. Stat. §§ 27-404(4) and 27-414 (Cum. Supp. 2010).

[7] See *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

relevant to intent is that to the extent that the argument has any logical basis, it is in the propensity-based reasoning that rule 404(2) precludes. The district court concluded, and the State also contends, that the factual similarities between the prior assaults and Amber's killing prove intent as well as identity. But, as explained below, we find those similarities to be superficial and unpersuasive. And, to the extent that the prior assaults do show intent, it is only because they support the inference that Ellis is the type of person who assaults young women. This is classic propensity reasoning that should be excluded under rule 404(2).

The alleged similarities between the offenses are not compelling. We addressed a comparable situation in *State v. Trotter*,[8] in which prior acts of spousal abuse were offered as evidence that the defendant had committed child abuse. But we explained that we could not

> say that the crimes charged and the evidence of [the defendant's] previous acts in this case are so similar, unusual, and distinctive that the trial judge in this case could reasonably find that they bear the same signature. The evidence of the manner in which [the defendant] may have abused his ex-spouses is similar to the extent it constituted abuse. While the acts of child abuse and spousal abuse are concededly similar in nature in that they both involve the abuse of a person, the facts described by the district court and the State could be present in most any situation where there is any type of abuse. The similarities the State points to in the case at bar are, in essence, the similarities in the statutory definition of the crimes themselves, not the manner in which [the defendant] may have carried them out.[9]

[5,6] The same is true here. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they

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[8] See *id.*

[9] *Id.* at 461, 632 N.W.2d at 340.

bear the same signature.[10] In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.[11]

But in this case, the prior acts were separated by more than a decade from Amber's disappearance. And the purported "signature" of the crime is that the victims were approximately the same age, they were isolated and alone when they were assaulted, one of Ellis' stepdaughters was subjected to blows to the head, and Ellis' other stepdaughter was, on at least one instance, assaulted while nude only from the waist down. These facts are not so distinctive as to separate these prior acts from nearly any other forcible sexual assault.

[7] Therefore, we conclude that the trial court abused its discretion in admitting evidence, during the guilt phase of the trial, of Ellis' assaults on his stepdaughters. But the State also argues that any error was harmless. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.[12] And here, given the strength of the State's other evidence, we conclude that the erroneously admitted evidence was harmless.

We recognize that the admission of other acts evidence, by its nature, is usually prejudicial to the defendant. But this is the rare instance in which it was not. For one thing, Shaffer testified, without objection, that Ellis admitted molesting young girls and impregnating his stepdaughter. And more fundamentally, Ellis was inescapably tied to Amber's killing through DNA evidence that, as we will explain below, was admissible and persuasive, and physical evidence that proved to be consistent with Ellis' careless statements that had already been reported to investigators. There was no innocent explanation

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[10] *Trotter, supra* note 7.

[11] *Id.*

[12] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

for how Ellis' DNA came to be on Amber's bloody clothing. Nor is there any innocent explanation for how several witnesses came forward with information *before* Amber's body or Ellis' DNA on her clothing had been discovered linking Ellis to the killing—some of whom even accurately described Amber's cause of death and the possible location of her body. This evidence can only be explained by the conclusion that Ellis was the killer.

Given Ellis' statements, the physical evidence, and the other circumstantial evidence, we have no doubt that any reasonable trier of fact would have found Ellis guilty of the charge against him. In particular, no reasonable trier of fact could overlook the testimony of Dennis, Smith, and Shaffer, each of whom was interviewed several weeks before Ellis' DNA was identified on Amber's clothing and at least a month before Amber's body was found in Hummel Park. Each witness found Ellis' interest in the case suspicious, and they all described details of the case that they had no way of knowing unless they heard them from the person who killed Amber. Therefore, although we find merit to Ellis' first assignment of error, we find that the error was not prejudicial to Ellis.

[8,9] For similar reasons, we find no merit to Ellis' second assignment of error. Ellis argues that the district court should have ordered a mistrial after the State made arguments during opening and closing statements that referred to the other acts evidence discussed above and, according to Ellis, referred to his propensity to commit such acts. Because the evidence was itself inadmissible, the court also erred in permitting argument based upon it. But the decision to grant a motion for mistrial is within the trial court's discretion,[13] and a defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.[14] Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only

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[13] *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

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

the possibility of prejudice.[15] Because we have concluded that the actual admission of the evidence was not prejudicial, we similarly conclude that the State's argument based upon that evidence was not prejudicial, because of the strength of the State's remaining evidence.

(b) Jailhouse Informer Statute

(i) Background

Before trial, Ellis moved to exclude testimony from Martin and Dennis, claiming the State had failed to make certain disclosures required by the statutes in effect at the time concerning "jailhouse informers."[16] Specifically, Ellis argued, the State was required to disclose the witnesses' known criminal history, any agreement made in exchange for the testimony, the statements allegedly made by the defendant, any other cases in which the witness had testified, and whether the witness had recanted at any time.[17] The State argued that the witnesses were not "jailhouse informers" because although they were in jail when they initially spoke to the State, they were no longer in jail at the time of trial. The district court agreed. And, the court noted, the State had in any event provided Ellis with the witnesses' criminal history records and informed Ellis that the witnesses had been promised no benefit for their testimony. And Martin and Dennis testified to that effect at trial.

(ii) Assignment of Error

Ellis assigns that the district court erred in denying his motion to exclude testimony pursuant to § 29-1929 and that as a result, his constitutional due process rights were violated.

(iii) Standard of Review

[10] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[18]

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[15] *Id.*

[16] See Neb. Rev. Stat. §§ 29-1928 and 29-1929 (Cum. Supp. 2006).

[17] See *id.*

[18] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

(iv) Analysis

It should be noted that since Ellis' trial, the statutes upon which he relies have been repealed. However, the provisions have been substantially reenacted as part of Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2010), and now specifically define "jailhouse witness" as a person who was in jail at the time the statements to which the person will testify were first disclosed. So, the question of statutory interpretation Ellis presents is a case of last impression. And, on the record before us, it is not a question we need to answer.

We explained in *State v. Gutierrez*[19] that the jailhouse informer statutes were discovery provisions, intended to ensure that criminal defendants have the opportunity to meaningfully confront the testimony of a jailhouse informer at trial. And the district court found that, even if Martin and Dennis were considered to be jailhouse informers, the State had complied with the statutory requirements. Nor is it apparent how Ellis was prejudiced by any deficiency in the State's disclosure.

The only point Ellis makes on appeal that appears to relate to prejudice is that after his testimony at trial, Dennis entered into a plea agreement for some charges that had been pending against him. But there is no evidence that the plea agreement had been reached, or contemplated, at the time Dennis testified. In other words, nothing in the record is contrary to the district court's express finding, in ruling on Ellis' motion to exclude testimony, that the relevant statutes were substantially complied with. The court did not abuse its discretion in rejecting Ellis' motion, and we find no merit to Ellis' assignment of error.

(c) DNA Evidence

(i) Background

As noted above, the State presented DNA evidence relating to a sample found on Amber's jeans that tended to implicate Ellis in the killing. Before trial, Ellis moved to exclude the

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[19] *Gutierrez, supra* note 12.

DNA evidence, but his motion was overruled, as was his foundational objection at trial.

The State's witness, Dr. James Wisecarver, explained generally that the testing process used in this case involved looking at 16 different genetic markers scattered throughout the genome at different loci. One of those is a sex marker that identifies the gender of the contributor; the other 15 are used to compare to known reference samples (in this case, for Amber and Ellis) to see if they are the same or different.

The DNA found on Amber's jeans was a mixture of DNA from at least two people, one of whom was male. Wisecarver explained that it was not possible to separate the mixture into a major and minor contributor at each locus. Instead, he said, the presence of the mixture was taken into account when calculating the likelihood that any other person would have any combination of the genetic markers that had been identified. Wisecarver explained that the purpose of the statistical calculations was to determine the likelihood that "we're going to find somebody, anybody, that could have any of these markers in any combination." In other words, Wisecarver said, when testing a mixture, "[w]e make no inferences as to who matches up with whom in there. We just want to say in all the populations how many people would we have to screen in order to find somebody, anybody, that would fit in here in any combination of those."

Given that Amber's genetic profile was known, Wisecarver testified that only 1 in 2.3 billion people would be expected to "plug in" as the other contributor to the mixture. And despite those odds, Ellis could not be excluded as a contributor to the mixture.

On cross-examination, Wisecarver was asked about what happened when two samples had common alleles—in other words, when the two possible contributors to the mixture were genetically identical at a tested locus. Wisecarver conceded that when such a common genetic marker was found at a locus, in this case, it was not possible to tell who had contributed the allele. But, Wisecarver said, it was still scientifically appropriate to consider such a locus when making statistical calculations.

(ii) Assignment of Error

Ellis assigns that the district court erred in denying his motion in limine regarding the State's use of DNA evidence.

(iii) Standard of Review

[11] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[20]

(iv) Analysis

[12] Ellis does not contend that the State's witnesses were not qualified to testify, or that their basic reasoning and methodology was not reliable. Rather, Ellis contends that under our *Daubert/Schafersman* framework,[21] that methodology was not properly applied in this case. We have said that under that framework, once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue.[22]

Ellis' appellate argument is focused on the use of common alleles in the State's statistical analysis. Ellis contends that the "overriding issue" with that method is that "where there is uncertainty as to the contributor, as long as the suspect is 'fully represented' . . . then that location counts against the suspect in calculating the possibility of exclusion."[23] This, according to Ellis, "is fundamentally unduly prejudicial and should not have been allowed."[24]

[13,14] Ellis cites no authority that is specifically relevant to the issue he raises, nor is it clear that he raised that issue in the trial court. It was not addressed in his pretrial motion, which was addressed generally at the theory of PCR-STR

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[20] *Casillas, supra* note 2; *Daly, supra* note 14.

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

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

[23] Brief for appellant at 55.

[24] *Id.* at 56.

DNA testing that was applied in this case.[25] Nor did he raise it at trial beyond a general foundational objection, which is insufficient to preserve a *Daubert/Schafersman* issue.[26] We have explained that to sufficiently call specialized knowledge into question under *Daubert/Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.[27] To meet this burden, Ellis' pretrial motion should have identified what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[28] But the issue now raised by Ellis was not identified then.

Furthermore, Ellis' argument rests upon a misunderstanding of the way in which the DNA statistics were calculated. As Wisecarver explained, the purpose of examining each locus is to determine two things: (1) whether the contributor of the reference sample can be excluded as a contributor and (2) how commonly one might expect the profile that is generated to occur randomly in the population.[29] In other words, the initial question was not whether the alleles that were found at each locus identified Ellis as the contributor; instead, it was whether the testing *excluded* Ellis as a *possible contributor*. And obviously, an allele that could be found in both Ellis' and Amber's genetic profile would not exclude Ellis as a possible contributor.

On the second step, the fact that the DNA sample was a mixture clearly affected the calculation of how many people might be expected to have genetic profiles consistent with the sample, which is presumably why the probabilities found in this case are relatively modest compared to others. While 1 in 2.3 billion

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

[26] See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[27] *Casillas, supra* note 2.

[28] See *id.*

[29] See, generally, *Fernando-Granados, supra* note 25.

people might seem like a daunting figure, other cases involving single-contributor or major-contributor samples have produced probabilities of 1 in several quintillion.[30] But that goes to the weight of the evidence, not its admissibility—in fact, Ellis explored that issue on cross-examination of one of the State's experts. The district court did not abuse its discretion in concluding that the DNA evidence was admissible, and we find no merit to Ellis' assignment of error.

2. Capital Sentencing Issues

(a) Repeal of Electrocution as Method of Execution

(i) Background

As noted above, Amber disappeared on November 29, 2005, and was presumably killed shortly thereafter. Ellis was charged with first degree murder on February 6, 2007. At the time, the Nebraska death penalty statutes provided that the mode of inflicting the punishment of death was electrocution.[31] But on February 8, 2008, this court decided *State v. Mata*,[32] in which we held that death by electrocution violated the cruel and unusual punishment provision of the Nebraska Constitution.[33] Ellis was sentenced to death on February 9, 2009. On May 28, the Governor approved 2009 Neb. Laws, L.B. 36, which amended the death penalty statutes to provide that a sentence of death shall be enforced by intravenous injection of a lethal substance.[34] The Legislature adjourned sine die on May 29, and L.B. 36 took effect 3 months later.[35]

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[30] Compare, e.g., *Edwards, supra* note 22; *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *Fernando-Granados, supra* note 25.

[31] See Neb. Rev. Stat. § 29-2532 (Reissue 2008).

[32] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[33] See, *id.*; Neb. Const. art. I, § 9.

[34] See § 29-2532 (Cum. Supp. 2010).

[35] See, L.B. 36; Neb. Const. art. III, § 27.

(ii) Assignment of Error

Ellis contends that the repeal of electrocution as the method of carrying out a sentence of death by L.B. 36 requires a sentence of life in prison.

(iii) Standard of Review

[15] When 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.[36]

(iv) Analysis

Ellis argues that he is not subject to the death penalty because at the time of the offense, electrocution was the sole method of carrying out a death sentence. Ellis concludes that he must be sentenced to life imprisonment because at the time of his sentencing, there was no valid method of punishment.

Ellis' argument is without merit for two reasons. First, in L.B. 36, the Legislature expressly stated that "[n]o death sentence shall be voided or reduced as a result of a determination that a method of execution was declared unconstitutional under the Constitution of Nebraska or the Constitution of the United States."[37] Instead, "[i]n any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution."[38] Thus, to the extent that Ellis' argument relies on the purported effect of L.B. 36, it is evident that the Legislature did not intend L.B. 36 to affect any sentence of death that had already been imposed.

[16] But Ellis' argument does not hinge upon L.B. 36; rather, it hinges upon our decision in *Mata*. Ellis' argument is really that because we struck down electrocution in *Mata*, he could not have been sentenced to death until another means of enforcing a death sentence was enacted. Ellis' argument, however, is inconsistent with *Mata*, in which we *affirmed* the defendant's

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[36] *Sellers, supra* note 5.

[37] Neb. Rev. Stat. § 83-968 (Cum. Supp. 2010).

[38] See *id.*

death sentence despite striking down the only method available under state law to enforce that sentence.[39] We explained:

> Having concluded that electrocution is cruel and unusual punishment, we face the question of how to dispose of this appeal. The fact remains that although the Nebraska statutes currently provide no constitutionally acceptable means of executing [the defendant], he was properly convicted of first degree murder and sentenced to death in accord with Nebraska law. We have already affirmed his conviction. *His sentence of death, although it cannot be implemented under current law, also remains valid.*
>
> Under Nebraska law, the sentencing panel can fix the sentence either at death or at life imprisonment. Because a panel's sentencing authority does not extend beyond that, the method of imposing a death sentence is not an essential part of the sentence. And Nebraska's statutes specifying electrocution as the mode of inflicting the death penalty are separate, and severable, from the procedures by which the trial court sentences the defendant. *In short, that a method of execution is cruel and unusual punishment "'"bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."'"* Because we find no error in imposing a sentence of death, we affirm the district court's judgment.[40]

Although Ellis was sentenced after *Mata* was decided, his situation is not meaningfully distinguishable. The sentence was lawfully imposed, and although the sentence could not have been executed at that very time, the sentence itself remains

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[39] See *Mata, supra* note 32. See, also, *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied*, Nos. 10-9897, 10A819, 2011 WL 1325226 (U.S. Neb. May 23, 2011); *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; *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009), *cert. denied* 559 U.S. 1010, 130 S. Ct. 1887, 176 L. Ed. 2d 372 (2010).

[40] *Mata, supra* note 32, 275 Neb. at 67-68, 745 N.W.2d at 278-79 (emphasis supplied). See, also, *Galindo, supra* note 39.

valid. The sentencing panel did not err in imposing a sentence of death because of *Mata*.

(b) Constitutionality of Death Penalty Statutes

[17] Ellis raises a number of arguments that challenge the constitutionality of various aspects of Nebraska's death penalty statutes.[41] The district court found no merit to any of Ellis' claims. Whether a statute is constitutional is a question of law; accordingly, on each of these arguments, we are obligated to reach a conclusion independent of the decision reached by the court below.[42]

(i) Separation of Powers

Ellis argues that the statutes establishing the procedure for enforcing a sentence of death, Neb. Rev. Stat. § 83-964 et seq. (Cum. Supp. 2010), delegate a legislative function to the executive branch in violation of the Nebraska Constitution. Ellis asserts, therefore, that his death sentence should be voided and that he should be sentenced to life imprisonment.

As noted above, Nebraska law now provides that "[a] sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services."[43] The Director of Correctional Services

> shall create, modify, and maintain a written execution protocol describing the process and procedures by which an execution will be carried out consistent with this section. The director shall (a) select the substance or substances to be employed in an execution by lethal injection, (b) create a documented process for obtaining the necessary substances, (c) designate an execution team composed of one or more executioners and any other personnel deemed

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[41] See Neb. Rev. Stat. § 29-2519 et seq. (Reissue 2008 & Cum. Supp. 2010).

[42] *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010).

[43] § 83-964.

> necessary to effectively and securely conduct an execution, (d) describe the respective responsibilities of each member of the execution team, (e) describe the training required of each member of the execution team, and (f) perform or authorize any other details deemed necessary and appropriate by the director.[44]

The only substantive direction provided by the Legislature regarding the execution protocol is that the protocol "shall require that the first or only substance injected be capable of rendering the convicted person unconscious and that a determination sufficient to reasonably verify that the convicted person is unconscious be made before the administration of any additional substances, if any."[45]

[18-20] Ellis argues that the Legislature has unconstitutionally delegated its legislative responsibility to establish an execution protocol, in violation of the Nebraska Constitution.[46] But a grant of administrative authority is not necessarily an unconstitutional delegation of legislative power.[47] 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.[48] Although 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, where the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.[49]

[21] We have said that delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of

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[44] § 83-965(2).

[45] § 83-965(3).

[46] See Neb. Const. art. II, § 1.

[47] *Yant, supra* note 42.

[48] See *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[49] See, *id.*; *Yant, supra* note 42.

continuous decision.[50] The subject at issue here clearly fits that description, which is why similar arguments based on comparable statutes have been uniformly rejected in other jurisdictions.[51] Those courts have reasoned that by specifying the purpose of the statute, the punishment to be imposed, and generally identifying the means, a legislature has declared a policy and fixed a primary standard, permitting delegation of details that the legislature cannot practically or efficiently perform itself.[52]

We agree, and likewise conclude that Nebraska's Legislature has provided reasonable limitations and standards for carrying out the duties of establishing a protocol for lethal injection. The tasks assigned to the director are highly technical and require a course of continuous decision, making it appropriate to delegate them. We also note, as an aside, that even if Ellis' separation of powers argument had merit, his sentence would not be void. Rather, as explained above, our holding in *Mata* dictates that his sentence would remain valid, even if the State lacked a constitutional means of enforcing it.[53] But we resolve Ellis' argument here on a more fundamental basis: Ellis is incorrect when he asserts that Neb. Const. art. II, § 1, has been violated. So, we find no merit to his assignment of error.

(ii) Constitutionality of Aggravating Circumstances

Generally, Ellis argues that the Nebraska death penalty statutes are unconstitutional on their face. Specifically, he contends that the third part of § 29-2523(1)(a) and the first and second parts of § 29-2523(1)(d) are unconstitutional on their face and as interpreted by the courts of the State of Nebraska and as applied in this case. But we have previously rejected each of Ellis' arguments.

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[50] *Yant, supra* note 42.

[51] See, *Sims v. State*, 754 So. 2d 657 (Fla. 2000); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App. 1978).

[52] See, e.g., *Sims, supra* note 51; *Ex parte Granviel, supra* note 51.

[53] See *Mata, supra* note 32.

a. § 29-2523(1)(a)

[22,23] To begin with, Ellis contends that § 29-2523(1)(a), which provides as an aggravating circumstance that the defendant "has a substantial prior history of serious assaultive or terrorizing criminal activity," is unconstitutional because it fails to define those terms clearly. But we have concluded otherwise on a number of occasions.[54] In death penalty cases, an eligibility or selection factor is not unconstitutional if it has some commonsense core of meaning that a juror can understand.[55] Because the proper degree of definition of eligibility and selection factors in death penalty cases often is not susceptible of mathematical precision, a vagueness review is quite deferential.[56]

We have explained that "serious," "assaultive," and "terrorizing" are words in common usage with meanings well fixed and generally clearly understood and that the term "substantial history" is likewise reasonably clear.[57] "History" refers to the individual's past acts preceding the incident for which he is on trial, and "substantial" refers to an actual, material, and important history of acts of terror of a criminal nature. And we have concluded that our interpretation and application of § 29-2523(1)(a) are neither unconstitutionally vague nor overbroad.[58]

Ellis acknowledges this authority, but contends that we should reconsider it in light of the fact that juries, and not judges, are now responsible for factfinding with respect to aggravating

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[54] See, *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra* note 32; *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

[55] *Mata, supra* note 32.

[56] *Id*.

[57] See *Holtan, supra* note 54. Accord *Bjorklund, supra* note 54.

[58] See, *Hessler, supra* note 54; *Bjorklund, supra* note 54; *Ryan, supra* note 54.

circumstances.[59] Ellis cites no authority for the proposition that these constitutional determinations are predicated on the identity of the fact finder. Instead, the relevant question is whether or not the instructions given to the jury, based upon appellate courts' narrowing constructions, are unconstitutionally vague.[60] And Ellis does not contend that the instructions given in this case were inconsistent with the narrowing constructions that we have given this aggravating circumstance.[61] In short, Ellis has not offered any compelling reason to overrule our authority holding that § 29-2523(1)(a) is constitutionally sufficient. We decline to do so.

b. § 29-2523(1)(d)

Similarly, Ellis takes issue with § 29-2523(1)(d), which provides as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." This aggravating circumstance contains two separate disjunctive components which may operate together or independently of one another.[62] Few provisions of Nebraska law have been more challenged, and as they are currently construed, they are constitutional.[63] Ellis again acknowledges this, and again contends that we should reevaluate those holdings in light of jury factfinding. We again decline to do so.

[24] Ellis specifically takes issue with the use of the term "helpless" in our construction of (and the jury instruction for) the "exceptional depravity" prong of § 29-2523(1)(d). We have

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[59] See, generally, *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[60] See, *State v. Cromwell*, 211 Ariz. 181, 119 P.3d 448 (2005); *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005) (en banc).

[61] Compare *Sandoval, supra* note 39.

[62] *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[63] See, *Mata, supra* note 32; *Hessler, supra* note 54; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra* note 54; *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999); *Ryan, supra* note 54. See, also, *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996); *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

held that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (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.[64] Ellis argues that the district court erred in including "helpless" in the jury instruction because it does not have a constitutionally acceptable definition.

Ellis points out that our construction of the "exceptional depravity" prong is broader than that of the Arizona law upon which it was based, because in Arizona, unlike Nebraska, a mere finding that the victim was helpless would *not* be sufficient to establish the aggravator.[65] But the fact that our construction may be broader than Arizona's does not make it unconstitutional. Our definition of "exceptional depravity" has been repeatedly upheld.[66] We note, in particular, that the same argument Ellis makes was squarely presented to the Eighth Circuit in *Palmer v. Clarke*,[67] which reversed the district court's conclusion that helplessness, standing alone, would not compel a finding of heinousness or depravity[68]; instead, the Eighth Circuit held that our construction of the exceptional depravity aggravator was "'clearly constitutional.'"[69]

And the basic question is whether the aggravating circumstance has been construed to permit a principled distinction between those who deserve the death penalty and those who do not.[70] The helplessness of the victim makes such a

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[64] *Moore, supra* note 62; *Palmer, supra* note 54.

[65] See *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006).

[66] See, *Joubert, supra* note 63; *Mata, supra* note 32; *Hessler, supra* note 54; *Palmer, supra* note 63.

[67] See *Palmer v. Clarke*, 408 F.3d 423 (8th Cir. 2005).

[68] See *Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb. 2003), *affirmed in part and reversed in part, Palmer, supra* note 67.

[69] *Palmer, supra* note 67, 408 F.3d at 439, quoting *Joubert, supra* note 63.

[70] *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). See, also, *Sandoval, supra* note 39.

distinction. We reject Ellis' argument that "[a]ny victim of a homicide could be said to be 'helpless.'"[71] Many courts have found the helplessness of a victim to be a determinative factor in evaluating the depravity of a defendant's conduct.[72] A "helpless" victim is readily understood to be one who is unable to defend oneself, or to act without help.[73] It is not difficult, for instance, to see the difference between a shooting that occurs in the context of a fight between two adult men[74] and the killing of an abducted 12-year-old girl. One circumstance clearly merits the death penalty more than the other, which is the distinction that the Constitution requires.[75] The killing of a victim who has already been rendered helpless exhibits a callous disregard for the sanctity of human life that sufficiently distinguishes cases in which consideration of the death penalty is warranted.[76]

As an aside, we note that the jury was instructed, with respect to the first prong of § 29-2523(1)(d), that it should find that the murder was especially heinous, atrocious, or cruel if Ellis inflicted serious mental anguish or serious physical abuse and that mental anguish "includes a victim's uncertainty as to his or her ultimate fate." We have since disapproved this instruction in *State v. Sandoval*.[77] But in this appeal, Ellis has not taken issue with the inclusion of mental anguish. So, we need not consider the effect of the "mental anguish" instruction

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[71] Brief for appellant at 76.

[72] See, *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990); *Strouth v. State*, 999 S.W.2d 759 (Tenn. 1999); *State v. Chaney*, 967 S.W.2d 47 (Mo. 1998) (en banc); *Quintana v. Commonwealth*, 224 Va. 127, 295 S.E.2d 643 (1982). Cf. *Hargrave v. Wainwright*, 804 F.2d 1182 (11th Cir. 1986), *vacated on other grounds on rehearing en banc* 832 F.2d 1528 (1987).

[73] Concise Oxford American Dictionary 417 (2006).

[74] See, e.g., *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, Thorpe, supra* note 12.

[75] See *Lewis, supra* note 70.

[76] See, *Tokar v. Bowersox*, 198 F.3d 1039 (8th Cir. 1999); *Hargrave, supra* note 72; *Strouth, supra* note 72; *Chaney, supra* note 72; *Quintana, supra* note 72.

[77] *Sandoval, supra* note 39.

here. We note, however, that in this case, unlike *Sandoval*, there is considerable evidence that sexual abuse was inflicted on Amber before her death, and we have consistently held that murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering are "especially heinous, atrocious, [or] cruel."[78]

In sum, we find no merit to Ellis' argument that either § 29-2523(1)(a) or § 29-2523(1)(d) is unconstitutional, on its face or as applied in this case. We note that Ellis' brief also asserts a number of other facial challenges to the Nebraska death penalty statutes: for instance, he asserts due process, equal protection, uniformity, and cruel and unusual punishment claims under the state and federal Constitutions. But his "laundry list" of constitutional claims contains no argument other than his assertions that these provisions were violated; he neither assigned them specifically as error nor argued them sufficiently to preserve them for appellate review.[79]

(iii) Jury Consideration of Mitigating Evidence

Ellis contends that the Nebraska death penalty statutes' prohibition on presenting mitigating evidence to a jury violates the 6th, 8th, and 14th Amendments to the U.S. Constitution. In a related argument, Ellis contends that the Nebraska death penalty statutes' prohibition against the jury's assigning any relative "weight" to an aggravating circumstance in comparison to any mitigating circumstance violates the 6th, 8th, and 14th Amendments to the U.S. Constitution.

We have previously rejected both of these arguments.[80] We have explained that the U.S. Supreme Court's holding in *Ring v. Arizona*[81] does not require that a jury make findings

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[78] See, *id.*; *Gales, supra* note 63. See, also, *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008).

[79] See, *Mata, supra* note 32; *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[80] See, *Sandoval, supra* note 39; *Mata, supra* note 32; *Hessler, supra* note 54; *Gales, supra* note 63; *Gales, supra* note 59.

[81] *Ring, supra* note 59.

other than the existence of the aggravating circumstances upon which a capital sentence is based and that neither *Ring* nor any other authority "'require[s] that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury.'"[82]

It is the finding of an aggravating circumstance increasing the defendant's authorized punishment which implicates the right to trial by jury, so "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[83] As the Court explained in *Apprendi v. New Jersey*,[84] facts in aggravation of punishment and facts in mitigation are fundamentally distinct.

> If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.[85]

[25] In other words, mitigating circumstances, and the "weight" to be assigned to the aggravating and mitigating circumstances, are relevant only to the sentencing panel's exercise of its discretion to decide which statutorily authorized sentence to impose and do not require determination by a jury. We find no merit to Ellis' assignments of error.

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[82] *Hessler, supra* note 54, 274 Neb. at 501, 741 N.W.2d at 424, quoting *Gales, supra* note 59. See, also, *Sandoval, supra* note 39; *Mata, supra* note 32.

[83] *United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

[84] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[85] *Id.*, 530 U.S. at 491 n.16.

(iv) Bifurcation of Factfinding and Sentencing

Ellis contends that the Nebraska death penalty statutes' separation of an aggravating circumstance fact finder (jury) and a mitigating circumstance fact finder (three-judge panel) where the sentence is ultimately to be determined by "weighing" the various factors is irrational, incoherent, and incapable of reasoned application, resulting in the sentencing panel's making specific factual findings in violation of *Ring*[86] and the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution. As we understand Ellis' argument, it is that the sentencing panel's imposition of sentence is unconstitutional because the sentencing panel cannot know, with certainty, the grounds upon which the jury based its findings of aggravating circumstances.

But we effectively rejected that argument in *State v. Hessler*.[87] In that case, the defendant had argued that the capital sentencing statutes are

> "irrational, unworkable, incoherent, and incapable of rendering a fair and just determination of life and death" . . . because the sentencing panel, which was not the fact finder during the aggravation phase, is not in as good a position as the jury to assign a weight to the aggravating circumstances, to weigh aggravating circumstances against mitigating circumstances, and to determine the sentence.[88]

We found no merit to that argument because, as explained above, there is no constitutional support for the contention that the jury's constitutional role extends beyond finding the facts that are necessary to condition an increase in the defendant's maximum punishment.[89]

The sentencing panel is *statutorily* limited to weighing the aggravating circumstances found by the jury, but there is no *constitutional* basis to argue that the sentencing panel is limited

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[86] *Ring, supra* note 59.

[87] *Hessler, supra* note 54.

[88] *Id.* at 501, 741 N.W.2d at 424.

[89] See *Ring, supra* note 59.

in the evidence it may consider, or the view of the evidence it may take, in exercising its sentencing discretion. The facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of constitutional analysis.[90] Once the jury has found the facts necessary to authorize the maximum penalty for an offense, "'it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'"[91] We find no merit to Ellis' argument that the Constitution does not permit the sentencing panel to weigh the aggravating circumstances and the evidence.

(v) Jury Sentencing

Ellis argues that the Nebraska death penalty statutes do not allow the jury to make the determination of life or death in violation of the 6th, 8th, and 14th Amendments to the U.S. Constitution. But we previously rejected this argument in *Hessler*.[92] *Ring* stands for the proposition that the jury must find the existence of the fact that an aggravating circumstance existed, but states may leave the ultimate life-or-death decision to the judge if they require a prior jury finding of aggravating circumstances in the sentencing phase.[93] We find no merit to Ellis' assignment of error.

(vi) Unanimous Findings of Fact by Jury

Ellis argues that the Nebraska death penalty statutes prejudice the defendant's right to a jury trial because no unanimous findings of specific facts are required before the jury may find an aggravating circumstance. But, if the defendant waives a jury, then the three-judge panel is required to make a unanimous finding of any fact in support of an aggravating

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[90] *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

[91] *Apprendi, supra* note 84, 530 U.S. at 497. Accord *Ring, supra* note 59.

[92] See *Hessler, supra* note 54.

[93] *Ring, supra* note 59 (Scalia, J., concurring).

circumstance. According to Ellis, this "unequal treatment,"[94] based on the assertion of a right to a jury trial, is in violation of the 6th, 8th, and 14th Amendments to the U.S. Constitution and the U.S. Supreme Court's decision in *United States v. Jackson*.[95]

But we rejected an identical argument in *Hessler*.[96] In *Jackson*, the Court had struck down a statute that authorized imposing a death sentence only if a jury recommended the death sentence, so, if the defendant waived his right to a jury trial, or pled guilty, the sentencing court could only impose a life sentence. The Court struck down the statute because it improperly coerced or encouraged the defendant to waive his or her Sixth Amendment right to a jury or his or her Fifth Amendment right to plead not guilty, thereby penalizing a defendant who asserted those rights.[97]

In *Hessler*, the defendant argued that Nebraska's statutory scheme violates *Jackson* because a defendant who prefers to have the same fact finder determine both the aggravating circumstances and the sentence must waive the right to have a jury find the aggravating circumstances. The defendant complained that "[i]n order for [him] to receive the additional benefit of unanimous findings of fact—in writing—supporting the aggravating circumstances,"[98] he was required to waive a jury determination, and according to the defendant, that violated *Jackson*. But we found that argument unpersuasive, explaining that

> [u]nlike *Jackson*, under the Nebraska death penalty statutes, a defendant cannot avoid the risk of a death penalty by waiving the right to a jury determination of aggravating circumstances; even if the defendant waived such right, the sentencing panel could still impose a death

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[94] Brief for appellant at 86.

[95] *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

[96] *Hessler, supra* note 54. See, also, *Sandoval, supra* note 39; *Galindo, supra* note 39; *Mata, supra* note 32.

[97] See *Jackson, supra* note 95.

[98] Brief for appellant at 71, *Hessler, supra* note 54 (No. S-05-629).

> penalty. . . . Unlike *Jackson*, in which the benefit to waiving the right to a jury was the elimination of exposure to the death penalty, the Nebraska statutory scheme does not provide a clear advantage to a defendant who waives his or her right to have a jury determine aggravating circumstances. The Nebraska statutory scheme does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right.[99]

Simply put, "[r]equiring three judges to unanimously agree on any fact supporting an aggravating circumstance does not necessarily make a favorable sentence more likely than requiring 12 jurors to unanimously agree under alternative theories."[100] *Jackson* did not hold that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.[101] A defendant's decision to waive a jury finding of aggravating circumstances would obviously implicate procedural differences, the advantages and disadvantages of which can be weighed by the defendant—but insisting on the jury finding does not penalize the defendant for that choice within the meaning of *Jackson*. We find no merit to Ellis' assignment of error.

(vii) Federal Preemption

Ellis argues that § 83-964 et seq. are in violation of the federal Controlled Substances Act (CSA)[102] and the Federal Food, Drug, and Cosmetic Act (FDCA)[103] and therefore are preempted under the Supremacy Clause of the U.S. Constitution. Specifically, he asserts that Nebraska's lethal injection statutes violate the CSA by permitting a controlled substance to be used without a prescription for a legitimate medical purpose

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[99] *Hessler, supra* note 54, 274 Neb. at 502-03, 741 N.W.2d at 425.

[100] *Mata, supra* note 32, 275 Neb. at 21, 745 N.W.2d at 249.

[101] *Mata, supra* note 32, citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

[102] 21 U.S.C. § 801 et seq. (2006 & Supp. III 2009).

[103] 21 U.S.C. § 301 et seq. (2006 & Supp. III 2009).

and violate the FDCA because the Director of Correctional Services is not required to obtain FDA approval of the drug or drugs used in the lethal injection protocol. And Ellis argues that the federal statutes preempt any Nebraska laws with which they conflict.[104]

[26,27] But the initial question posed by Ellis' argument is one of standing: whether either of the federal statutes relied upon by Ellis gives rise to a private right of action to enforce it. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.[105] The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.[106] Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter or how compatible with the statute.[107]

And courts have consistently held that neither the FDCA nor the CSA creates a private remedy.[108] The U.S. Supreme Court has expressly held that "[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance . . . ."[109] As a result, the Fifth Circuit has rejected an argument similar to Ellis' under the FDCA, denying a stay of execution on the basis that the defendant had not made a showing of likelihood

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[104] See, generally, *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[105] *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[106] *Id.*

[107] *Id.*

[108] See, *Durr v. Strickland*, 602 F.3d 788 (6th Cir. 2010), *cert. denied* 559 U.S. 1087, 130 S. Ct. 2147, 176 L. Ed. 2d 757; *O'Bryan v. McKaskle*, 729 F.2d 991 (5th Cir. 1984). See, also, *West v. Ray*, No. 3:10-0778, 2010 WL 3825672 (M.D. Tenn. Sept. 24, 2010); *Ringo v. Lombardi*, No. 09-4095-CV-C-NKL, 2010 WL 3310240 (W.D. Mo. Aug. 19, 2010); *Jones v. Hobbs*, 745 F. Supp. 2d 886 (E.D. Ark. 2010).

[109] *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001). See, also, *Fiedler v. Clark*, 714 F.2d 77 (9th Cir. 1983).

of success on the merits.[110] The court noted that it was "unable to identify the legal footing for [the defendant's] present effort to enforce this detailed federal administrative scheme," given that the FDCA provides that all proceedings to enforce it shall be by and in the name of the United States or, under limited circumstances, by a State government.[111] The FDCA provides Ellis with no privately enforceable right of action.

Similarly, the Sixth Circuit recently held in *Durr v. Strickland*[112] that declaratory relief was unavailable to a defendant making arguments effectively identical to Ellis'. In *Durr*, the defendant argued that using lethal injection drugs without a prescription from a licensed medical practitioner and distributed without proper authorization violated the CSA and FDCA. But the Sixth Circuit affirmed the federal district court's conclusion that "no private right of action exists under either act."[113]

The CSA expressly gives the Attorney General the power to enforce its provisions,[114] and where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.[115] Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons, and a statute that focuses on the agency that will do the regulating is yet another step further removed.[116] The CSA's focus is on those who handle controlled substances, and on the authority of the Attorney General to enforce the act—it does not focus on the individuals protected by it, and evinces no intent to create a private remedy.[117]

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[110] See *O'Bryan, supra* note 108.

[111] See, *id.* at 993 n.2; 21 U.S.C. § 337.

[112] See *Durr, supra* note 108.

[113] *Id.* at 789. See, also, *West, supra* note 108; *Jones, supra* note 108.

[114] See, e.g., 21 U.S.C. §§ 821, 824, and 877.

[115] *Karahalios v. Federal Employees*, 489 U.S. 527, 109 S. Ct. 1282, 103 L. Ed. 2d 539 (1989).

[116] See, *Alexander, supra* note 105; *Ringo, supra* note 108.

[117] *Ringo, supra* note 108.

We find that reasoning persuasive, and likewise conclude that neither the FDCA nor the CSA provides a private right of action that Ellis can assert. We also note that even if Ellis' argument had merit, for the reasons explained above, Ellis' challenge to the legality of the lethal injection protocol would not invalidate his sentence.[118] So, we find no merit to his assignment of error.

(c) Sufficiency of Evidence

(i) Background

The jury was instructed, at the aggravation hearing, as to several of the aggravating circumstances set forth in § 29-2523(1). As relevant, the jury was instructed that it should find an aggravating circumstance if it found that Ellis had "a substantial prior history of serious assaultive or terrorizing criminal activity."[119] The jury was also instructed to find whether the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[120] The jury was instructed that the murder was especially heinous, atrocious, or cruel if Ellis inflicted serious mental anguish or serious physical abuse, meaning torture, sadism, or sexual abuse, on Amber before her death. And the jury was told that the murder manifested exceptional depravity if Ellis apparently relished the murder, inflicted gratuitous violence on Amber, or needlessly mutilated her; if there was a cold, calculating planning of Amber's death; or if Amber was helpless.

In determining whether those aggravating circumstances existed, the jury was instructed to consider the evidence received at the trial of guilt.[121] And the State adduced additional evidence at the aggravation hearing. Evidence of Ellis' prior criminal convictions was presented, establishing that Ellis had been convicted of two robberies and two associated charges of

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[118] See *Mata, supra* note 32.

[119] See § 29-2523(1)(a).

[120] See § 29-2523(1)(d).

[121] See § 29-2520(4)(c).

use of a firearm to commit a felony[122] and two counts of first degree sexual assault on a child in connection with his assaults of his stepdaughters. And the State adduced testimony from Ellis' former daughter-in-law, who had become involved in a sexual relationship with Ellis after she and Ellis' son were divorced. She described how Ellis threatened and harassed her and violently assaulted her on several occasions. The jury was instructed that the State had to prove beyond a reasonable doubt that Ellis had committed the uncharged offenses committed—specifically, whether Ellis had committed the offense of terroristic threats, assault in the third degree, or false imprisonment in the first degree.

The jury found that Ellis had a substantial prior history of serious assaultive or terrorizing criminal activity[123] and that Amber's killing was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.[124]

(ii) Assignment of Error

Ellis argues that there was insufficient evidence for the jury to find either of those aggravating circumstances and that as a result, the sentencing panel erred in relying on those circumstances in reaching the sentence of death.

(iii) Standard of Review

[28] 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.[125]

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[122] See, *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985); *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983).

[123] See § 29-2523(1)(a).

[124] See § 29-2523(1)(d).

[125] *Sandoval, supra* note 39; *Gales, supra* note 63.

(iv) Analysis

[29] Ellis' first argument is that there was insufficient evidence to find that he has a substantial prior history of serious assaultive or terrorizing criminal activity.[126] Ellis contends that because the testimony of his former daughter-in-law was uncorroborated, it was insufficient to support the uncharged conduct used by the State to prove this aggravating circumstance. This argument is plainly without merit. To begin with, the credibility of witnesses is for the jury, and a jury's findings may be based upon the uncorroborated testimony of a single witness.[127] Ellis' former daughter-in-law's testimony, even standing alone, would have been sufficient evidence to support the jury's finding.[128]

But that testimony did not stand alone. As noted above, the State also adduced evidence of Ellis' convictions for armed robbery and sexual assault. And we note that while evidence that Ellis had sexually assaulted his stepdaughters should not have been admitted at trial, it would have been admissible during the aggravation hearing as relevant to this aggravating circumstance.[129] Taken together, the evidence was certainly sufficient to prove Ellis' substantial prior history of serious assaultive or terrorizing criminal activity.[130]

Ellis also argues that there was insufficient evidence to support a finding that the killing was especially heinous, atrocious, or cruel.[131] Ellis contends that "there was no clear directive from the jury" that it had found sexual abuse had occurred

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[126] See § 29-2523(1)(a).

[127] See, *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990).

[128] See *id.*

[129] See, generally, *Galindo, supra* note 39. See, e.g., *State v. Williams*, 73 Ohio St. 3d 153, 652 N.E.2d 721 (1995); *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987); *State v. Price*, 126 Wash. App. 617, 109 P.3d 27 (2005); *LaFevers v. State*, 897 P.2d 292 (Okla. Crim. App. 1995).

[130] See, e.g., *Hessler, supra* note 54; *Bjorklund, supra* note 54; *Holtan, supra* note 54; *Rust, supra* note 54.

[131] See § 29-2523(1)(d).

before Amber's death.[132] But, given our standard of review, that is not the question. Rather, the question is whether taken in the light most favorable to the State, a rational jury could have found that sexual abuse had occurred. Given how Amber's clothing had been removed, and Ellis' statements admitting to rape and inquiring about the degradation of semen, there is little question that the evidence was sufficient to support a finding of sexual abuse. And this was sufficient to prove that the murder was especially heinous, atrocious, or cruel.[133]

Finally, Ellis contends that the evidence was insufficient to prove that the murder manifested exceptional depravity by ordinary standards of morality and intelligence.[134] But in support of this contention, Ellis merely restates his argument with respect to whether the victim was "helpless," which we have rejected above.

In sum, the evidence was sufficient to support the jury's findings of aggravating circumstances. Ellis' assignment of error has no merit.

(d) Failure to Find Statutory Mitigating Circumstances

(i) Background

At sentencing, Ellis presented expert testimony that he had schizoaffective disorder and a history of polysubstance abuse. However, Ellis' expert witness, Dr. Bruce Gutnik, admitted that his diagnosis was based on Ellis' self-reporting of symptoms such as hallucinations and emotional instability. Gutnik also admitted that Ellis seemed to be exaggerating some of his symptoms, and Gutnik noted that he had been unable to corroborate some of Ellis' self-reported symptoms. And Gutnik had not performed any psychological tests on Ellis that might have detected malingering.

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[132] Brief for appellant at 90.

[133] See, e.g., *Gales, supra* note 63; *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979).

[134] See § 29-2523(1)(d).

The State presented Dr. Y. Scott Moore as a rebuttal witness. Moore found no evidence of schizophrenia, noting that Ellis displayed no symptoms of schizophrenia when he was examined despite reporting that he had not been medicated for approximately 2 years. Instead, Moore diagnosed Ellis with antisocial personality disorder, which Moore explained is not a psychotic disorder, although it is a mental disorder that can be serious. Moore said that psychological testing that had previously been performed at the Lincoln Regional Center had suggested that Ellis was exaggerating symptoms and malingering, and Moore explained how Ellis' self-reported symptoms were more consistent with deception than a genuine mental illness.

Ellis argued that this evidence proved two mitigating circumstances: The crime was committed while the offender was under the influence of extreme mental or emotional disturbance,[135] and 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.[136] But the sentencing panel found that while Ellis suffered from some sort of mental condition, the evidence did not show that his condition was "extreme."[137] And the sentencing panel found the evidence insufficient to show that on November 29, 2005, Ellis was unable to appreciate the wrongfulness of his conduct or conform his conduct to the law. Thus, the sentencing panel did not find either of these statutory mitigating circumstances to exist. But the sentencing panel did consider Ellis' history of mental health problems as a nonstatutory mitigating circumstance,[138] although the panel found it did not approach or exceed the weight the panel gave to the aggravating circumstances that had been found.

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[135] See § 29-2523(2)(c).

[136] See § 29-2523(2)(g).

[137] See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[138] See *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990).

(ii) Assignment of Error

Ellis assigns that the sentencing panel erred in failing to find the evidence submitted at the sentencing hearing supported a finding of statutory mitigating factors under § 29-2523(2)(c) and (g).

(iii) Standard of Review

[30,31] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[139] We note that while there is no burden of proof with regard to mitigating circumstances, because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on Ellis.[140]

(iv) Analysis

Ellis argues that a diagnosis of either schizoaffective disorder or antisocial personality disorder would prove that the crime was committed while Ellis was under the influence of extreme mental or emotional disturbance within the meaning of § 29-2523(2)(c). But we have explained that for purposes of § 29-2523(2)(c), "extreme" means that the disturbance must be "'existing in the highest or the greatest possible degree, very great, intense, or most severe.'"[141] Neither expert who testified at sentencing described a condition that could be fairly characterized as extreme.

Beyond that, given the evidence of malingering on Ellis' part, Moore's testimony was more persuasive. And Moore described a person who has antisocial personality disorder as someone who does not think in terms of right and wrong, but instead in terms of self-gratification, and does not understand or have interest in the rights or feelings of others. While this is an apt description of what the record establishes concerning

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[139] See, *Gales, supra* note 63; *Dunster, supra* note 137; *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

[140] See *Vela, supra* note 39.

[141] *Dunster, supra* note 137, 262 Neb. at 369, 631 N.W.2d at 911, quoting *Holtan, supra* note 54.

Ellis' behavior, it is not an extreme mental disturbance, nor are we persuaded that it in any way mitigates Ellis' conduct.

With respect to § 29-2523(2)(g), we agree with the sentencing panel that the evidence was insufficient to support a finding that *at the time of the crime*, Ellis was unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. Neither Gutnik nor Moore testified to that effect. Gutnik did not express an opinion on Ellis' ability to appreciate the wrongfulness of his conduct or conform it to the law at any time, and although Moore discussed the general effect of antisocial personality disorder on a person's ability to distinguish right from wrong, Moore specifically said that he was "not able to provide any information about [Ellis'] state of mind at the time of the crime." Moore explained that Ellis denied committing the crime and that "[h]is denial does not seem to be the outgrowth of any sort of psychotic thinking." And, we note, Ellis' evident attempts to conceal the crime are inconsistent with any claim that he was unable to appreciate its wrongfulness.

In sum, the evidence falls far short of proving what is required by § 29-2523(2)(g). We have said, in the context of an insanity defense, that the fact that a defendant has some form of mental illness or defect does not by itself establish insanity.[142] The same is true of § 29-2523(2)(g). Because there was no evidence that Ellis' ability to appreciate the wrongfulness of his conduct or conform his conduct to the law was impaired at any time, much less at the time of the crime, there was no basis to find this mitigating circumstance.[143]

We find no merit to Ellis' argument that the sentencing panel should have found statutory mitigating circumstances.

(e) Sentencing Panel Proportionality Review

(i) Background

In a capital sentencing proceeding, the sentencing panel is required to consider whether the sentence of death is excessive

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[142] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[143] See, *Sandoval, supra* note 39; *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[144] In this case, the panel explained that it found three opinions of this court to be particularly pertinent in its proportionality review: *Hessler*,[145] *State v. Joubert*,[146] and *State v. Otey*.[147] The panel found that in light of its review of those cases, which will be discussed in more detail below, imposing a sentence of death in Ellis' case would not be excessive or disproportionate to the penalty imposed in similar cases.

(ii) Assignment of Error

Ellis argues that the sentencing panel erred in the proportionality review to be conducted pursuant to § 29-2522(3) and thus violated Ellis' rights under the 5th, 8th, and 14th Amendments to the U.S. Constitution.

(iii) Standard of Review

[32] In a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[148]

(iv) Analysis

Ellis' argument is simply that the facts of *Hessler*, *Joubert*, and *Otey* are insufficiently similar to those of the instant case to make a valid comparison. We disagree. Obviously, a proportionality review does not require that a court "color match" cases precisely.[149] It would be virtually impossible to find two murder cases which are the same in all respects.[150] Instead, the question is simply whether the cases being compared are sufficiently similar, considering both the crime and the defendant, to provide the court with a useful frame of reference for

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[144] § 29-2522(3).

[145] *Hessler, supra* note 54.

[146] *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986).

[147] *Otey, supra* note 133.

[148] *Vela, supra* note 39.

[149] See *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

[150] *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

evaluating the sentence in this case. And the cases relied upon by the sentencing panel in this instance were sufficiently similar for purposes of evaluating proportionality.

In *Hessler*, the defendant was convicted of first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony, based upon the killing of a 15-year-old girl who disappeared while making deliveries on her newspaper route.[151] The girl's body was found in the basement of an abandoned house. The defendant admitted to having sex with her, but claimed it was consensual; he said that after the victim suggested she would not keep the encounter secret, he took her to the basement of the abandoned house and shot her. The defendant was sentenced to death based upon findings that he had a substantial history of serious assaultive or terrorizing criminal activity, that the murder was committed in an effort to conceal the commission of a crime, and that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[152]

In *Joubert*, the defendant was convicted of two counts of first degree murder arising out of the killings of two young boys.[153] In each instance, the defendant had abducted the victim and taken him to a secluded area, where he tormented and killed each victim. The defendant was sentenced to death in each case based upon findings that the murder was committed in an effort to conceal the commission of a crime; that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity; and, in one case, that the defendant had a substantial history of serious assaultive or terrorizing criminal activity.[154]

Finally, in *Otey*, the defendant was convicted of first degree murder in the perpetration of a first degree sexual assault, after he entered the victim's apartment and raped her, then stabbed her, struck her on the head with a hammer, and strangled her

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[151] *Hessler, supra* note 54.

[152] See *id.*

[153] *Joubert, supra* note 146.

[154] See *id.*

with a belt.[155] The defendant was sentenced to death based upon the court's findings that the murder was committed in an effort to conceal the commission of a crime and that the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity.[156]

Ellis asserts that

> the facts in these three cases are in no way similar to this case. Each of the defendants in the cases the sentencing panel determined were to be used in their proportionality analysis confessed the facts supporting their convictions. The testimony provided by the State's witnesses in this case does not establish any facts remotely similar to the facts in these cases.[157]

Ellis is essentially arguing that the instant case is not comparable to the cases relied upon by the sentencing panel because in this case, Ellis neither confessed nor left a living witness. In other words, Ellis seeks to benefit from the partial success of his efforts to conceal direct evidence of his crime.

But that is one form of success for which society has no reward.[158] While there is no *direct* evidence of many of the details of the crime that are most pertinent to this issue, there is plenty of *circumstantial* evidence, and it does not take much imagination to infer from that evidence how events must have unfolded when Amber was abducted, taken to a rural area, raped, and then murdered. Circumstantial evidence, we have said, is sufficient to support the inferences necessary to convict someone of murder[159]; there is no reason that it cannot also be used to support the inferences necessary to evaluate a murderer's appropriate sentence.

In short, we find no merit to Ellis' argument that the cases relied upon in the sentencing panel's proportionality review

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[155] See, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *Otey, supra* note 133.

[156] See *id.*

[157] Brief for appellant at 100-101.

[158] See *Edwards, supra* note 22.

[159] See *id.*

were not comparable. On our de novo review, we agree with the sentencing panel that those cases are relevant and helpful in evaluating the proportionality of Ellis' sentence.

(f) Supreme Court De Novo Review and Proportionality Review

[33] Finally, in reviewing a sentence of death, we conduct a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[160] In so doing, we consider whether the aggravating circumstances justify imposition of a sentence of death and whether the mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.[161] Having considered the evidence, we are of the opinion that the aggravating circumstances—particularly the cruelty inflicted by Ellis' abduction and sexual assault of Amber—justify imposing the death penalty and that the sole mitigating circumstance identified by the sentencing panel—Ellis' history of mental health problems—does not approach or outweigh those aggravating circumstances. We conclude that the aggravating and mitigating circumstances support imposing the death penalty.

[34,35] In addition, we are required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty.[162] The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[163] Our proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires us to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death

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[160] *Gales, supra* note 63.

[161] See § 29-2522(1) and (2).

[162] See, § 29-2521.03; *Palmer, supra* note 54.

[163] See *Vela, supra* note 39.

penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[164]

In conducting our review, we agree with the sentencing panel that our decisions in *Hessler*, *Joubert*, and *Otey*, discussed in detail above, are particularly pertinent here.[165] In addition, we note our decisions in *State v. Gales*[166] and *State v. Williams*.[167] In *Gales*, the defendant was convicted of, as relevant, two counts of first degree murder.[168] The defendant had, as relevant, raped and murdered a 13-year-old girl and murdered her 7-year-old brother because he was a potential witness. The defendant was sentenced to death based on findings that he had previously been convicted of a crime of violence, he committed the murders in an effort to conceal his identity as the perpetrator, he committed another murder at the same time, and, with respect to the girl, the murder was especially heinous, atrocious, or cruel.[169] And in *Williams*, the defendant was convicted of two counts of murder in the first degree, and one count of first degree sexual assault, after he shot two women, raping one of them.[170] He was sentenced to death based upon findings that he had previously been convicted of a crime of violence, he committed the murders in an effort to conceal his identity as the perpetrator, he committed another murder at the same time, and the murder was especially heinous, atrocious, or cruel.[171]

Having reviewed our capital jurisprudence, and taking note of comparable cases, we are persuaded that the imposition of the sentence in this case was not greater than those imposed in other cases with the same or similar circumstances.

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[164] See, *Hessler, supra* note 54; *Gales, supra* note 63.

[165] *Hessler, supra* note 54; *Joubert, supra* note 146; *Otey, supra* note 133.

[166] See, *Gales, supra* note 63.

[167] *Williams, supra* note 150.

[168] See *Gales, supra* note 63.

[169] See *id.*

[170] See *Williams, supra* note 150.

[171] See *id.*

III. CONCLUSION

Although we find that Ellis' argument regarding evidence admitted pursuant to rule 404(2) has merit, we find that the error was harmless; the physical evidence, and statements Ellis was reported to have made before the physical evidence connected him to the crime, established his guilt beyond any reasonable dispute. The district court, however, correctly overruled Ellis' objections to alleged "jailhouse informer" testimony and DNA evidence. And we find no merit to Ellis' constitutional challenges to Nebraska's capital sentencing scheme or his claims that the evidence is insufficient to support the findings of the jury and the sentencing panel. Finally, we find, on our de novo review, that the death penalty is warranted and proportional in this case. Therefore, Ellis' conviction and sentence are affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MAURO YOS-CHIGUIL, APPELLANT.
798 N.W.2d 832

Filed May 27, 2011. No. S-10-671.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred presents a question of law.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.
5. **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.
6. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order.

7. **Postconviction: Appeal and Error.** In a postconviction motion, an appellate court will not consider as an assignment of error a claim that was not presented to the district court.
8. **Postconviction: Statutes.** Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) is not a general postconviction relief statute.
9. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
10. **Postconviction: Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
11. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
12. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a court denies relief without an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.
13. **Postconviction: Effectiveness of Counsel: Proof.** To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.
14. **Effectiveness of Counsel: Proof.** To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
15. ____: ____. 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.
16. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.
17. ____: ____: ____. To establish an ineffective assistance of counsel claim, the viability of the defense is relevant as to how it would have reasonably affected the defendant's decision whether to plead guilty or go to trial.
18. **Postconviction: Effectiveness of Counsel: Proof.** A postconviction petitioner does not need to show that a defense of which counsel failed to advise him would have succeeded at trial. Instead, he must show only a reasonable probability that he would have insisted on going to trial.
19. **Effectiveness of Counsel: Pleas: Proof.** In a claim for ineffective assistance of counsel, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial.

20. **Effectiveness of Counsel: Proof.** As with all applications of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the question whether a given defendant has made the requisite showing will turn on the facts of a particular case.
21. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.
22. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.
23. **Postconviction: Justiciable Issues: Right to Counsel.** When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded.

Mauro Yos-Chiguil, pro se.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

CONNOLLY, J.

In 2008, Mauro Yos-Chiguil pleaded nolo contendere to attempted second degree murder and second degree assault. The Court of Appeals dismissed his direct appeal as untimely. He then unsuccessfully sought relief under Nebraska's immigration advisement statute.[1] He now petitions for postconviction relief. The district court denied his petition without an evidentiary hearing, and he appealed. We conclude that we lack jurisdiction over some, but not all, of Yos-Chiguil's claims. We remand the claim over which we have jurisdiction for an evidentiary hearing.

BACKGROUND

The State initially charged Yos-Chiguil in December 2007 with one count of attempted second degree murder, a Class II

[1] See Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).

felony[2]; one count of second degree assault, a Class IIIA felony[3]; and two counts of use of a deadly weapon to commit a felony, a Class III felony.[4] As part of a plea bargain, Yos-Chiguil pleaded nolo contendere to amended charges of one count of attempted second degree murder and one count of second degree assault. On May 9, 2008, the court sentenced him to prison for 18 to 28 years on the attempted murder conviction and 2 to 5 years on the assault conviction. The court gave Yos-Chiguil credit for 153 days served and ordered that the sentences be served concurrently. Yos-Chiguil did not file his notice of appeal until June 17, which rendered it untimely under Neb. Rev. Stat. § 25-1912 (Reissue 2008). On July 15, 2008, in case No. A-08-697, the Court of Appeals summarily dismissed his appeal.

Later in 2008, Yos-Chiguil sought to withdraw his nolo contendere pleas under § 29-1819.02, which allows defendants facing immigration consequences to withdraw their pleas if the court failed to warn them of such consequences.[5] The district court denied him relief. On appeal in *State v. Yos-Chiguil*,[6] we upheld the district court's order. We concluded that although the trial court did not warn Yos-Chiguil of the effect his conviction would have on efforts to gain naturalization, he had not shown that his conviction had had any effect on such efforts.

Yos-Chiguil next moved for postconviction relief, which is the current appeal. His first claim is somewhat difficult to pin down. It seemingly alleges both a due process violation and an ineffective assistance of counsel claim. Yos-Chiguil seems to argue that due process requires strict compliance with § 29-1819.02 and that his attorney was ineffective for failing to press this claim. Yos-Chiguil's next claim is clearer; he argues that his attorney was ineffective for not explaining that

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[2] Neb. Rev. Stat. §§ 28-201 and 28-304 (Reissue 2008).

[3] Neb. Rev. Stat. § 28-309 (Reissue 2008).

[4] Neb. Rev. Stat. § 28-1205 (Reissue 2008).

[5] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[6] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

the defense of intoxication could possibly negate the intent element required for second degree murder. As his final claim, Yos-Chiguil argues that his attorney was ineffective in failing to timely perfect his direct appeal. Yos-Chiguil explains that he made his desire to appeal known to his attorney but that it was frustrated because the attorney wrote all correspondence to Yos-Chiguil in English, a language that Yos-Chiguil does not understand. Yos-Chiguil argues that this language barrier complicated the perfecting of the appeal and ultimately caused it to be untimely. As relief, Yos-Chiguil sought an evidentiary hearing, discovery, and ultimately a vacation of the convictions and sentences.

On January 22, 2010, the district court ruled on several of Yos-Chiguil's claims. The district court denied the first claim regarding strict compliance with § 29-1819.02. The court seems to have considered our previous ruling in *Yos-Chiguil* dispositive as to that issue. The court also denied the claim that trial counsel was ineffective in failing to perfect an appeal. The court said that it was aware of no precedent requiring that counsel provide translated documents to his client. The court also noted that Yos-Chiguil apparently had access to translation services in prison because he has been able to file lengthy legal documents. Finally, the court found that defense counsel should have discussed an intoxication defense with the defendant. It gave the State 30 days to brief why the failure to discuss the intoxication defense should not be considered ineffective assistance of counsel. Yos-Chiguil moved for reconsideration of this order, but on February 11 the court denied this motion.

On June 21, 2010, the court entered an order overruling the remaining postconviction claim, which asserted that defense counsel was ineffective for not advising the defendant of an intoxication defense. The court denied this claim because it concluded that the argument could have been presented at an earlier proceeding but was not, and was thus procedurally barred. The court apparently thought that the argument could have been presented with Yos-Chiguil's § 29-1819.02 motion.

On July 7, 2010, Yos-Chiguil filed his notice of appeal in the district court, perfecting his appeal to this court.

ASSIGNMENTS OF ERROR

Yos-Chiguil assigns that the district court erred as follows:

(1) in finding that Yos-Chiguil's postconviction motion is procedurally barred;

(2) in denying Yos-Chiguil's motion for an evidentiary hearing and postconviction relief on his claim that counsel was ineffective in failing to (a) perfect an appeal, (b) argue that due process required strict compliance with § 29-1819.02, and (c) advise Yos-Chiguil of the possibility of an intoxication defense;

(3) in committing plain error by not requiring strict compliance with the terms of § 29-1819.02 when Yos-Chiguil entered his nolo contendere pleas; and

(4) in denying Yos-Chiguil's motion for appointment of counsel to assist him with presenting the meritorious claims raised in his postconviction motion.

STANDARD OF REVIEW

[1-3] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.[7] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[8] Whether a claim raised in a postconviction proceeding is procedurally barred also presents a question of law.[9]

[4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[10] Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[11] We review factual findings for clear error.[12]

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[7] See *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

[8] See *id.*

[9] See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

[10] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[11] See *id.*

[12] See *Haas, supra* note 9.

ANALYSIS

JURISDICTION

[5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[13] The State argues that we lack jurisdiction over Yos-Chiguil's claims that the trial court dismissed in its January 22, 2010, decision because Yos-Chiguil did not file his notice of appeal within 30 days of the date of the judgment.[14] The State asserts that even if the 30 days did not begin running until February 11 because of Yos-Chiguil's motion to reconsider, the notice of appeal filed on July 7 would have still been untimely.

[6] We agree that we lack jurisdiction over several of Yos-Chiguil's claims. We have previously stated that within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order.[15] In other words, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim.[16] Under § 25-1912, a notice of appeal must be filed within 30 days. Yos-Chiguil did not file his appeal until July 7, 2010, which, even if the clock did not begin running until February 11, is well outside the 30 days that Yos-Chiguil had to file his appeal.

So we do not have jurisdiction to hear any claims that were disposed of in the court's January 22, 2010, order. These include the claims that trial counsel was ineffective in not arguing that due process requires trial courts to follow the exact language of § 29-1819.02 and that trial counsel was ineffective in perfecting the appeal. Excising these claims from the errors assigned by Yos-Chiguil, we are left with the following assigned errors to consider: whether the trial court's failure to strictly comply with § 29-1819.02 constitutes plain error,

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[13] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

[14] See § 25-1912.

[15] See, *Poindexter, supra* note 13; *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[16] *Poindexter, supra* note 13.

whether the postconviction court erred in determining that Yos-Chiguil's ineffective assistance claim regarding the intoxication defense was barred, and if it was not, whether the claim was meritorious and whether the court should have appointed counsel for Yos-Chiguil.

Strict Compliance With § 29-1819.02

[7] Yos-Chiguil argues that it was error for the trial court that took his plea to not strictly comply with § 29-1819.02. As mentioned, Yos-Chiguil's first claim for relief in his petition is somewhat muddled, so it is not entirely clear that Yos-Chiguil presented this argument to the district court. We have previously said that, in a postconviction motion, we will not consider as an assignment of error a claim that was not presented to the district court.[17]

But giving Yos-Chiguil the benefit of the doubt and reading his complaint to include this claim for relief would not help his cause. Assuming that we read Yos-Chiguil's motion to encompass this claim, the court dismissed this claim in the January 22, 2010, order. The court made clear that the only claim not dismissed in the January 22 order is the ineffective assistance of counsel claim regarding the intoxication defense. Because Yos-Chiguil did not timely appeal from that final order, we lack jurisdiction to consider his strict compliance claim.

Ineffective Counsel for Failure to Advise on an Intoxication Defense

Yos-Chiguil claimed that his trial counsel was ineffective because he did not advise him on the possibility of an intoxication defense. Although this is Yos-Chiguil's first postconviction proceeding, the district court found that this argument was procedurally barred because Yos-Chiguil had previously moved to withdraw his pleas under § 29-1819.02. The court ruled that Yos-Chiguil could have raised his ineffective assistance of counsel argument then. The State concedes that the district court erred. The State correctly explains that § 29-1819.02 is a statutory remedy for the trial court's failure

[17] See *Haas, supra* note 9.

to give an immigration advisement and cannot be used to assert other errors.

[8] Section 29-1819.02 is not a general postconviction relief statute. The Nebraska Postconviction Act[18] provides relief if there was a "denial or infringement" of constitutional rights. But the failure of a trial court to warn a defendant of immigration consequences does not implicate a constitutional right.[19] So a defendant seeking to withdraw his plea because the court failed to advise him of immigration consequences cannot find relief under the act.

However, recognizing the unfairness present when a defendant pleads to a crime without knowing the immigration consequences of such a plea, the Legislature enacted § 29-1819.02. This statute requires that courts apprise defendants of the potential immigration consequences of their pleas and allows some defendants to withdraw their pleas if a court has failed to do so. While the Constitution does not require such a practice, the Legislature, in its judgment, determined that fairness did.

[9] Section 29-1819.02, however, speaks only to immigration consequences. Nothing in its text indicates that the Legislature intended it to serve as a vehicle for asserting all errors in the plea process. And we will not read into a statute a meaning that is not there.[20] We conclude that the district court erred in holding that Yos-Chiguil's claim of ineffective assistance of counsel was procedurally barred because he could have raised it in his § 29-1819.02 motion.

The State, nevertheless, argues that we should still affirm the decision of the district court, but for a different reason. The State argues that Yos-Chiguil's pleadings are insufficient to grant him relief.

[10,11] Normally, a voluntary guilty plea waives all defenses to a criminal charge.[21] However, in a postconviction proceeding

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[18] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008).

[19] See *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010).

[20] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., ante* p. 93, 798 N.W.2d 823 (2011).

[21] See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

brought by a defendant because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[22]

[12] At this stage in the proceedings, the question is not whether Yos-Chiguil is entitled to relief. Rather, it is simply whether his pleadings are sufficient to grant him an evidentiary hearing. When a court denies relief without an evidentiary hearing, we must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.[23]

[13-16] To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.[24] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[25] 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.[26] Within the plea context, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[27]

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[22] See *id.*

[23] See *id.*

[24] See *McGhee, supra* note 10. See, also, *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[25] *State v. Cook*, 257 Neb. 693, 601 N.W.2d 501 (1999).

[26] See *McGhee, supra* note 10.

[27] *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, also, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Lyman*, 241 Neb. 911, 492 N.W.2d 16 (1992), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005); *State v. Stevenson*, 9 Neb. App. 316, 611 N.W.2d 126 (2000); *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

The State, while acknowledging that this is the standard we have long applied to guilty pleas, insists that we have misinterpreted U.S. Supreme Court precedent regarding the prejudice requirement. The State argues that a showing that the defendant would have insisted on trial is not enough; the defendant must also prove that the defense would have likely succeeded at trial. In support of its argument, the State cites *Hill v. Lockhart*,[28] which contains two paragraphs that have resulted in a split of authority.[29] They read:

> We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*[30] and *McMann v. Richardson*.[31] The second, or "prejudice," requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.
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> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead

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[28] *Hill, supra* note 27.

[29] See *Grosvenor v. State*, 874 So. 2d 1176 (Fla. 2004).

[30] *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973).

[31] *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).

> guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. See, *e. g.*, *Evans* v. *Meyer*, 742 F. 2d 371, 375 (CA7 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*,[32] these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the "idiosyncrasies of the particular decisionmaker."[33]

The State seizes on language in the second paragraph and argues that Yos-Chiguil must show that his defense will ultimately be successful at trial. The State argues that to merely claim that he would have insisted on a trial is not enough.

[17] We, however, do not read *Hill* as the State does. Under our reading, a defendant must only allege facts showing a reasonable probability that he would have insisted on going to trial had counsel informed him of the defense. The viability of the defense is relevant as to how it would have reasonably affected the defendant's decision whether to plead guilty or go to trial. But it is not the sole factor to consider.

Two aspects of the above-quoted language lead us to this reading of *Hill*. Most important, the Court unequivocally stated that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but

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[32] *Strickland, supra* note 24.

[33] *Hill, supra* note 27, 474 U.S. at 58-60, quoting *Strickland, supra* note 24.

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[34] This seems clear.

It is true that the Court also stated, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial."[35] But we would emphasize the word *largely*. This qualifying language indicates to us that there are other factors at play. Other relevant factors could include the benefit of an offered plea bargain or the potential penalties the defendant faces. We do not believe that the ultimate merits of the defense are the only consideration. But they are relevant to whether the defendant would, in the light of all the circumstances known to him at the time, roll the dice on that defense and insist on going to trial.

In *Grosvenor v. State*,[36] the Florida Supreme Court confronted the exact argument we find before us. The court concluded that the defendant did not have to allege that the defense would have ultimately succeeded at trial to show prejudice. The court also noted that this approach was the majority rule.[37]

The Florida court explained that the viability of any defense went to the credibility of the defendant's assertion that he or she would have insisted on going to trial. In other words, if counsel failed to advise the defendant of a defense that was likely unmeritorious, it is doubtful that the defendant was prejudiced because he would probably have taken the benefit of a favorable plea bargain and refused to bet on a long shot.

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[34] *Id.*, 474 U.S. at 59.

[35] *Id.*

[36] *Grosvenor, supra* note 29.

[37] *Id.* See, also, e.g., *Dando v. Yukins*, 461 F.3d 791 (6th Cir. 2006); *Miller v. Champion*, 262 F.3d 1066 (10th Cir. 2001); *Armstead v. Scott*, 37 F.3d 202 (5th Cir. 1994); *Ex Parte Imoudu*, 284 S.W.3d 866 (Tex. Crim. App. 2009); *McKeeth v. State*, 140 Idaho 847, 103 P.3d 460 (2004); *Copas v. Commissioner of Correction*, 234 Conn. 139, 662 A.2d 718 (1995).

The U.S. Supreme Court's recent decision in *Premo v. Moore*[38] also bolsters our analysis. In *Premo*, the Court reversed the Ninth Circuit's grant of habeas corpus to an inmate who alleged that his counsel had provided ineffective assistance in advising him to plead to the charge without first attempting to suppress a confession. The Court repeated that to show prejudice under *Hill*, a defendant must show "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[39] The Court found that the state postconviction court's conclusion that the defendant would have accepted the plea bargain even if the confession had been suppressed was not unreasonable. The Court noted that the defendant's early plea cut short the State's investigation, during which it could have found even more incriminating evidence; that the State already had two other admissible confessions; that the defendant could face the death penalty or life without parole; and that the defendant received the statutory minimum sentence under the plea bargain. The Supreme Court's analysis confirms our prior decisions holding that the inquiry is whether the defendant would have pleaded guilty or insisted on trial based on the circumstances known to him at the time.

[18-20] In sum, a postconviction petitioner does not need to show that a defense of which counsel failed to advise him would have succeeded at trial. Instead, he must show only a reasonable probability that he would have insisted on going to trial. But the likelihood of the defense's success is not irrelevant; rather, it is relevant to the consideration of whether "a rational defendant [would have] insist[ed] on going to trial."[40] It should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's

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[38] *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

[39] *Id.*, 562 U.S. at 129, quoting *Hill, supra* note 27.

[40] *Roe v. Flores-Ortega*, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), citing *Hill, supra* note 27.

case. Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial.[41] "As with all applications of the *Strickland* test, the question whether a given defendant has made the requisite showing will turn on the facts of a particular case."[42]

We thus stay true to our prior holdings that to allege ineffective assistance of counsel regarding the entry of a guilty plea, a petitioner must allege only facts that show deficient performance on the part of counsel and facts that show the defendant would have insisted on going to trial but for the deficient performance.

Having reviewed the pleadings, we conclude that Yos-Chiguil's pleadings state a claim for postconviction relief. And because the meager record in front of us does not affirmatively show that he is not entitled to relief, Yos-Chiguil must receive an evidentiary hearing.

Appointment of Counsel

[21-23] Finally, we consider whether Yos-Chiguil is entitled to appointed counsel on remand. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.[43] Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[44] But when the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel.[45]

As mentioned, we have determined that Yos-Chiguil's pleadings are adequate to state a claim for ineffective assistance of

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[41] *Berkey v. U.S.*, 318 F.3d 768 (7th Cir. 2003).

[42] *Flores-Ortega, supra* note 40, 528 U.S. at 485.

[43] *Silvers, supra* note 15.

[44] *Id.*

[45] *Id.*

counsel. Thus, on remand, he is entitled to have the assistance of appointed counsel.

CONCLUSION

We conclude that we are unable to reach any of Yos-Chiguil's claims with the exception of his claim that counsel was ineffective for not discussing an intoxication defense. We believe that that claim alleges sufficient facts to warrant an evidentiary hearing. Finally, Yos-Chiguil is entitled to the assistance of counsel during his hearing.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

HEAVICAN, C.J., concurring.

I concur with the majority's decision and reasoning. I write separately to highlight one important caveat: A defendant seeking postconviction relief after pleading guilty might receive an evidentiary hearing by alleging in pleadings that he or she would have insisted on going to trial but for his or her counsel's ineffective assistance. But this is merely the first hurdle. As the U.S. Supreme Court recently stated in *Premo v. Moore*[1]:

> There are certain differences between inadequate assistance of counsel claims in cases where there was a full trial on the merits and those . . . where a plea was entered even before the prosecution decided upon all of the charges. A trial provides the full written record and factual background that serve to limit and clarify some of the choices counsel made. Still, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. . . .
>
> Hindsight and second guesses are also inappropriate, and often more so, where a plea has been entered without a full trial or . . . even before the prosecution decided on the charges. The added uncertainty that results when there is no extended, formal record and no actual history

[1] *Premo v. Moore*, *562* U.S. 115, 132, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

> to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

In addition to making sufficient allegations to warrant an evidentiary hearing, defendants such as Yos-Chiguil must also bear "the substantial burden" to show that counsel was ineffective.

Middle Niobrara Natural Resources District et al., appellants, and Michael Jacobson, appellee and cross-appellant, v. Department of Natural Resources, appellee and cross-appellee.

799 N.W.2d 305

Filed June 3, 2011. No. S-09-1311.

1. **Administrative Law: Appeal and Error.** In an appeal from a Department of Natural Resources order, an appellate court reviews whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. The department's decision must also conform to the governing law.
2. **Administrative Law.** 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.
3. ____. Agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious.
4. **Administrative Law: Appeal and Error.** An appellate court independently reviews questions of law decided by the director of the Department of Natural Resources.
5. **Jurisdiction: Judgments.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
6. **Statutes.** The meaning and interpretation of a statute present a question of law.
7. **Judgments.** Whether a decision conforms to law is by definition a question of law.

8. **Standing: Jurisdiction.** Standing is fundamental to a court's exercising jurisdiction, so a litigant or court can raise the question of standing at any time during the proceeding.
9. **Administrative Law: Waters: Standing: Proof.** Generally, to be an "interested person" under Neb. Rev. Stat. § 46-713(2) (Cum. Supp. 2008), a litigant challenging a fully appropriated determination by the Department of Natural Resources must be asserting its own rights and interests, not those of a third party, and must demonstrate an injury in fact sufficient to confer common-law standing.
10. **Political Subdivisions: Public Officers and Employees: Standing: Constitutional Law: Statutes.** Unless an exception applies, state officials and political subdivisions generally do not have standing to challenge the constitutionality of statutes directing their duties.
11. **Political Subdivisions: Standing.** Political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.
12. **Administrative Law: Waters.** Because the director of the Department of Natural Resources cannot resolve a challenge to a call before the department issues its annual evaluations, the department cannot premise its annual evaluations upon a senior appropriator's call.
13. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

Appeal from the Department of Natural Resources. Reversed and vacated.

Donald G. Blankenau and Thomas R. Wilmoth, of Blankenau Wilmoth, L.L.P., for appellants.

Jon Bruning, Attorney General, Marcus A. Powers, and Justin D. Lavene, for appellee Department of Natural Resources.

Michael Jacobson, pro se.

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

CONNOLLY, J.

I. SUMMARY

Under the Nebraska Ground Water Management and Protection Act (the Act),[1] the Department of Natural Resources (Department) designated the portion of the Lower Niobrara

[1] See Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2004 & Cum. Supp. 2008).

River Basin upstream of the Spencer hydropower facility fully appropriated. The appellants are four natural resources districts (NRDs) that regulate ground water in the fully appropriated boundary. They appeal the Department director's 2009 order finding that in 2008, the basin was fully appropriated. Michael Jacobson cross-appeals. He owns and farms land in the basin.

A "fully appropriated" designation requires the NRDs to undertake significant and costly land management practices to sustain a balance between water uses and water supplies.[2] The overarching issue is whether the Department's 2008 order designating the basin fully appropriated was an arbitrary and capricious action. We conclude that it was and reverse and vacate.

II. BACKGROUND

1. Nebraska Public Power District's Appropriation Rights

Nebraska Public Power District (NPPD) holds three surface water appropriations in the Niobrara totaling 2,035 cubic feet per second. The State approved these appropriation rights in 1896, 1923, and 1942. NPPD uses its appropriations for producing electricity at the Spencer hydropower facility.

The Department's 2008 fully appropriated designation was triggered by a "call" for diversion rights by NPPD. A call by a senior appropriator, meaning an appropriator with an earlier-in-time right to use the water,[3] is a request that the Department close the rights to divert water belonging to junior appropriators upstream of the senior appropriator. Closures require junior appropriators to stop diverting water from a river or stream for the benefit of a senior appropriator.[4] This action increases the streamflow to satisfy the senior appropriator's right to divert water.

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[2] See § 46-715(2).

[3] See Neb. Rev. Stat. § 46-203 (Reissue 2010).

[4] See *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

2. The Basin

The Lower Niobrara River Basin follows the Niobrara from Mirage Flats Diversion Dam in northwest Nebraska to the confluence of the Niobrara and Missouri Rivers in northeast Nebraska. It encompasses about 8,900 square miles. Spencer Dam is near Spencer in northeast Nebraska, close to the eastern edge of the river basin. The Department's fully appropriated designation for the portion of the river basin upstream of Spencer Dam includes most of the river basin.

3. The Act's Requirements and the Department's Regulations

Beginning in 2006, unless the Department has already determined that a river basin is fully appropriated or overappropriated, the Act requires the Department to complete, by January 1 of each year, an evaluation of the State's river basins. The Department must evaluate "the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new ground water uses in each of the state's river basins."[5] Simplified, the Department can designate a river basin or one of its subparts as fully appropriated if its evaluation shows that current uses of hydrologically connected water will cause a river or stream to be insufficient to satisfy, over the long term, three specified purposes.[6]

Section 46-713(3) is stated in the alternative. It permits the Department to determine that a river basin or subpart is fully appropriated if any of three specified circumstances exist. One circumstance is present when the surface water is insufficient to sustain existing natural flow, storage, or instream appropriations.[7] The Department's reports show that it assumes that a basin's ground water and surface water are interconnected: i.e., insufficient streamflow to sustain surface water appropriations means that there is insufficient streamflow to sustain ground water wells built in aquifers dependent upon recharge from the

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[5] § 46-713(1)(a).

[6] See § 46-713(3).

[7] See *id.*

river. So in determining whether a river basin is fully appropriated, the Department focuses only on whether a river's surface water is sufficient to sustain existing appropriations.

The Act requires the Department, in preparing its annual report, to "rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the report are reliable."[8] Also, the Act requires the Department to "provide [in the report] sufficient documentation to allow these data, information, methodologies, and conclusions to be independently replicated and assessed."[9]

But the Act does not set a standard for determining whether the surface water or streamflow of a river or stream is insufficient. The Department's regulations set the standard. The regulations and reports show that in setting the standard, the Department focuses solely on whether the surface water is insufficient to sustain existing surface water appropriations over the long term. The standard for determining the insufficiency of surface water is whether a surface water appropriator with the most junior right to divert water could divert sufficient water to meet the Department's specified irrigation requirements. And the irrigation requirements are set percentages of the Department's determination of the water needed to fully irrigate a 70-acre corn crop during two different periods in the upcoming year.[10] Summed up, if the most junior appropriator could not divert the amount required under the set percentages for either irrigation period, then the surface water, and thus the river basin, is fully appropriated. The NRDs dispute the Department's 2008 methodology for this calculation.

The Act also does not define hydrologically connected water supplies. To determine the boundary of the fully appropriated land area in the basin with ground water that is hydrologically connected to the river's surface water, the Department

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[8] § 46-713(1)(d).

[9] *Id.*

[10] 457 Neb. Admin. Code, ch. 24, § 001.01A (2006).

applies an analytical formula. The NRDs also challenge this methodology.

4. The Department's Actions From 2006 to 2008

In its 2006 and 2007 reports, the Department determined that the Lower Niobrara River Basin was not fully appropriated. In March 2007, NPPD "placed a call" with the Department, asking the Department to administer the Niobrara to satisfy its appropriation rights.[11] Before 2007, NPPD had not placed a call for water in 50 years.

In May 2007, the Department issued closing notices. The closing notices directed about 400 junior appropriators to stop diverting water for the benefit of NPPD's hydropower facility.[12] Two junior appropriators immediately petitioned for an administrative hearing to challenge the validity of NPPD's appropriations.[13] Soon after issuing the closing notices, the Department temporarily lifted them to allow time for the junior appropriators to enter into subordination agreements with NPPD. The Department reinstated the closings on August 1. Later, in county court, the two junior appropriators successfully condemned part of NPPD's appropriation rights under their constitutionally superior preference rights.[14] The director then dismissed as moot their petition challenging the validity of NPPD's appropriations.[15] This court reversed that decision and remanded the cause for further proceedings.[16]

Meanwhile, in October 2007, the Department issued its 2008 report. The 2008 report concluded that the portion of the Lower Niobrara River Basin upstream of Spencer Dam was fully appropriated. The Department based its decision on NPPD's call. The Department did not designate the small portion of the river basin downstream of Spencer Dam as fully

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[11] See *In re 2007 Appropriations of Niobrara River Waters, supra* note 4.

[12] See *id.*

[13] See *id.*

[14] See *id.*

[15] See *id.*

[16] See *id.*

appropriated. It applied its analytical formula to determine the boundary for the basin. In January 2008, the former director made final the Department's adjusted fully appropriated determination.

5. The NRDs' Petitions

In February 2008, each affected NRD filed a petition for a contested hearing. Each alleged that (1) it had provided information to the Department that the river basin was not fully appropriated; (2) the Department had failed to rely on the best scientific data, information, and methodologies available; and (3) the Department had failed to properly analyze whether the current uses of hydrologically connected water supplies, in the long term, would cause insufficient surface water or insufficient streamflow to recharge aquifers supporting ground water wells.

6. The Department's Hearing

To expedite the proceedings, the parties agreed to submit their experts' affidavits. The NRDs argued that the Department's order was unlawful or arbitrary and capricious, and therefore invalid. They presented their expert's affidavit, in which he stated that he could not replicate the Department's conclusions.

The Department conceded that the only change in its fully appropriated evaluation from January 2007 to January 2008 was NPPD's call. It presented the affidavit of its analyst who had performed the Department's evaluations. He stated that he prepared a spreadsheet of the mean daily streamflow values at the Spencer hydropower facility for the preceding 20 years (from 1987 to 2006). He compared these records against NPPD's total appropriations (2,035 cubic feet per second) and determined how many times the mean daily streamflow value fell below NPPD's appropriations. He assumed for those days that NPPD would have closed, or shut off, the most junior appropriator's diversion rights. He concluded that the most junior appropriator's rights would have been closed so often that it could not have diverted enough water to satisfy the Department's corn irrigation requirements.

The NRDs' hydrology expert had reviewed all the Department's data and methodologies and peer-reviewed literature. He stated that the Department failed to include essential streamflow data for the river, which data he retrieved from other sources. Even after retrieving this data, he could not replicate the Department's 20-year averaging. He also could not replicate its estimate of streamflow depletion because it was unclear what data the Department had used. Finally, he stated that it was impossible to assess the Department's conclusions because the Department had not verified its results with observed streamflow conditions.

The Department's analyst responded in a second affidavit that the Department does not include all of its data because if it did, it could not economically publish the report. Instead, the report states that the data is available upon request. The Department's analyst also did not estimate streamflow depletion or verify his results with observations of streamflow conditions. He stated that these measures were unnecessary when the Department's calculations showed an insufficient water supply without considering the lag effect of ground water pumping.

7. The Director's Order

In December 2009, the director rejected the NRDs' challenges. He concluded that under § 46-713(1)(d), the NRDs had failed to show that the Department's data, information, methodologies, and conclusions could not be independently replicated and assessed. He relied on the 2008 report's statement that the Department's data was available upon request.

The director rejected the NRDs' argument that the Department had failed to analyze whether the current uses of hydrologically connected water supplies would result in insufficient streamflow to recharge aquifers supporting ground water wells. He concluded that under § 46-713(3), the Department could focus solely on whether the surface water was insufficient to sustain existing surface water appropriations. He also concluded that the Department had properly applied its regulatory criteria for that determination. He stated, "[T]he process is based upon whether a senior appropriator makes a valid call, and whether

the affected junior appropriator's right is met [under the regulatory] criteria due to the call."

The director rejected the NRDs' argument that the Department could not rely on NPPD's call when a challenge to the call was still pending. He stated that he knew from personal knowledge that NPPD's call was valid. And he reasoned that the Department must timely issue its reports despite any pending litigation: "In any event, having determined the senior calling right valid for purposes of the call prior to issuing closing notices, no additional analysis is necessary by the Department for purposes of the annual evaluation."

In addition, the director concluded that the NRDs and Jacobson had failed to show that the Department had not used the best available scientific data and methodologies to determine the basin's fully appropriated boundary. He concluded that the analytical formula was the best method available to the Department. He also rejected Jacobson's chemical analysis test as a better methodology.

III. ASSIGNMENTS OF ERROR

The NRDs assign, restated and condensed, that the director erred in the following rulings:

(1) The Lower Niobrara River Basin is fully appropriated, despite a pending challenge to the appropriations that triggered the designation;

(2) the Department properly conducted its fully appropriated analysis, despite its use of a flow demand for the Spencer hydropower facility that failed to take into account subordination agreements, preference rights, and limitations on the face of the appropriations;

(3) in the Department's 2008 report concluding that the basin was fully appropriated, the Department provided sufficient documentation to allow for independent replication and assessment of its conclusions;

(4) section 46-713 permits land to be designated as fully appropriated even when ground water wells on such lands do not, or would not, withdraw water from the Niobrara River;

(5) the Department complied with § 46-713(1)(d), which requires the Department to use the best available scientific

data, information, and methodologies to prepare its annual report; and

(6) the Department properly delineated the areas of hydrologically connected water supplies within the basin.

Additionally, the NRDs assign that the Department should not have advocated for itself, instead of acting as a neutral fact finder.

IV. STANDARD OF REVIEW

[1] In an appeal from a Department of Natural Resources order, we review whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.[17] The Department's decision must also conform to the governing law.[18]

[2,3] 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.[19] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[20]

[4-7] We independently review questions of law decided by the director.[21] A jurisdictional issue that does not involve a factual dispute presents a question of law.[22] The meaning and interpretation of a statute present a question of law.[23]

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[17] See *id.*

[18] See *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987).

[19] *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[20] See, *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008); *Miss. Dept. of Environ. Qual. v. Weems*, 653 So. 2d 266 (Miss. 1995); *Texas Mut. Ins. v. Vista Community Medical*, 275 S.W.3d 538 (Tex. App. 2008); *Guier v. Teton County Hosp. Dist.*, 248 P.3d 623 (Wyo. 2011).

[21] See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

[22] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[23] See *Travelers Indem. Co. v. Gridiron Mgmt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

Whether a decision conforms to law is by definition a question of law.[24]

V. ANALYSIS

1. Jurisdiction

[8] Because standing is a component of jurisdiction, we first address the State's argument that the NRDs and Jacobson lacked standing to challenge the Department's order.[25] Standing is fundamental to a court's exercising jurisdiction, so a litigant or court can raise the question of standing at any time during the proceeding.[26]

After the director accepted the Department's fully appropriated determination in 2008, the NRDs petitioned for a contested hearing under the Administrative Procedure Act (APA).[27] In his 2009 order, the director treated the NRDs' petition for a contested hearing under the APA as a petition for a contested hearing under Neb. Rev. Stat. § 61-206 (Reissue 2009). That section gives the Department jurisdiction over all matters pertaining to water rights except as limited by statute. When the Department makes a decision affecting water rights within its jurisdiction, § 61-206 authorizes it to hold a postdecision hearing if the Department made its decision without a hearing. The director interpreted "without a hearing" to mean without a contested hearing and permitted the NRDs to challenge the decision under § 61-206.

But the director expressed doubt that the NRDs had standing to challenge the fully appropriated designation, even though he did not decide the issue. He doubted that the NRDs could show that the order adversely affected their interests merely because the designation triggered statutory duties for the NRDs under § 46-715. Section 46-715 requires the NRDs to participate in the development of an "integrated

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[24] *Id.*

[25] See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[26] See *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000).

[27] See Neb. Rev. Stat. § 84-913 (Reissue 2008).

management plan" for the river basin. It specifies the objectives that the plan must achieve and procedures that the NRDs must implement.

On appeal, the Department does not explicitly argue that the NRDs lacked standing. Instead, it concedes that complying with their duties under § 46-715 may impose costs on the NRDs. It asserts that whether these costs constitute an adverse impact for standing presents an issue of first impression.

Neither party has discussed the application of § 46-713(2) here, but we believe that it is relevant to whether the NRDs had standing. Section 46-713(2) requires the Department to reevaluate its fully appropriated designation if it believes that a reevaluation may lead to a different result. Its decision to reevaluate can be "in response to a petition filed with the [D]epartment by any interested person."[28] The petition is sufficient to trigger this reevaluation if it is "accompanied by supporting information showing that . . . (b) the [D]epartment relied on incorrect or incomplete information when the river basin, subbasin, or reach was last evaluated."[29]

The Legislature authorized an "interested person" to challenge the Department's determination by petitioning for a reevaluation. We believe that it would be inconsistent with this authorization for us to hold that an interested person could not challenge the determination by petitioning for a contested hearing on the same grounds under the APA or § 61-206(1). So we view the only standing issue as whether the NRDs are interested persons under § 46-713(2).

Section 46-706(1) defines "person" to include political subdivisions, which include NRDs.[30] But in *Metropolitan Utilities Dist. v. Twin Platte NRD*,[31] we held that an NRD does not have standing to object to an appropriation application when it does not have a water right that would be adversely affected by the

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[28] § 46-713(2).

[29] *Id.*

[30] See, e.g., *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

[31] *Id.*

application.[32] We recently reiterated our holdings that a political subdivision must be asserting its own interests, rather than a third party's interests, and stated that it must show an injury in fact.[33]

[9] The same standing rules apply to § 46-713(2): Generally, to be an "interested person" under § 46-713(2), a litigant challenging a fully appropriated determination by the Department must be asserting its own rights and interests, not those of a third party, and must demonstrate an injury in fact sufficient to confer common-law standing.

As in our earlier cases, the NRDs, as entities, did not claim to have water rights adversely affected by the Department's fully appropriated designation. But unlike our earlier cases, the Department's action triggers duties for the NRDs that will require them to spend public funds. Here, all of the NRDs alleged that because of the Department's order, they would be required to take regulatory measures that will be costly to taxpayers in their districts. And Neb. Rev. Stat. § 77-3442(4)(c) (Reissue 2009) supports this claim. It authorizes an NRD to levy taxes in this circumstance. Specifically, the taxes are used to "administer and implement ground water management activities and integrated management activities" if the NRD has land within a river basin, subbasin, or reach that the Department has determined to be overappropriated or fully appropriated.[34] So we consider whether the NRDs' duties or expenditures create an exception to the requirement that they assert their own rights and interests.

[10] Unless an exception applies, state officials and political subdivisions generally do not have standing to challenge the constitutionality of statutes directing their duties.[35] But the NRDs are not challenging the legislation directing their duties

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[32] See, also, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[33] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[34] § 77-3442(4)(c).

[35] See, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); 16 Am. Jur. 2d *Constitutional Law* § 149 (2009).

in the event of the Department's action or any legislation. They are challenging the validity of the.Department's action that compelled them to spend public funds. Holding that the NRDs lacked standing here would leave political subdivisions at the mercy of superior agencies with no redress for actions that improperly or arbitrarily and capriciously require them to spend public funds.

[11] Moreover, in *Upper Big Blue NRD v. State*,[36] we implicitly concluded that an NRD had standing to challenge the Department's fully appropriated designation under the Uniform Declaratory Judgments Act. Our decision in *Upper Big Blue NRD* is consistent with the rule that political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.[37] We conclude that because the NRDs have fiduciary duties with regard to the public funds that they are charged with raising and controlling, they have standing to challenge state action that requires them to spend those funds.

For the same reason, the NRDs have standing to appeal under Neb. Rev. Stat. § 61-207 (Reissue 2009). That statute states in part, "If any county, party, or parties interested in irrigation or water power work affected thereby are dissatisfied with the decision or with any order adopted, such dissatisfied county, party, or parties may appeal to the Court of Appeals to reverse, vacate, or modify the order complained of." We recognize that § 46-750 provides that a person aggrieved by a Department order issued under the Act may appeal the order in accordance with the APA. But § 46-750 does not provide that an APA review is the exclusive means of appealing a Department order. Because the director permitted the NRDs' petition under § 61-206, we conclude that the NRDs could invoke appellate review under § 61-207 here.

Our conclusion that the NRDs have standing, however, does not apply to Jacobson. The Department's final fully

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[36] *Upper Big Blue NRD v. State*, 276 Neb. 612, 756 N.W.2d 145 (2008).

[37] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *Kenney v. East Brunswick Tp.*, 172 N.J. Super. 45, 410 A.2d 713 (1980).

appropriated designation requires the Department and an NRD with land within the river basin to continue the stays issued after the Department's preliminary designation on the issuance of increased or new water appropriations.[38] But these stays do not adversely affect existing rights to use ground water.[39] Because Jacobson failed to allege any actual or imminent harm that would satisfy the requirement of an injury in fact and no exception applies, we conclude that he lacked standing and we thus need not address his cross-appeal.

We turn now to the merits of the NRDs' challenge.

2. 2008 Fully Appropriated Designation

The NRDs contend that the Department failed to rely on the best information available by hinging its analysis on NPPD's call. They point out that in 2006 and 2007, the Department had found that the surface water was relatively abundant and that the river basin was not fully appropriated. They argued that the Department's analysis changed dramatically solely because of NPPD's 2007 call. They further contend that the director improperly assumed that NPPD's appropriations were valid despite pending legal challenges. And they contend that if that challenge results in a finding that NPPD has forfeited its appropriations, the Department's conclusion would likely be the same as it was in 2006 and 2007—a basin not fully appropriated.

[12] The Department counters that it cannot wait for the outcome of a legal challenge to make its preliminary determination whether the river basin was fully appropriated. That is correct. We recognize that the Act requires the Department to issue its annual report by January 1 of each year. But we reject the Department's contention that its investigation of NPPD's water use at the dam was based on the best information available to the Department for its 2008 analysis. It is precisely because the director cannot resolve a challenge to a call before the Department issues its annual evaluations that the Department cannot premise its annual evaluations upon a

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[38] See § 46-714.

[39] See *id.*

senior appropriator's call. We also agree with the NRDs that the director improperly assumed that NPPD's appropriations were valid. The director's reasoning that a challenge to a call is irrelevant after the Department has issued closing notices is incorrect. Until a challenge is decided, the director is not at liberty to conclude that it is without merit.

Furthermore, the Department could have avoided this dispute by simply following its own regulations. We agree with the director that § 46-713(3)(a) permits the Department to designate a river basin or subpart as fully appropriated by focusing solely on whether surface water appropriations are sustainable. But nothing in its regulations permits the Department to make that determination by comparing a senior appropriation right to the streamflow values at a specific diversion point or streamflow gauge.

(a) The Department's Failure to Follow Regulations

Although the Department provided a copy of its 2005 regulations in the 2008 annual report, the Department's 2006 regulations were in effect when it prepared that report. The relevant provision is found at 457 Neb. Admin. Code, ch. 24, § 001.01A and is known as the Department's 65/85 rule. Summarized, the 65/85 rule requires the Department to project whether the most junior surface water appropriator can divert sufficient water to satisfy two different standards: (1) 65 percent of the Department's calculated annual corn irrigation requirement from July 1 through August 31 and (2) 85 percent of the Department's calculated annual corn irrigation requirement from May 1 through September 30. If the most junior appropriator could not meet either one of these standards, then the Department determines that the river basin is fully appropriated.

But more important here, § 001.01A also specifies the information and fallback methodology that the Department must use to make its projection:

> The inability to divert will be based on stream flow data and diversion records, if such records are available for the most junior surface water appropriator. *If these records*

> *are not available,* the inability to divert will be based on the average number of days within each time period (May 1 to September 30 and July 1 to August 31) that the most junior surface water appropriation for irrigation would have been closed by the Department and therefore could not have diverted during the previous 20 year period. In making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate. *In addition the historical record will be adjusted to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells.* The projected future impacts from ground water wells to be included shall be the impacts from ground water wells located in the hydrologically connected area that will impact the water supply over the next 25 year period.

(Emphasis supplied.)

This regulation requires in unmistakable terms that the Department use its streamflow data and diversion records to project the most junior appropriator's ability to divert sufficient water. Further, because its averaging method for the preceding 20-year period is a fallback methodology if the streamflow data and diversion records are not available, the regulation obviously requires the Department to use its current data and records. This interpretation of the regulation is supported both by its plain language and by changes made to the 2005 regulation.

Specifically, under the previous 2005 regulation—which was not in effect for these proceedings—the only method for projecting whether the most junior appropriator could divert sufficient water was to determine the percentage of time that the appropriator could divert water during the previous 20 years and then to project the lag impact of existing wells for the next 25 years. The Department's 2006 amendment to its regulation to make the averaging method the fallback method shows that before 2008, the Department had changed its methodology to use its current data and records. But in 2008, it did not use

its current data and records to determine that the basin was fully appropriated.

[13] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[40] The 2006 regulation is substantive. It supplies the standard for determining whether the surface water in a river or stream is insufficient to sustain existing appropriations. So for a valid fully appropriated determination, the Department's action must conform to its rules which are in effect when the action is taken.[41] Nebraska's statutes require the Department to keep streamflow data and diversion records.[42] The Department's reports show that it has them. So without any explanation for its use of the fallback averaging methodology, we conclude that the Department has failed to follow the methodology required by its regulation.

Moreover, contrary to the director's statements in his order, even when the Department properly uses its 20-year averaging method, the methodology specified in the Department's regulation does not hinge upon a call. Instead, it specifically requires the Department to adjust the historical record "to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells." That is not what occurred in 2008.

As noted, the Department's analyst stated that he compared NPPD's total appropriations to the mean daily streamflow values at Spencer Dam for the preceding 20 years. But the regulation does not permit this comparison analysis at a specific diversion point. And that is not how the Department applied the 20-year averaging methodology in its 2006 and 2007 reports. A difference of 1 year (2006) in a 20-year average could not have varied the Department's results this much without a very significant drop in the 2006 streamflow rate. Nothing in the Department's report suggests that such a drop

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[40] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[41] See, *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007); *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

[42] See Neb. Rev. Stat. §§ 46-227, 46-230, and 46-235(1) (Reissue 2010).

occurred. Instead, the Department conceded that the difference was solely attributable to NPPD's call. A review of its previous results shows that even if the Department had properly used the fallback averaging methodology in 2008, it applied it in an arbitrary manner.

(b) The Department's Failure to Use Consistent Methodologies

The Department cannot square its 2008 methodologies and results with the results in its previous reports. Most important, they show that the Department has not applied its 20-year averaging methodology consistently. When using this method in 2006, the Department adjusted the river's historical streamflow values for the preceding 20 years by total appropriations existing at the start of the 20-year period. In 2007, the Department adjusted the river's historical streamflow values by total appropriations existing at the time of its analysis. And in neither year did the Department find that the basin was fully appropriated. But in 2008, it did not adjust the streamflow values for the upstream portion at all. Instead, it compared NPPD's appropriations to the average streamflow values at Spencer Dam for the preceding 20 years.

(i) 2006 Methodology for 20-Year Averaging

As discussed, the 2005 regulation required the Department to perform an averaging of the previous 20-year period to determine the percentage of time that the most junior appropriator could divert water. For the 2006 report, the Department analyzed the 20-year period from 1985 to 2004. The methodology statements in the 2006 report showed that if an appropriator with a priority date after the 20-year period began had made a call, the Department would reconstruct "the administrative record as if all the surface water appropriations that existed as of 2004 existed in 1985." In its chapter on the Lower Niobrara River Basin, the Department noted that a 1991 call had resulted in a 4-day closing of junior appropriation rights. But because the senior appropriator had a priority date before 1985, the Department stated that it was not required to reconstruct the administrative record.

Why are the 2006 methodology statements significant? They show that regardless of whether a call was made, the Department accounted for all appropriations that existed in 1985, at the start of the 20-year period. This shows that the Department accounted for all of NPPD's appropriations because they all existed before 1985. The 2006 methodology statements also show that the Department was not calculating the average number of days that water was available for diversion based upon what appropriators were actually diverting, but upon what appropriators were authorized to divert. In other words, for any days in which a senior appropriator could have made a call because the streamflow was insufficient to meet its diversion right, the Department would have assumed that the most junior appropriator's right to divert would have been closed.

(ii) 2007 Methodology for 20-Year Averaging

The 2006 regulations were in effect when the Department prepared its 2007 report. But the Department failed to explain why it did not use its current data and records to project whether the most junior appropriator would be able to divert sufficient water to meet the Department's irrigation requirements. Instead, it used the 20-year averaging method then also. In 2007, the Department analyzed the 20-year period from 1986 to 2005.

Yet the methodology statements in the 2007 report showed that the Department followed the 2006 regulation's requirement for adjusting the historical record when it used the averaging method. The 2007 report specifically stated that "[t]he historical record was adjusted to include the impacts of all currently existing surface water appropriations . . . ." Currently existing appropriations would have included all of NPPD's appropriations. So in 2007, the Department also accounted for all of NPPD's appropriations when it adjusted the historical record to calculate the average number of available days in which water was available for diversion in the preceding 20 years. In brief, the Department accounted for all of NPPD's appropriations in both 2006 and 2007 when adjusting the river's streamflow values. And yet, in both years, the Department concluded that the river basin was not fully appropriated.

(iii) 2008 Report

In contrast to the Department's previous reports, in the 2008 report, which is the subject of this appeal, the Department divided the Lower Niobrara River Basin into two sections: upstream and downstream of Spencer Dam. It appears to have applied its 2007 adjustment methodology to the downstream portion of the river basin because its results for that portion were identical to its previous results for the entire basin. But for the upstream portion, the Department compared NPPD's total appropriations to the mean daily streamflow values only at Spencer Dam for the preceding 20 years. We do not believe, however, that the variance in its methodology is justified simply by NPPD's call when both the 2006 and 2007 reports accounted for NPPD's appropriations.[43] Nor did the Department explain how the streamflow values at the dam related to streamflow values for other parts of the river or the river as a whole.

A table illustrates the wide variance in the Department's results before and after it divided the river into upstream and downstream portions. The variance exists because the Department had not previously applied its 20-year averaging methodology as a comparison of NPPD's total appropriations to the streamflow values at Spencer Dam.

Average Number of Days in Which Water Was Available for Diversion Based on 20-Year Averages

	July 1 to Aug. 31	May 1 to Sept. 30
2006 (1985-2004)	62	153
2007 (1986-2005)	61.9	152.9
2008 (1987-2006)		
Upstream	2.7	24.6
Downstream	61.9	152.9

As the table illustrates, using the Department's comparison analysis to perform its 20-year averaging dramatically reduced

[43] See *Girard v. City of Glens Falls*, 173 A.D.2d 113, 577 N.Y.S.2d 496 (1991).

the number of days in which water was available for diversion upstream of Spencer Dam.

Also, an unexplained difference exists in the Department's 2008 results for the number of days that an appropriator would need to divert water to meet the Department's calculated irrigation needs for a 70-acre corn crop. Remember that the Department concludes that a river basin is fully appropriated if the most junior appropriator could not meet the required percentages in either of two irrigation periods.

The Department did not change the number of acre-inches that a corn crop would require annually for the different irrigation zones in the river basin. Nor did it change its formula for converting the required acre-inches into the number of days that an irrigator would need to divert water to meet the 65-percent and 85-percent requirements in its two irrigation periods. But in 2008, the Department did not calculate a range of days to reflect the five different irrigation zones in the river basin's upstream portion. Instead, its calculation of the number of diversion days needed to irrigate for the entire upstream portion of the river basin equaled the number of days it had previously said were needed only in the basin's most western irrigation zone.

Diversion Days Needed to Meet Irrigation Percentages

	To Meet 65% From July 1 to Aug. 31	To Meet 85% From May 1 to Sept. 30
2006	23.9 to 37.2	31.3 to 48.6
2007	23.6 to 36.9	30.9 to 48.3
2008		
Upstream	36.9	48.3
Downstream	23.6 to 25.6	30.9 to 33.4

As the table illustrates, these variances in the Department's results show that it has not applied its methodologies in a consistent manner to the upstream portion of the river basin. And the Department failed to account for these variances under its stated methodologies and regulations to show that the change was not arbitrary.[44] The Department may not apply

[44] See *Girard, supra* note 43.

a particular methodology one year and arbitrarily decide to ignore it the next. Nor is it free to disregard its own substantive rules.

We conclude that the Department's 2008 fully appropriated designation is arbitrary and capricious. The Department failed to follow its own regulations to conclude that the basin was fully appropriated. It also failed to apply its methodologies in a consistent manner.

(c) The Department's Failure to Comply With § 46-713(1)(d)

The NRDs also contend that the Department failed to comply with § 46-713(1)(d). That section requires the Department to use the best available scientific data, information, and methodologies to prepare its annual report. Even if the Department could in hindsight offer a reasonable explanation for the variances in its results, § 46-713(1)(d) requires it to "provide [in the report] sufficient documentation to allow these data, information, methodologies, and conclusions to be independently replicated and assessed."[45] We agree with the NRDs that many of the Department's conclusions could not be replicated and assessed even if the Department had provided its raw data, because methodology information is missing.

First, the report does not explain how the Department projects whether the most junior appropriator can divert sufficient water based on its current streamflow data and diversion records. We assume that the river's streamflow rates would be crucial to whether water is available for diversion. But nothing in the report provides the Department's determination of the river's streamflow rates. And even if the Department does not rely on this information, it has failed to provide any analytical framework for its determinations.

Similarly, the Department explicitly makes streamflow values a necessary consideration in reaching a fully appropriated determination under its averaging methodology. But the Department has provided only the results of its 20-year

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[45] *Id.*

averaging methodology in tables. It has not explained how it adjusts the historical record of daily streamflow values to account for all currently existing appropriations.

Further, even if the Department had provided the river's streamflow rates or values, its reports show that it maintains many streamflow gauges in the river. And its analyst's affidavit shows that it records more than one daily reading at these points. An independent party could not replicate and assess the Department's findings and methodologies without knowing whether its determinations of streamflow rates or values represented the mean, median, or mode of the Department's daily readings. There is a similar failure to explain how the Department performs its erosion analysis under 457 Neb. Admin. Code, ch. 24, § 001.01C, which also adjusts the historical record to account for the impact of ground water pumping.

In sum, the Department's procedures are opaque. Because the general statements in its regulations and reports are not sufficient for an independent party to replicate or assess its findings or methodologies, we conclude that the Department has failed to comply with § 46-713(1)(d).

Because we conclude that the Department's fully appropriated designation is invalid, we do not reach the NRDs' contention that the Department's methodology for determining the basin's land boundary is not the best available.

VI. CONCLUSION

We conclude that the NRDs had standing to challenge the Department's 2008 determination that the Lower Niobrara River Basin was fully appropriated. Jacobson, however, lacked standing.

We conclude that the Department's fully appropriated designation was arbitrary and invalid. The Department failed to comply with its own regulations when it determined that the basin was fully appropriated by comparing the streamflow values at a specific diversion point or streamflow gauge to a senior appropriator's total appropriation rights. A review of its previous reports also shows a complete lack of consistency in the way it has applied its 20-year averaging methodology.

Finally, we conclude that the Department has failed to plainly describe its methodologies so that they can be replicated and assessed in compliance with § 46-713(1)(d).

We hold that the Department's 2008 fully appropriated determination for the Lower Niobrara River Basin was invalid. We reverse and vacate the director's order affirming that determination.

REVERSED AND VACATED.

JAMES TIERNEY AND JEFFREY TIERNEY, APPELLANTS,
v. FOUR H LAND COMPANY LIMITED
PARTNERSHIP ET AL., APPELLEES.

798 N.W.2d 586

Filed June 3, 2011. No. S-10-103.

1. **Judges: Recusal.** A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.
2. ____: ____. 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 is shown.
3. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
4. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
5. **Judges: Recusal: Appeal and Error.** A traditional harmless error analysis is inappropriate for review of questions of judicial disqualification.
6. ____: ____: ____. The disqualification of a judge is not a disqualification to decide erroneously. It is a disqualification to decide at all.
7. ____: ____: ____. The three-factor special harmless error test in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), should be used for determining when vacatur is the appropriate remedy for a trial judge's failure to recuse himself or herself when disqualified under the Nebraska Code of Judicial Conduct.
8. **Judges.** When a judge is biased, his or her personal integrity and ability to serve are thrown into question, placing a strain on the court that cannot easily be erased.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto

from the District Court for Lincoln County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellants.

Jay C. Elliott, of Elliott Law Office, P.C., L.L.O., for appellees Four H Land Company Limited Partnership and Western Engineering Company, Inc.

Susan C. Williams for appellees Frank Aloi and Aloi Living Trust.

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

MCCORMACK, J.

NATURE OF CASE

James Tierney and Jeffrey Tierney brought this action against Four H Land Company Limited Partnership (Four H Land); Western Engineering Company, Inc. (Western Engineering); Frank Aloi, trustee of the Aloi Living Trust; and the Aloi Living Trust (collectively the defendants) to compel them to lower the elevation of a lakeside housing development adjoining the Tierneys' land. The district court granted summary judgment in favor of the defendants, and the Tierneys appealed. While their appeal was pending, the Tierneys discovered that the district court judge who issued the order harbored a personal prejudice against their attorney. We reverse, and remand with directions.

BACKGROUND

AGREEMENT AND PERMIT

The Tierneys are owners of real estate that adjoins 60.8 acres of real property previously owned by Four H Land and currently owned by Aloi, trustee of the Aloi Living Trust, and the Aloi Living Trust. In 1997, the 60.8 acres consisted primarily of an alfalfa field on level ground with a line of cottonwood trees and a road alongside the adjoining edge of the Tierneys' property. The alfalfa field was somewhat lower than the road,

and there were some depressed areas of wetlands. Four H Land and Western Engineering wished to open and operate a sand and gravel pit on the 60.8 acres. When the excavation was complete, they planned to create a lake and fill in the surrounding land for a housing development.

Four H Land and Western Engineering sought a conditional use permit from the Lincoln County Planning Commission (the Commission). The Tierneys objected that the sand and gravel pit would be a nuisance. The Commission granted the permit with the following conditions:

> At the close of each phase of the sand and gravel pit operation the area shall be leveled to its original topography within one year of termination of each phase. The areas not covered by water shall then be covered with four inches (minimum) of topsoil and seeded with appropriate native grasses to prevent erosion of the soil.

The Tierneys appealed the Commission's decision. Eventually, the Tierneys reached an agreement with Four H Land and Western Engineering. The agreement provided more detailed mining operation restrictions and stated in relevant part:

> As the operation in one phase is completed and the operation moves to the next phase, [Four H Land] and [Western Engineering] shall reclaim the land in the phase of prior operations by filling to at least its approximate original topography, covered with a minimum of four (4) inches of top soil and seeded with appropriate native grasses to prevent erosion and to visually restore the site, except the area to be used for a lake.

The terms and conditions of the August 11, 1998, agreement were "to be incorporated into and made a part of the Conditional Use Permit to be approved by the . . . Commission" and "[a]ll of the other terms and conditions contained in the Conditional Use Permit shall apply, except to the extent they are contrary to or less restrictive than the terms agreed to in the settlement of this controversy . . . ." That same date, the conditional use permit was reissued by the Commission. The permit specifically attached and incorporated the August 11 agreement.

After completion of the gravel pit operation, the lake was created and the surrounding land was prepared for the housing development. The lots were raised to comply with flood plain requirements. The parties agree that the lots, which comprise most of the land, are higher in elevation than the previously existing alfalfa field.

The Tierneys brought this action against the defendants on April 9, 2009. They contend that the final elevation of the land violated the agreement because the agreement required a return to the preexisting elevation and the land was 6 to 8 feet higher. Their action was brought before the Honorable John P. Murphy of the Lincoln County District Court, and the Tierneys were represented by James J. Paloucek.

In December 2009, the Tierneys filed a motion for summary judgment and the defendants filed cross-motions for summary judgment. Several depositions were submitted in support of the motions disputing the intent of the permit and agreement. On January 8, 2010, the district court granted summary judgment in favor of the defendants. The court concluded that by virtue of the "at least" language in the permit, the defendants were required to return the land to the original elevation level or higher, and that there was no dispute the elevation was "at least" as high as it was before the gravel pit operation. The court concluded that there was thus no material issue of fact as to whether the defendants had complied with the permit and agreement. The Tierneys appealed.

Bias Against Tierneys' Attorney

While the Tierneys' appeal was pending, on July 13, 2010, Paloucek received a letter from Judge Murphy. In the letter, Judge Murphy wrote, "Because I hold you personally responsible for the Florom fiasco, I am recusing myself from any pending case or any future case involving your law firm." Since that time, Judge Murphy has, in fact, recused himself from all cases involving the law offices of Norman, Paloucek & Herman.

The Tierneys were allowed to amend their assignments of error to allege that Judge Murphy erred in failing to recuse himself, sua sponte, from deciding the case, because such bias

must have existed at the time of the summary judgment hearing. The Tierneys alleged that prior to receiving this letter, they did not know that Judge Murphy harbored prejudice against their attorney.

The source of the alleged bias stems from disciplinary proceedings against a former county court judge, Kent E. Florom. In 2008, Florom became involved in matters surrounding the criminal prosecution and revocation of the teaching certificate of the head coach of the girls' softball team on which Florom's daughter played. Florom tried to use his influence to convince the prosecutor not to press charges and later threatened Paloucek, who served on the school board, stating that Paloucek would make an "enemy" if Paloucek supported the action to remove the coach's teaching certificate.

The Nebraska Commission on Judicial Qualifications (JQC) filed a complaint charging Florom with violations of the Nebraska Code of Judicial Conduct. A hearing was held before a special master appointed by this court, and Paloucek testified at the hearing. The special master concluded there was clear and convincing evidence that Florom's conduct violated the Nebraska Code of Judicial Conduct. By November 5, 2009, the JQC issued the recommendation that Florom be removed from judicial office. On July 9, 2010, we independently reviewed the findings of the JQC and removed Florom from judicial office.[1]

Court of Appeals Opinion

The Nebraska Court of Appeals, in a memorandum opinion, affirmed Judge Murphy's order granting the defendants' motions for summary judgment and denying the Tierneys' cross-motion for summary judgment.[2] The Court of Appeals held that the alleged 8- to 10-foot-high berm complied with the provisions in the conditional use permit requiring a berm at least 6 feet high and that this provision was not contrary to

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[1] See *In re Complaint Against Florom*, 280 Neb. 192, 784 N.W.2d 897 (2010).

[2] *Tierney v. Four H Land Co.*, No. A-10-103, 2010 WL 4354243 (Neb. App. Nov. 2, 2010) (selected for posting to court Web site).

or less restrictive than the terms of the agreement. The Court of Appeals concluded that it did not need to reach the issue of Judge Murphy's failure to recuse himself because it had made an independent determination of the correctness of the grant of summary judgment. We granted the Tierneys' petition for further review.

ASSIGNMENTS OF ERROR

On further review, the Tierneys assert that the Court of Appeals erred in (1) concluding as a matter of law that the berm currently surrounding the lake is in compliance with the initial application and conditional use permit which required a minimum 6-foot berm, (2) affirming the district court's order granting the defendants' motions for summary judgment, (3) affirming the district court's order denying the Tierneys' motion for summary judgment, (4) failing to address the assigned error regarding the district court judge's failure to recuse himself, and (5) failing to find that the Tierneys' due process rights required reversal for new proceedings before an unbiased judge.

STANDARD OF REVIEW

[1] A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.[3]

ANALYSIS

The Tierneys argue that they had a right to have the summary judgment motions decided by a judge who was not disqualified because of admitted bias against their attorney. We conclude that the decision by Judge Murphy should be vacated and that it was error for the Court of Appeals to apply a traditional harmless error analysis to the disqualification issue. Without addressing the underlying merits of this dispute, we reverse, and remand to the Court of Appeals with directions to vacate the judgment and remand the cause for a new hearing.

The Nebraska Revised Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the

[3] Neb. Rev. Code of Judicial Conduct § 5-302.11(A) (previously found at Neb. Code of Judicial Conduct § 5-203(E)).

judge, except when disqualification is required."[4] The code further states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[5] Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ."[6]

[2] We have explained 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 is shown.[7] By Judge Murphy's own admission, the so-called Florom fiasco caused him to have a personal bias against the Tierneys' attorney. While Judge Murphy did not announce his bias until after Florom was removed from judicial office, a reasonable observer would conclude that this same bias was present when Judge Murphy decided the parties' cross-motions for summary judgment. At the time of the summary judgment hearing, the disciplinary proceedings against Florom were well underway. Paloucek had already testified before the special master, and the JQC had already recommended removal. A reasonable observer would find it unlikely that Judge Murphy was ignorant of the ongoing disciplinary proceedings against his colleague. And a reasonable observer would conclude that Judge Murphy's bias against the Tierneys' attorney was not formed suddenly at the moment Florom was dismissed from judicial office. Judge Murphy should have recused himself from deciding the motions for summary judgment.

[3] Since the Tierneys were unaware of the bias that formed the basis of Judge Murphy's disqualification, they did not waive the disqualification issue by failing to raise it before the motions for summary judgment were decided. A party is said

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[4] Neb. Rev. Code of Judicial Conduct § 5-302.7 (previously found at § 5-203(B)(1)).

[5] § 5-302.11(A) (previously found at § 5-203(E)).

[6] § 5-302.11(A)(1) (previously found at § 5-203(E)(1)(a)).

[7] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.[8] Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants "'a second bite at the apple.'"[9]

[4] But, as the court in *Urias v. Harris Farms, Inc.*,[10] explained, the rule that it is generally too late to raise the issue of disqualification after the matter is submitted for decision rests on the principle that a party may not gamble on a favorable decision. This principle does not apply when the facts constituting the disqualification are unknown, because no gamble could have been purposefully made.[11] Instead, the issue of disqualification is timely if submitted at the "'earliest practicable opportunity' after the disqualifying facts are discovered."[12]

In this case, the Tierneys were not delaying raising the issue of Judge Murphy's recusal until they could know whether they would be granted summary judgment. Despite the defendants' argument that it was ostensibly common knowledge that Judge Murphy and Florom were friends, Paloucek could not have known that because of this friendship, Judge Murphy would harbor such bias against him for his unintended role in Florom's disciplinary proceedings. We conclude that the Tierneys raised the disqualification issue at the earliest practicable opportunity after the disqualifying facts were discovered.

[5,6] We must consider, however, whether Judge Murphy's failure to recuse himself is subject to a harmless error analysis. The Court of Appeals did not reach the issue of whether Judge

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[8] See *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[9] *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 450, 778 N.W.2d 115, 120 (2010).

[10] *Urias v. Harris Farms, Inc.*, 234 Cal. App. 3d 415, 285 Cal. Rptr. 659 (1991).

[11] *Id.*

[12] *Id.* at 425, 285 Cal. Rptr. at 664.

Murphy should have recused himself because it concluded that any disqualification, if present, was harmless in light of the Court of Appeals' independent conclusion that the decision granting summary judgment to the defendants was correct. We hold that this type of approach is inappropriate for review of questions of judicial disqualification. As we said in *Harrington v. Hayes County*,[13] where we held that harmless error review was inappropriate for statutory judicial disqualification, "The disqualification . . . is not a disqualification to decide erroneously. It is a disqualification to decide at all."

While we have never specifically addressed whether harmless error review is likewise inappropriate for disqualification under the Nebraska Code of Judicial Conduct, we find that the same reasoning applies.

Most other jurisdictions hold that actions by a disqualified judge are not subject to traditional harmless error review, regardless of whether the disqualification is by statute or judicial code.[14] In *Blaisdell v. City of Rochester*,[15] for instance, the

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[13] *Harrington v. Hayes County*, 81 Neb. 231, 236, 115 N.W. 773, 774 (1908). See, also, *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997).

[14] See, e.g., *Christie v. City of El Centro*, 135 Cal. App. 4th 767, 37 Cal. Rptr. 3d 718 (2006); *People v. Dist. Ct.*, 192 Colo. 503, 560 P.2d 828 (1977); *Abington Ltd. Partnership v. Heublein*, 246 Conn. 815, 717 A.2d 1232 (1998); *In re M.C.*, 8 A.3d 1215 (D.C. 2010); *Butler v. Biven Software, Inc.*, 222 Ga. App. 88, 473 S.E.2d 168 (1996); *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467 (Ky. 2010); *Blaisdell v. City of Rochester*, 135 N.H. 589, 609 A.2d 388 (1992); *People v. Alteri*, 47 A.D.3d 1070, 850 N.Y.S.2d 258 (2008); *Matter of Estate of Risovi*, 429 N.W.2d 404 (N.D. 1988); *Cuyahoga Co. Bd. of Mental Retardation v. Association*, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975); *Mosley v. State*, 141 S.W.3d 816 (Tex. App. 2004). See, also, *Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983); *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55 (2000). But see, *Ajadi v. Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006); *H & S Horse Vans v Carras*, 144 Mich. App. 712, 376 N.W.2d 392 (1985); *Sargent County Bank v. Wentworth*, 547 N.W.2d 753 (N.D. 1996); *Reilly by Reilly v. Southeastern Pa. Transp.*, 507 Pa. 204, 489 A.2d 1291 (1985); *State v. Alonzo*, 973 P.2d 975 (Utah 1998).

[15] *Blaisdell v. City of Rochester, supra* note 14.

court was confronted with an action presided over by a judge who should have disclosed to the parties a familial relationship with a member of the law firm that represented one of the parties which would have disqualified him under the applicable judicial code of conduct. Despite the fact that the plaintiff did not raise the issue of recusal until a year after the case was dismissed as barred by the doctrine of res judicata, the court found that the issue was timely. And despite the contention that there was no actual personal relationship between the judge and his relative, the court found there was an appearance of impropriety which should not be overlooked.

The court in *Blaisdell* vacated the order and subsequent related orders without addressing their underlying legal merits. It rejected a harmless error review, saying: "In our opinion, it would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge's ruling to stand when those standards have been violated."[16]

In *Cuyahoga Co. Bd. of Mental Retardation v. Association*,[17] the court similarly held that when the undisputed facts are such that a trial judge is under a clear and mandatory duty to disqualify himself under the applicable code of judicial conduct, the judge's attempt to act in violation of that duty by continuing to hear the case will be vacated and the underlying merits of the dispute will not be reached on appeal. The court explained that the canons of judicial conduct are binding and mandatory unless otherwise indicated. These standards were not intended to be "empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary action against himself, with no effect upon the improper actions which the canons were designed to protect against."[18]

In *Scott v. U.S.*,[19] the court systematically set forth the reasons it believed that a traditional harmless error analysis

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[16] *Id.* at 594, 609 A.2d at 391.

[17] *Cuyahoga Co. Bd. of Mental Retardation v. Association, supra* note 14.

[18] *Id.* at 33-34, 351 N.E.2d at 782-83.

[19] *Scott v. U.S.*, 559 A.2d 745 (D.C. 1989).

is inappropriate for judicial disqualification issues. First, a traditional harmless error analysis is best suited for review of "'discrete exercises of judgment'" by lower courts where information is available that makes it possible to gauge the effect of a decision on the trial as a whole.[20] Second, the traditional harmless error rule presumes the existence of an impartial judge.[21] Third, a review of the record for actual prejudice under the traditional harmless error standard is inconsistent with the goal of the American Bar Association's Model Code of Judicial Conduct,[22] which is to prevent even the appearance of impropriety.[23]

We agree that a traditional harmless error analysis is inappropriate. Any attempt to determine or ameliorate actual prejudice through a traditional harmless error analysis would undermine the high function of the judicial process that the ethical canons are designed to protect. We must decide, then, what the appropriate test is.

Several courts have adopted the view that all actions by a judge who is disqualified are void per se.[24] However, in *Liljeberg v. Health Services Acquisition Corp.*,[25] the U.S. Supreme Court set forth a more flexible three-factor test to determine when orders issued by a disqualified judge should be

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[20] *Id.* at 750 (quoting *Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)).

[21] *Id.* (citing *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

[22] See, currently, Model Code of Judicial Conduct Canon 2, rule 2.11(a) (2007).

[23] *Scott v. U.S., supra* note 19.

[24] See, e.g., *Christie v. City of El Centro, supra* note 14; *People v. Dist. Ct., supra* note 14; *Butler v. Biven Software, Inc., supra* note 14; *Petzold v. Kessler Homes, Inc., supra* note 14; *Blaisdell v. City of Rochester, supra* note 14; *People v. Alteri, supra* note 14; *Matter of Estate of Risovi, supra* note 14; *Cuyahoga Co. Bd. of Mental Retardation v. Association, supra* note 14.

[25] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

vacated on appeal. The *Liljeberg* test is sometimes referred to as a "special harmless error test."[26]

Based on the appearance of impropriety, the lower appellate court in *Liljeberg* had vacated the trial court's judgment after the appeal was final, pursuant to Fed. R. Civ. P. 60(b)(6). The Supreme Court agreed that the judge should have recused himself. The Court found the judge had violated 28 U.S.C. § 455(a) (2006), which provides that any judge shall "'disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"[27] The trial judge sat on the board of trustees of a university which stood to benefit from a decision in favor of the plaintiff, but the judge did not become conscious of this connection until after the judgment. The defendants did not learn of the trial judge's interest in the dispute until 10 months after the judgment.

The Court explained that the judge's consciousness of the circumstances creating the appearance of impropriety was not an element of a violation of § 455(a). The Court rejected the argument that if awareness of the conflict is an element of disqualification, the judge is called upon to perform an impossible feat—to recuse himself or herself when not knowing of the need to do so. It is not an impossible feat, the Court explained, because the disqualification provision can be applied retroactively. The oversight can later be rectified so that public confidence in the impartiality of the judiciary is maintained.[28]

The Court explored under what circumstances vacatur was the appropriate method of rectifying such judicial lapses. It concluded that a traditional harmless error analysis robbed the litigants of effective relief, and was inappropriate.[29] But it also

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[26] See *In re M.C., supra* note 14, 8 A.3d at 1232. Accord *U.S. v. O'Keefe*, 169 F.3d 281 (5th Cir. 1999).

[27] *Liljeberg v. Health Services Acquisition Corp., supra* note 25, 486 U.S. at 858.

[28] *Liljeberg v. Health Services Acquisition Corp., supra* note 25.

[29] See *id.*

rejected "a draconian remedy for every violation."[30] Instead, in concluding that vacatur was the proper remedy under the facts presented in *Liljeberg*, the Court considered three factors: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.[31] The Court placed special emphasis on this last factor, noting, "We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'"[32]

The Court first considered the third factor because it was the most important one: The risk that public faith in the judiciary would be undermined as a result of the violation.[33] In this regard, the court noted that, while the case at hand may not have involved actual knowledge of the conflict, it would be difficult for the general public to understand how personal concerns can be so forgotten by busy federal judges. A judge's forgetfulness is "'not the sort of objectively ascertainable fact that can avoid the appearance of partiality.'"[34] The Court also concluded that the violation at issue was "neither insubstantial nor excusable."[35] Instead, the "facts create[d] precisely the kind of appearance of impropriety that § 455(a) was intended to prevent."[36] Thus, this factor weighed heavily in favor of vacating the trial court's judgment.

Second, the Court considered whether denial of relief would produce injustice in other cases. The Court determined that it would not. Quite the opposite, the Court concluded that vacating the judgment would have prophylactic value, since it might encourage future judges and litigants "to more carefully examine possible grounds for disqualification and to promptly

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[30] *Id.*, 486 U.S. at 862.

[31] *Liljeberg v. Health Services Acquisition Corp., supra* note 25.

[32] *Id.*, 486 U.S. at 864.

[33] *Id.*

[34] *Id.*, 486 U.S. at 860.

[35] *Id.*, 486 U.S. at 867.

[36] *Id.*

disclose them when discovered."[37] After finding that the first two factors warranted vacatur, the Court concluded: "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment."[38]

In considering prejudice to the parties, the Court noted that an "analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment . . . than there is in allowing a new judge to take a fresh look at the issues."[39] The Court also pointed out that the parties did not show special hardship by reason of their reliance on the original judgment. Finally, the respondent's request to vacate was timely despite being made for the first time on appeal, because the respondent did not know of the facts surrounding the disqualification until that time. Thus, the Court found no compelling reason not to vacate the lower court's judgment. Several other jurisdictions have adopted the *Liljeberg* special harmless error test in determining whether to vacate court orders by a judge who should have recused himself or herself.[40]

[7] We believe that the *Liljeberg* test is the best means of determining when the rulings of a judge, who should have recused himself or herself, will be vacated, and we hereby adopt it. Applying the *Liljeberg* test to the facts of this case, we conclude that Judge Murphy's order on the parties' cross-motions for summary judgment should be vacated.

First, the risk of undermining the public's confidence in the judicial process is high. Judge Murphy's failure to inform the

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[37] *Id.*, 486 U.S. at 868.

[38] *Id.*

[39] *Id.*

[40] See, *Abington Ltd. Partnership v. Heublein, supra* note 14; *In re M.C., supra* note 14; *Petzold v. Kessler Homes, Inc., supra* note 14; *Mosley v. State, supra* note 14; *Tennant v. Marion Health Care Foundation, supra* note 14.

parties of his bias was "neither insubstantial nor excusable."[41] Whether Judge Murphy was consciously aware of the extent of his bias against Paloucek at the time of the summary judgment hearing, the reasonable observer would question his impartiality in light of his subsequent letter and his sua sponte prospective recusal from ever again hearing anything brought by Paloucek or his firm.

[8] Unlike other circumstances leading to an appearance of impropriety which a reasonable observer could conclude had no actual effect on the trial court's judgment, a charge of bias "'must be deemed at or near the very top in seriousness.'"[42] It is the basic precept to our system of justice that a judge must be free of all taint of bias and partiality.[43] Thus, "'bias kills the very soul of judging—fairness.'"[44] When a judge is biased, his or her "'personal integrity and ability to serve are thrown into question, placing a strain on the court that cannot easily be erased.'"[45]

Next, considering the risk to future litigants, we conclude that vacatur will only provide a benefit. Given the importance of the charge of bias, relief in this case will prevent injustice in some future case by encouraging judges and litigants to more carefully examine possible grounds for bias and promptly disclose them when discovered. Thus, under *Liljeberg*, the lower court's judgment must be vacated unless the risk of unfairness to the parties cautions against it.

The defendants have made no showing of special hardship by reason of their reliance on the original judgment. And, as already discussed, although the issue of Judge Murphy's bias was not raised until the pendency of this appeal, the Tierneys raised the issue at their earliest opportunity. There is little to

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[41] See *Liljeberg v. Health Services Acquisition Corp., supra* note 25, 486 U.S. at 867.

[42] *McKenna v. Delente*, 123 Conn. App. 137, 144, 1 A.3d 260, 266 (2010).

[43] See *People v. Dist. Ct., supra* note 14.

[44] *McKenna v. Delente, supra* note 42, 123 Conn. App. at 144-45, 1 A.3d at 266.

[45] *Id.* at 145, 1 A.3d at 266.

lose and much to be gained by letting a different judge examine the parties' motions for summary judgment.

We find it unnecessary and inappropriate in this case to address the underlying merits of the motions. An analysis of whether Judge Murphy's decision was correct could not adequately erase the taint of his bias or the appearance of such bias. Not only for the sake of the parties, but for the public as a whole and its faith in the judicial system, we conclude that the Court of Appeals' judgment must be reversed. We express no implicit or explicit approval of the Court of Appeals' legal conclusions regarding the construction of the permit and contract here in dispute, but hold that the Court of Appeals erred in applying a harmless error analysis to Judge Murphy's failure to recuse himself from the summary judgment hearing.

CONCLUSION

We find the grounds alleged under the Nebraska Code of Judicial Conduct sufficiently serious to warrant vacatur. We reverse, and remand to the Court of Appeals with directions to vacate the judgment below and remand the cause for a new summary judgment hearing before another judge to be appointed by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. PIERSON, RESPONDENT.

798 N.W.2d 580

Filed June 3, 2011. No. S-10-304.

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 a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate 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. ____. In a disciplinary proceeding, an isolated incident not representing a pattern of conduct is considered a mitigating factor.
10. ____. Cooperation during attorney disciplinary proceedings and remorse are relevant mitigating factors.

Original action. Judgment of probation.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

INTRODUCTION

Relator, the Counsel for Discipline of the Nebraska Supreme Court, filed formal charges against respondent, Robert J. Pierson, alleging that he violated his oath of office as an attorney licensed in Nebraska, Neb. Rev. Stat. § 7-104 (Reissue 2007), and the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.15 (safekeeping property) and 3-508.4 (misconduct). The formal charges arose out of the manner in which respondent handled the proceeds resulting from the settlement of his clients' personal injury lawsuit. When respondent initially distributed the settlement funds, State Farm Mutual Automobile Insurance Company (State Farm) did not receive its subrogation interest

from the claim, due to what appeared to be a lost check. State Farm contacted respondent repeatedly. After submitting a grievance to relator, State Farm received its money more than 1 year after the intended distribution.

A hearing was held on the formal charges before a referee. The referee found that respondent violated the Nebraska Rules of Professional Conduct. With respect to discipline, the referee recommended that respondent receive 2 years' probation with monitoring conditions. Relator filed exceptions to the referee's report, asserting that the recommended discipline was too lenient for the misconduct involved. We find that respondent violated the Nebraska Rules of Professional Conduct. However, because we conclude that the recommended discipline is not too lenient, we reject relator's exception with respect to discipline. Accordingly, we order respondent to be placed on 2 years' probation under the conditions outlined below.

STATEMENT OF FACTS

Relator filed formal charges against respondent on March 24, 2010. In the charges, relator alleged that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska and §§ 3-501.15 and 3-508.4 of the rules of professional conduct.

The allegations arose out of respondent's settlement of a personal injury lawsuit. Respondent's clients received settlement proceeds, which respondent deposited in his trust account. State Farm had a subrogation interest in the claim. The case was settled in December 2007, and respondent distributed the proceeds of the settlement in February 2008. Respondent testified that he wrote checks to his clients, to his firm for fees, and to State Farm to cover its subrogation interest.

In August 2008, respondent learned from State Farm that it had not received its check in the amount of $4,094.68. When respondent learned that State Farm had not received its check, he called his bank and was erroneously told that the check had cleared. Respondent took no further action concerning this matter.

State Farm indicated that it made multiple unsuccessful attempts to secure payment from respondent. Having exhausted

attempts to secure payment from respondent, State Farm contacted relator. Respondent acknowledged that it took over a year to resolve the matter.

In the course of the investigation, respondent provided his trust account records to relator and relator claims that it determined that numerous times after February 25, 2008, the balance of respondent's trust account fell below $4,094.68, the amount that should have been in his trust account to cover the check to State Farm.

A hearing on the matter was had before a referee, at which hearing evidence was received. Respondent admitted that at times, his trust account balance would not have covered the State Farm check had it cleared. At the hearing, respondent acknowledged his negligence which resulted in a violation of the Nebraska Rules of Professional Conduct. As an explanation for his actions and inappropriately reacting to the fact that State Farm had not received the subrogation proceeds in February 2008, respondent stated that during the period in question, he was experiencing various problems. Respondent stated that he was suffering from health problems and that his fiance had died a few months before the settlement. Respondent indicated that for a year after her death, he "wasn't thinking clearly." Respondent also indicated that he did not have a secretary. Respondent acknowledged that during the period when the check was missing, he "dropped the ball" and should have been involved in counseling.

The referee issued a report on September 8, 2010. In his report, the referee noted that respondent did not have prior disciplinary problems in either Nebraska or Iowa, where respondent is also licensed to practice law. The referee found that respondent had violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct. The referee recommended that respondent be placed on probation for a period of 2 years and that the probation include an audit of respondent's trust account by a certified public accountant at respondent's expense. Such audit would be conducted at the end of each year. Further, if respondent committed any further rule violations, he would be subject to suspension or disbarment.

On September 17, 2010, relator filed exceptions to the referee's report, asserting that the recommended sanction was too lenient. Respondent did not file exceptions.

ANALYSIS

[1-4] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence. *Id.* When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive. *Id*. 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. Petersen*, 272 Neb. 975, 981-82, 725 N.W.2d 845, 850 (2007).

In this case, neither respondent nor relator takes exception to the referee's findings that he violated the rules of professional conduct; rather, relator takes exception to the referee's recommended discipline, which relator asserts is too lenient. When no exceptions to the findings of fact are filed, we may consider the referee's findings final and conclusive, which we do in the present case. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct. The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, § 7-104, and we find that respondent has violated said oath. Having found violations of the rules of professional conduct, we will limit the remainder of our discussion to the appropriate discipline.

Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or

(3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or

(4) Censure and reprimand by the Court; or

(5) Temporary suspension by the Court; or

(6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, Neb. Ct. R. § 3-310(N) of the disciplinary rules.

[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. *State ex rel. Counsel for Dis. v. Switzer, supra*.

[6,7] In imposing attorney discipline, we evaluate each case in the light of its particular facts and circumstances. *Id.* 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. *Id.*

[8] When determining appropriate discipline of an attorney, we consider aggravating and mitigating factors. *Id.*

[9,10] Regarding mitigation, we have stated that an isolated incident not representing a pattern of conduct is considered a mitigating factor. *Id.* Cooperation during attorney disciplinary proceedings and remorse are also relevant mitigating factors. *Id.*

The evidence in the present case establishes, among other facts, that respondent failed to properly maintain his office records and the funds in his trust account. The referee indicated, and we agree, that there are several mitigating factors weighing in respondent's favor, including that respondent has had no prior complaints and was cooperative and responsive throughout the proceedings. Further in favor of mitigation, we note that the exact amount of money which respondent's trust account would have been "out of trust" during the period that State Farm had not been paid was not in evidence, the evidence

did not show willful misconduct, there was no dispute that respondent initially sent a check that was not received, and respondent was dealing with the death of his fiance and health issues at the time of the conduct at issue.

Relator asserts that the referee's recommended discipline of 2 years' probation is too lenient. Upon due consideration of the facts of this case, and giving consideration to the several mitigating factors weighing in respondent's favor, we disagree. Accordingly, we determine that the proper sanction in this case is probation with the conditions outlined below. Repondent's probation shall start on the date this opinion is filed. Respondent is directed to submit a probation plan for approval by this court within 30 days after this opinion is filed. The probation plan shall provide for supervision by an identified monitoring lawyer licensed in the State of Nebraska who shall agree to supervise respondent's office management and compliance with the rules of professional conduct and shall further agree to report any violation of the rules of professional conduct to relator. The monitoring lawyer shall sign a separate declaration reflecting agreement to the foregoing terms, and respondent shall attach such declaration as an exhibit to his probation plan. Respondent's probation shall be completed 2 years after this court approves respondent's probation plan. Further, respondent shall submit compliance reports quarterly to relator. The quarterly reports shall be approved by the monitoring lawyer and shall show compliance with trust account requirements and show that respondent is adhering to practices which demonstrate his periodic review of his trust account balance. Further, respondent must submit to an audit of his trust account by a certified public accountant at his own expense, to be conducted at the end of each year during respondent's term of probation. If respondent commits further violations of the Nebraska Rules of Professional Conduct, he shall be subject to revocation of his probation and the imposition of other discipline as outlined in disciplinary rule § 3-304.

CONCLUSION

The court finds that respondent violated §§ 3-501.15 and 3-508.4 of the rules of professional conduct and his oath as

an attorney, Neb. Rev. Stat. § 7-104. It is the judgment of this court that respondent should be and is hereby placed on probation commencing on the filing of this opinion and that respondent is ordered to submit a probation plan for approval by this court within 30 days of the date of filing of this opinion. The probation plan must show supervision of respondent by a monitoring lawyer licensed in the State of Nebraska on the terms listed previously in this opinion, with compliance reports to be submitted quarterly to relator by respondent and approved by the monitoring lawyer. Respondent's probation shall terminate 2 years after this court approves the submitted probation plan. Further, respondent must submit to an audit of his trust account by a certified public accountant at his own expense, to be conducted at the end of each year during respondent's term of probation. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-115(2) (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PROBATION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TERENCE W. NERO, APPELLANT.
798 N.W.2d 597

Filed June 3, 2011. No. S-10-457.

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. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
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. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
5. **Criminal Law: Constitutional Law.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
6. **Appeal and Error.** Whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
8. **Burglary: Intent: Convictions.** Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, Joseph D. Nigro, and Matthew F. Meyerle, Senior Certified Law Student, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Terence W. Nero appeals his conviction of burglary, a Class III felony, under Neb. Rev. Stat. § 28-507 (Reissue 2008), which states: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate . . . with intent to commit any felony or with intent to steal property of any value." Nero entered a plea of not guilty, and a bench trial was held in the Lancaster County District Court. The district court declined to make a specific finding regarding which felony it determined Nero had intended to commit to support the charge of burglary. The court found Nero guilty of burglary and sentenced him to 24 to 40 months' imprisonment. Nero appeals the conviction. The issues presented in this appeal are whether the State is

required to specify the underlying felony or felonies it seeks to prove to support a charge of burglary and whether the evidence presented at trial was sufficient to sustain the conviction. For the following reasons, we reverse, and remand for a new trial.

BACKGROUND

Nero was charged with burglary, a Class III felony. An information was filed in the district court on May 8, 2009. Nero filed a written waiver of his right to appear at arraignment and entered a plea of not guilty. Nero waived his right to a jury trial, and a bench trial followed.

Evidence Presented at Trial

The evidence adduced at trial was as follows: On February 25, 2009, Jennifer McDonald was at home in her apartment, which she shared with two roommates, including Katie Huenink. The apartment was located on the second floor of a house converted to apartments. The main door to the apartment was at the top of a flight of stairs, at the bottom of which the outside door to the house was located. The door at the bottom of the stairs automatically locked when shut; however, the door to McDonald's apartment needed to be manually locked, and McDonald never locked it.

At approximately 4 a.m., McDonald was lying down on the couch in the living room, and Huenink was asleep in her bedroom. McDonald was half asleep, but she heard the outside door and then the apartment door open and someone enter and walk over to where she lay on the couch. After looking at the man who had entered, McDonald realized she did not recognize him. He carried a magazine, and sat down next to McDonald. When she asked him what he was doing in her house, he said that he just wanted to talk to her. He said that his name was "Steve" and continued repeating that he just wanted to talk to her.

McDonald stood up and offered the man some water, but he pulled her back down to the couch by her hips and said he did not want any. She asked him whether he wanted a cigarette, and he said he did. When McDonald stood to get him

a cigarette, he pulled her back down to the couch and said he would get it. After being pulled down to the couch twice, McDonald again asked whether he would like a cigarette. The man "finally" let McDonald go get him a cigarette, which she then gave him. She told the man she had to go to the bathroom and went instead into Huenink's room. McDonald woke up Huenink and told her there was a man in the apartment that she had never seen before. Huenink went into the living room, yelled at the man, and told him to get out of the apartment. The man repeated that he just wanted to talk to McDonald, and Huenink told him no and again told him to leave. The man then left the apartment.

McDonald called the police to report what had happened. McDonald noticed that the man had left the magazine he had been carrying—which was a pornographic magazine containing photographs of nude men. McDonald and Huenink observed that the downstairs door was damaged where a piece of wood appeared to be "busted out," and on the stairs leading up to the apartment, they found an ice scraper that did not belong to them. Huenink testified that the damage to the door had not been present prior to the man's entering their apartment.

Officers Andrew Nichols and Jeffrey Hanson responded to McDonald's call. Hanson had the magazine processed for fingerprints, and a print belonging to Nero was identified. No other usable prints were found on the scene. The officers issued a broadcast to interview or pick up Nero.

On April 7, 2009, Officer Robert Brenner stopped Nero for a traffic violation. Brenner ran a check of police traffic charges and found that Nero was flagged for a broadcast for burglary. Brenner told Nero he needed to be interviewed regarding a burglary for entering a female's apartment. Nero told Brenner that he had not entered anybody's apartment, and then said that he did not touch anyone and did not hurt anyone. Brenner took Nero to the police station for questioning. Nero was taken to an interview room and read the *Miranda* warnings, to which Nero waived his rights. Nero consented to a search of his apartment, and following the search, he was arrested for burglary. After Nero was arrested, Nichols showed McDonald and

Huenink a photographic lineup which included Nero; neither woman identified any of the suspects as the man who entered their apartment.

Procedural Background

Prior to the filing of the information in district court, Nero initially appeared in county court for a preliminary hearing. After hearing testimony from Nichols, the court heard argument on whether there was probable cause to believe a felony had occurred. Nero conceded that his behavior in the apartment was inappropriate and disturbing, and he stated that the circumstances of the case might support a charge of trespass,[1] misdemeanor false imprisonment,[2] disturbing the peace,[3] or criminal mischief.[4] However, he maintained that there was no evidence that he intended to commit any felony or steal any property. Upon the court's request, the State provided the elements of false imprisonment. The court stated that the circumstances of the case were consistent with the crime of false imprisonment in the first degree and bound the case over to district court.

Nero filed a plea in abatement in district court, arguing that there was insufficient evidence to bind over the case. At the hearing on Nero's plea in abatement, Nero maintained that there was no evidence of any underlying felony. The State argued that it was not required to prove what underlying felony Nero intended to commit. The State admitted that it did not have a clear theory as to exactly what underlying felony it might seek to prove. The State offered the possible felonies of terroristic threats, sexual assault, and false imprisonment. The district court found that the case was appropriately bound over and denied Nero's plea in abatement.

Nero next filed a pretrial motion for a bill of particulars, requesting that the court require the State to specify Nero's alleged intent at the time he entered the apartment relating to

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[1] Neb. Rev. Stat. § 28-520 (Reissue 2008).

[2] Neb. Rev. Stat. § 28-315 (Reissue 2008).

[3] Neb. Rev. Stat. § 28-1322 (Reissue 2008).

[4] Neb. Rev. Stat. § 28-519 (Reissue 2008).

the charge of burglary. At the hearing on Nero's motion for a bill of particulars, Nero again argued that the State must specify the underlying felony that supported the charge of burglary. Nero further stated that without being informed of the underlying felony, his ability to defend against the burglary charge was hampered. The State asserted that it is required only to allege crimes in the language of the statute.

At the hearing, the State noted that if the case were tried to a jury, it would request instructions on sexual assault, false imprisonment, and terroristic threats, but argued: "[B]ased on the fact that obviously you [the judge] have the knowledge of all the potential felonies out there, [you] could come to your own conclusion without the State specifically saying what felony was believed to be committed." However, the State was unwilling to limit its theory of the case to the underlying felonies it named. The State argued that the bill of particulars should be overruled:

> [I]t's premature to be able to say because, depending on how the evidence comes in, I may or may not prove up the requisite things to have the trier of fact believe that [Nero] was — what felony he may have been entering the residence to commit.
>
> . . . .
>
> It's, in effect, simpler with the court because with a jury, obviously, we have to define every single one of them and that is something that should be done at the close of the evidence and arguably — obviously, I'll argue my theory on which felonies and it may change if he testifies.

The district court overruled Nero's motion for a bill of particulars.

At trial, the State presented its theory that Nero intended to commit first or second degree false imprisonment and that his plans were interrupted by Huenink's presence in the apartment. After the State rested, Nero moved for a directed verdict on the ground that the State had failed to establish a prima facie case. The court heard argument on the motion, found that the State had met its burden, and overruled Nero's motion for directed verdict. Nero offered no evidence. In closing

argument, Nero argued that the State failed to adduce evidence to show that Nero intended to commit a felony to support the charge of burglary.

On January 15, 2010, the district court found that the evidence presented against Nero supported a finding of guilt beyond a reasonable doubt. After the court's pronouncement of guilt, Nero inquired as to what underlying felony the court determined Nero tried to commit. Nero argued that if the case had been heard by a jury, the court would have instructed the jury on a specific felony, and that due process required the court to inform him of the basis on which he was convicted. The State objected, and the court denied Nero's request that it announce a finding of what underlying felony supported the conviction. Nero was sentenced to 24 to 40 months' imprisonment. Nero now appeals.

ASSIGNMENTS OF ERROR

Nero assigns that (1) the district court erred in failing to require the State to specify at any stage of the proceedings what underlying felony Nero intended to commit when prosecuting him for burglary under § 28-507 and (2) the evidence adduced at trial was insufficient to sustain a conviction for burglary.

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.[5]

[2,3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[6] 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

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[5] *State v. Peterson*, 280 Neb. 641, 788 N.W.2d 560 (2010).

[6] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

found the essential elements of the crime beyond a reasonable doubt.[7]

ANALYSIS

Failure to Specify Underlying Felony

[4] Section 28-507(1) defines burglary: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Nero does not contest that he entered McDonald's apartment unlawfully. However, there is no allegation that Nero stole or intended to steal any property from the apartment he entered. Therefore, the basis for charging Nero with burglary rests on the proposition that Nero unlawfully entered the apartment with the intent to commit a felony. We must determine whether the State is required to specify the underlying felony upon which the charge of burglary is based in order to sustain a conviction under § 28-507. This presents a question of law for which we have an obligation to reach an independent conclusion irrespective of the decision of the court below.[8]

Nero asserts that the district court's failure to require the State to specify an underlying felony to support the charge of burglary violated his rights to due process and a fair trial.[9] Nero contends that the State must specify which felony or felonies he allegedly intended to commit when breaking and entering. Failure to specify the intended felony, he maintains, forces the defendant to defend himself against "'the entire criminal code.'"[10]

The State argues that in the information, it is not obligated to include anything other than the applicable statutory language, and that Nero was adequately apprised of the State's theories of guilt during the pretrial proceedings. The State concedes that,

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[7] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

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

[9] See *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

[10] Brief for appellant at 24.

were this case tried to a jury, it would be required to instruct on the underlying felonies it sought to prove.

At the hearing on Nero's motion for a bill of particulars, the State argued that the judge, based on his knowledge "of all the potential felonies out there," could come to his own conclusion without the State specifically saying what felony was believed to be committed. But the issue is whether Nero had an opportunity to prepare an adequate defense, not whether the court had a proper knowledge of the law to analyze the State's theory on what underlying felony Nero intended to commit.

[5] The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[11] This is no less true should a defendant choose to waive his right to a jury, as Nero did in this case. We agree that unless we require the State to specify the underlying felony or felonies supporting a burglary charge, defendants may be convicted on nothing more than speculation as to what might have happened. We determine that the State is required to specify the felony or felonies that the defendant intended to commit after the breaking and entering. Here, the district court erred in denying Nero's motion for a bill of particulars specifying any underlying felonies the State sought to establish. Unless the State limits its prosecution to establishing that the defendant intended to steal property as encompassed in our burglary statute,[12] the State must specify which felony or felonies it believes a defendant intended to commit.

The jurisdictions that have addressed this issue are split, but the relevant statutory language accounts for the difference in treatment. In states where the burglary statute requires only intent to commit "an offense," "a crime," or "any crime," specific intent to commit a particular crime upon entry is not a material element of the offense.[13] Thus, in these jurisdictions,

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[11] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[12] See § 28-507(1).

[13] See, *De Vonish v. Keane*, 19 F.3d 107 (2d Cir. 1994); *State v. Robinson*, 289 N.J. Super. 447, 673 A.2d 1372 (1996); *Com. v. Alston*, 539 Pa. 202, 651 A.2d 1092 (1994); *State v. Bergeron*, 105 Wash. 2d 1, 711 P.2d 1000 (1985) (en banc).

the State need prove only general intent, which may be inferred from the circumstances of the break-in itself.[14] Such statutes are much broader than the common-law definition of burglary where one of the elements was that the breaking and entering be "with intent to commit any felony" therein.[15]

In those states where the burglary statute is in terms of "intent to commit a felony" or "intent to commit any felony or steal property," such intent is considered an essential element of the offense, and the State must specify the particular felony that the defendant intended to commit after the breaking and entering.[16] These courts reason that the particular crime intended must be specified because, if anything other than a felony was intended, the breaking and entering did not constitute burglary.[17]

Nebraska's burglary statute is comparable to the common-law definition of burglary and those statutes in jurisdictions which require the State to specify an underlying felony.[18] In keeping with the common-law definition, the intent to commit a felony or to steal property is an element of burglary under § 28-507. The State is therefore required to specify the felony or felonies that the defendant intended to commit after the breaking and entering.

The jurisdictions that have adopted this reasoning have generally done so in the context of a jury trial.[19] But we do not find the present case to be distinguishable simply because Nero was convicted by a judge. And, in either instance, it

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[14] See, *De Vonish v. Keane, supra* note 13; *Com. v. Alston, supra* note 13.

[15] See *id.*

[16] See, e.g., *State v. Mesch*, 574 N.W.2d 10 (Iowa 1997); *Com. v. Walter*, 40 Mass. App. 907, 661 N.E.2d 942 (1996); *State v. Rush*, 255 Kan. 672, 877 P.2d 386 (1994); *People v. Palmer*, 83 Ill. App. 3d 732, 404 N.E.2d 853, 39 Ill. Dec. 262 (1980); *People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966).

[17] See *State v. Mesch, supra* note 16.

[18] See, e.g., Cal. Penal Code § 459 (West 2010); 720 Ill. Comp. Stat. Ann. 5/19-1 (LexisNexis 2008); Iowa Code Ann. § 713.1 (West 2003); Kan. Stat. Ann. § 21-3715 (2007) (see § 21-5807, effective July 1, 2011); Mass. Gen. Laws. Ann. ch. 266, § 18 (West 2008).

[19] See, e.g., *State v. Mesch, supra* note 16.

remains that "[r]equiring the State to specify the felony is not onerous. While the State may not know what the defendant *actually* intended to do inside the dwelling, the State knows very well what *evidence* of intent it has."[20] Throughout the preliminary proceedings, the State did refer to underlying felonies it believed Nero may have intended to commit. However, the State was clear that it was unwilling to limit its theory of guilt. We agree that this placed Nero in a position where he was forced to prepare a broad defense in an attempt to rebut all possible underlying felonies.

The issue is whether Nero had such an opportunity, not whether the court had a proper knowledge of the law to analyze the State's theory on what underlying felony Nero intended to commit. Nero was made to speculate as to the State's apparently limitless theory of guilt. This did not provide Nero an opportunity to prepare an adequate defense. The federal Constitution guarantees Nero an opportunity to prepare an adequate defense,[21] regardless of the identity of the trier of fact. A jury must be instructed on such underlying felonies, and when a defendant requests such information during a bench trial, it is error to deny it.

Harmless Error

[6] We therefore conclude that it was error for the district court to deny Nero's motion for a bill of particulars. Still, whether an assigned error was prejudicial, requiring reversal, is at issue in every appeal.[22] We consider whether the court's failure to require the State to specify the underlying felonies was harmless error.

In *Stirone v. United States*,[23] the U.S. Supreme Court stated that under the Fifth Amendment's right to a grand jury indictment, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." The Court

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[20] *Id.* at 14 (emphasis in original).

[21] See *State v. Poe, supra* note 11.

[22] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

[23] *Stirone v. United States*, 361 U.S. 212, 217, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960).

characterized a variance between the charges contained in the indictment and the evidence presented during trial as "fatal error,"[24] because it "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."[25] The Eighth Circuit has also noted such error can be harmless only if a defendant's right to notice is not prejudiced.[26] We find this rule to be persuasive in Nero's case.

Nero was not charged by indictment, but by information. However, analogous to the right recognized in *Stirone*, this court has determined that a defendant must be given notice of information vital to the preparation of a defense.[27] An information may sufficiently allege the statutory elements of a criminal offense, yet fail to state with sufficient particularity information about the alleged crime which is vital to the preparation of a defense.[28] The court failed to give Nero notice of the alleged underlying felonies with sufficient particularity. The court's failure to require the State to specify the underlying felonies prejudiced Nero's right to notice and denied Nero a meaningful opportunity to present a complete defense. Because Nero's right to notice was prejudiced, we cannot determine such prejudice to be "harmless." Accordingly, the judgment should be reversed.

Sufficiency of Evidence

[7] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Nero's conviction. If it was not,

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[24] *Id.*, 361 U.S. at 219.

[25] *Id.*, 361 U.S. at 217. See, also, *Gautt v. Lewis*, 489 F.3d 993 (9th Cir. 2007).

[26] See, *U.S. v. Whirlwind Soldier*, 499 F.3d 862 (8th Cir. 2007); *U.S. v. Harris*, 344 F.3d 803 (8th Cir. 2003); *U.S. v. Stuckey*, 220 F.3d 976 (8th Cir. 2000).

[27] See *State v. Beermann, supra* note 9.

[28] *Id.*

then concepts of double jeopardy would not allow a remand for a new trial.[29] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[30] We determine that the circumstantial evidence against Nero was sufficient to sustain the verdict. We therefore reverse the conviction and remand the cause for a new trial.

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[31] 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.[32]

[8] Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry.[33] Viewing the evidence in the light most favorable to the prosecution, we determine intent to commit a felony could be inferred from the circumstances surrounding Nero's entry and subsequent actions in the apartment. We determine that a rational trier of fact could have found the underlying felony element proved beyond a reasonable doubt. Accordingly, we remand for a new trial.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating.

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[29] See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[30] *Id.*

[31] *State v. Edwards, supra* note 6.

[32] *State v. Lamb, supra* note 7.

[33] *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987).

IN RE TRUST CREATED BY HENRY S. HANSEN, DECEASED. WELLS FARGO BANK, N.A., TRUSTEE OF THE HENRY S. HANSEN TRUST, ET AL., APPELLEES, V. ESTATE OF RUTH ELAINE MANSFIELD, APPELLANT.

798 N.W.2d 398

Filed June 10, 2011. Nos. S-10-537, S-10-902.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **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.
3. ____: ____. 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.
4. **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.
5. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the County Court for Douglas County: EDNA ATKINS, Judge. Judgment in No. S-10-537 affirmed. Appeal in No. S-10-902 dismissed.

Michael D. McClellan and William E. Gast, of Gast & McClellan, for appellant.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellees Paula Baird-Kaminski and Stephen Scholder.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee Wells Fargo Bank, N.A.

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

STEPHAN, J.

This case is before us for the second time. It presents the question of whether a trustee violated its fiduciary duty by

declining to pay the amount of the beneficiary's last-illness expenses to the beneficiary's estate following her death. In the first appeal, we held that a decedent beneficiary's estate can seek to enforce the beneficiary's interests in a trust to the same extent that the beneficiary could have enforced his or her interests immediately before death, and we remanded the cause to the county court for Douglas County with directions to hold an evidentiary hearing.[1] These consolidated appeals are from the county court's entry of summary judgment in favor of the trustee and the remainder beneficiaries.

FACTS AND PROCEDURAL BACKGROUND

In June 1979, Henry S. Hansen executed an inter vivos trust. The trust provided for the care, support, and maintenance of Hansen during his lifetime. Upon Hansen's death, the residue of his estate was to be held in trust for the lifetime benefit of his daughters. Article I provided: "The Trust shall continue for the duration of the lives of Grantor's two daughters, MILDRED B. BONACCI and RUTH E. MANSFIELD, and until the death of the survivor of them." Article II provided in part:

> The Trustee shall make two divisions of the corpus of the Trust, one for MILDRED B. BONACCI and one for RUTH E. MANSFIELD. During the lifetime of each of said daughters, the Trustee shall pay the net income of the respective divisions of the Trust to said daughters in installments not less frequently than quarterly. In addition, should either of said daughters, by reason of accident or illness require funds in excess of the net income of the Trust, then the Trustee shall make such payments from such daughter's division of the principal as it may deem proper for the benefit of such daughter.

Article III provided that upon the death of one of the daughters, the trust would continue for the benefit of the surviving daughter, "with the division of the Trust for the deceased daughter remaining in the Trust for the use and benefit of the surviving daughter." Article III instructed that upon the surviving daughter's death, the trustee was to pay out of the "corpus

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[1] *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007).

of both divisions of the Trust" $5,000 to each of Hansen's four great-grandchildren, if living, and to then distribute the remaining funds to his two grandchildren, Paula Sue Baird-Kaminski and Stephen Scholder (remainder beneficiaries). At all relevant times, Wells Fargo Bank, N.A. (Wells Fargo), has served as trustee of Hansen's trust.

Hansen died in 1979, and Mildred B. Bonacci died in 1986. Ruth Elaine Mansfield (Ruth) died at the age of 87 on January 8, 2005, in New York City, where she had resided as an adult. For the last 13 or 14 years of her life, Ruth suffered from diffuse cerebrovascular disease, which was gradually progressive and eventually resulted in severe dementia. By June 2002, her medical condition required that she have home health care. In August 2004, she was placed in a nursing home in New York, where she resided until her death. Ruth did not have children. Beginning in late 2002, Jane Falion assisted Ruth in arranging home health care and eventually residential long-term care services. Falion was the daughter of Ruth's longtime companion who resided with her and predeceased her.

In August 2004, a social worker advised Falion that Ruth "needed the appointment of a guardian for her person and property." Falion, assisted by an attorney, began the process of having herself appointed as Ruth's guardian in a proceeding initiated in a New York state court. During the pendency of the guardianship proceeding, Falion and her attorney learned of the existence of the Hansen trust. During September and October 2004, Falion attempted to contact the trustee regarding Ruth's circumstances but was not permitted to speak with a trust officer because she had not been appointed Ruth's guardian. The remainder beneficiaries appeared in the New York guardianship proceeding for the purpose of asserting their interest in the Hansen trust and objecting to its use to pay Ruth's expenses. On or about December 22, 2004, Dawn Heese, the Wells Fargo trust administrator assigned to the Hansen trust, received unsigned copies of documents pertaining to the New York guardianship proceedings, apparently sent by one of the remainder beneficiaries.

On January 5, 2005, Heese received a telephone call from the attorney representing Falion in the New York guardianship proceedings. The attorney told Heese that Ruth was not doing

well and that a judge had entered an order requiring the trust to pay her medical expenses until a guardian was appointed. The attorney said that he would fax a copy of the order to Heese, but he never did. Heese told the attorney that Wells Fargo would need to see documentation of the claimed expenses, which the attorney agreed to provide. On or about January 7, another Wells Fargo trust administrator received a message from the attorney representing the remainder beneficiaries in the New York guardianship proceeding, stating that they were not objecting to the appointment of a guardian but were taking the position that Ruth's assets "should be utilized for her care first before the Trust is invaded."

On January 10, 2005, one of the remainder beneficiaries informed Heese that Ruth had died on January 8. Also on January 10, the New York guardianship proceedings were dismissed as moot as a result of Ruth's death. Several days later, Heese received copies of Ruth's medical bills from Falion. In an accompanying letter dated January 5, 2005, Falion identified herself as Ruth's stepdaughter and requested payment of "all of [Ruth's] medical expenses" from the Hansen trust principal. Falion's letter instructed Heese to contact her attorney regarding any questions and identified the same attorney with whom Heese had spoken on January 5. In e-mail correspondence sent to Heese on February 2, one of the remainder beneficiaries questioned Falion's right to make any claim against the trust and stated her belief that Falion was attempting to maximize the assets of Ruth's estate because she stood to inherit from it.

On March 10, 2005, Heese sent letters to Falion's attorney and the attorney representing the remainder beneficiaries, stating that the trustee would not pay the claimed expenses because Ruth's interest in the trust terminated upon her death and Ruth's estate had sufficient assets to pay the expenses. Falion's attorney responded in a letter dated March 22, 2005, indicating that his firm was representing Ruth's estate and requesting that the trust pay $69,000 in medical expenses and $9,175 for the cost of the guardianship proceeding.

In May 2005, the trustee registered the trust with the county court for Douglas County, with notice to interested parties, including Ruth's estate and the remainder beneficiaries. Shortly

thereafter, the remainder beneficiaries filed an action to determine their interests in the trust, specifically raising the issue of whether the estate's claim for Ruth's last-illness expenses was payable from the trust. In the same docketed proceeding, Wells Fargo filed a petition requesting the court, pursuant to Neb. Rev. Stat. § 30-3812 (Reissue 2008), to determine whether Ruth's last-illness expenses were payable from the trust, and Ruth's estate filed a petition to compel the trustee to pay the expenses.

The county court initially concluded that the trust was a discretionary support trust and that the trustee had properly denied payment of the medical bills because the purpose of the trust had ended with Ruth's death. In our opinion in the first appeal, we concluded that the provision in the trust that the trustee "shall" make payments for the daughters' benefit if they should require funds in excess of the trust's income because of an accident or illness was "the functional equivalent of a term providing that '"the trustee '*shall* pay or apply only so much of the . . . principal . . . as is necessary for the [medical care] . . . of a beneficiary.'"'"[2] In light of this language, we stated that the trustee "had discretion to determine whether and how much additional support Ruth properly required as the result of an accident or illness, but it did not have discretion to determine whether to support her."[3]

Our prior opinion also rejected the premise that the trustee properly refused to make payments under the trust because the trust's purpose ended when Ruth died. In this respect, we noted the "general common-law rule" that a beneficiary's estate may recover income of the trust, which is accrued and payable at the time of the beneficiary's death but has not been paid over, "unless the trustee had uncontrolled discretion whether to make distributions of income."[4] We held that "Ruth's estate can seek to enforce Ruth's interests in the trust to the extent that Ruth could have enforced her interests immediately before

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[2] *Id*. at 209, 739 N.W.2d at 179, quoting *Pohlmann v. Nebraska Dept. of Health & Human Servs*., 271 Neb. 272, 710 N.W.2d 639 (2006).

[3] *In re Trust Created by Hansen, supra* note 1, 274 Neb. at 209, 739 N.W.2d at 179.

[4] *Id.* at 212, 739 N.W.2d at 181.

her death."[5] We adopted the legal standard set forth in the Restatement (Third) of Trusts § 50[6] for determining whether the estate was entitled to recover the beneficiary's last-illness expenses from the trust.

Following remand, additional proceedings were conducted. On December 12, 2008, the county court entered an order on a motion for partial summary judgment filed by Ruth's estate and a motion for summary judgment filed by the remainder beneficiaries. The court made findings of fact but overruled both motions and directed the trustee to determine "whether to pay [Ruth's] expenses related to her illness, and, if payable, how much as it may deem proper" utilizing the legal standard adopted in our previous opinion applied to the facts as determined by the court. Ruth's estate filed a motion for new trial, which the court overruled.

Subsequently, the trustee declined the estate's request that Ruth's last medical expenses be paid from the trust and proposed a distribution of all trust assets in accordance with article III of the trust instrument, with Hansen's four great-grandchildren to receive $5,000 each and the balance paid in equal shares to the remainder beneficiaries. Ruth's estate objected to the proposed distribution. The trustee and remainder beneficiaries filed motions for summary judgment. On November 3, 2009, the court entered a "Final Judgment Order" and granted the motions, concluding that the trustee "did not breach its fiduciary duty or abuse its discretion toward Ruth . . . or her Estate, and its proposed distribution is proper and not contrary to law."

Through apparent inadvertence, the county court's November 3, 2009, order was never mailed to the parties. Upon realizing this, Ruth's estate filed a motion asking the court to vacate the November 3 order due to lack of notice to the parties. The court conducted a hearing on this motion on May 5, 2010, at which counsel for all parties were present. Counsel orally agreed that the motion to vacate should be granted. The court announced on the record that the November 3, 2009, order

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[5] *Id.*

[6] Restatement (Third) of Trusts § 50, comment *d(5)* (2003).

was vacated and made a written docket entry reflecting this action. The court then issued a new "final" order on May 5, 2010, which was identical to the November 3, 2009, order. The May 5, 2010, order made no reference to the vacating of the November 3, 2009, order.

The estate filed an appeal from the May 5, 2010, order on May 26, and that appeal is docketed in this court as case No. S-10-537. Apparently still concerned about the jurisdictional issue, the trustee, the estate, and the remainder beneficiaries then jointly sought an order nunc pro tunc from the county court. The rationale was that the court's failure to address the motion to vacate in the May 5 order was a clerical error that could be corrected via a motion nunc pro tunc. In response to this joint request, and while the appeal from the May 5 order was pending, the county court then issued a "Final Judgment Order and Order Nunc Pro Tunc" on August 13. The August 13 order is substantively identical to both the November 3, 2009, and May 5, 2010, orders, except that the August 13 order specifically states that the November 3, 2009, order is vacated effective May 5, 2010. It also states that the effective date of the final order is May 5. On September 9, Ruth's estate filed a notice of appeal from the August 13 order, and that appeal is docketed as case No. S-10-902.

ASSIGNMENTS OF ERROR

Ruth's estate assigns, restated and summarized, that the county court erred in (1) finding that the trustee did not breach a duty to pay or abuse its discretion in refusing to pay the estate for Ruth's medical expenses, (2) finding that the trustee did not unduly delay its response to Ruth's claim, (3) failing to find that the trustee breached fiduciary duties to Ruth during her lifetime, and (4) construing the language of the trust.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[7]

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[7] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[2,3] 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.[8] 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.[9]

ANALYSIS

Appellate Jurisdiction

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[10] In preargument filings, both Ruth's estate and the remainder beneficiaries questioned whether the appeals before us are from final orders. We ordered the parties to address these issues in the briefs.

From our review of the record, we are satisfied that the county judge entered a final order resolving all pending substantive and procedural issues on May 5, 2010. Accordingly, the notice of appeal filed in case No. S-10-537 was timely and sufficient to confer appellate jurisdiction. We address the merits of that appeal and dismiss the subsequently filed appeal designated as case No. S-10-902.

Summary Judgment

As we noted in our previous opinion, the trust provided that Ruth was to receive the net income from her division of the trust for her lifetime. It further provided: "'In addition, should [Ruth], by reason of accident or illness require funds in excess

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[8] *Id.*; *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

[9] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010). See *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

[10] *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010); *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

of the net income of the Trust, then the Trustee shall make such payments from [Ruth's] division of the principal as it may deem proper for the benefit of [Ruth].'"[11]

It is undisputed that Ruth suffered from an illness that commenced in 2002 and that the expenses she incurred as a result of that illness were in excess of the net income she received from the trust during the time period of the illness. Ruth's estate argues that under the language of the trust, these facts alone trigger the trustee's duty to pay Ruth's last-illness expenses, regardless of whether her other assets were sufficient to satisfy her obligations. The estate relies in part on our statement in the prior appeal that "[t]he language of Hansen's trust indicates that his primary concern was the care of his daughters in the event of an accident or illness."[12]

But the estate's interpretation of the trust language fails to consider the whole of our prior opinion. Immediately after the language on which the estate relies, we stated: "We conclude that Hansen authorized the trustee to exercise the same degree of discretion created by an ordinary support trust but limited Ruth's interests in the trust's principal to the support she needed upon the happening of a designated event."[13] We also expressly stated that the trust language was the "functional equivalent" of a trust providing that the trustee "shall" pay or apply "only so much" of the principal "as is necessary" for the medical care of the beneficiary. We noted that the trustee therefore "had discretion to determine *whether and how much* additional support Ruth properly required as the result of an accident or illness, but it did not have discretion to determine *whether* to support her."[14] The statements mean that the trustee was required under the trust instrument to support Ruth through regular payments of trust income, and also had the power to determine whether additional support should be paid from the trust principal for her medical expenses. Thus, contrary to the estate's argument,

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[11] *In re Trust Created by Hansen, supra* note 1, 274 Neb. at 201, 739 N.W.2d at 174.

[12] *Id.* at 210, 739 N.W.2d at 179.

[13] *Id.*

[14] *Id.* at 209, 739 N.W.2d at 179 (emphasis supplied).

we have already determined that the language of the trust did not impose a duty on the trustee to pay Ruth's medical expenses from the trust principal simply because they exceeded the amount of the trust income.

In our prior opinion, we adopted the following standard for an estate's recovery of the beneficiary's last-illness expenses from the Restatement:

> A question may arise, following the death of the beneficiary of a discretionary interest, whether a support or other standard authorizes or requires the trustee to pay the beneficiary's funeral and last-illness expenses and debts incurred by the beneficiary for support. Ultimately, the question is one of interpretation when the terms of the trust are unclear, with the presumption being that the trustee has discretion to pay these debts and expenses.
>
> A duty to do so is presumed only to the extent that (i) probate estate, revocable trust, and other assets available for these purposes are insufficient or (ii) the trustee, during the beneficiary's lifetime, either agreed to make payment or unreasonably delayed in responding to a claim by the beneficiary for which the terms of the trust would have required payment while the beneficiary was alive.[15]

Focusing on the second paragraph of the standard, we first consider whether the trustee is presumed to have a duty to pay Ruth's medical expenses. The evidence does not support a reasonable inference that Ruth's assets were insufficient to pay her last expenses. At the time of her death, Ruth owned assets valued at approximately $574,000, notwithstanding the fact that according to her tax returns, she paid health care expenses of over $200,000 in the 3-year period preceding her death. An intermediate accounting filed in Ruth's estate reflected unpaid claims for medical expenses as of December 31, 2005, in the amount of only $23,081. In 2006, Ruth's estate had sufficient funds to make distributions totaling $270,000 to various institutions and individuals, including Falion. Clearly, the only reasonable inference is that Ruth's assets were sufficient to pay

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[15] Restatement, *supra* note 6 at 269.

any medical expenses which had not already been paid at the time of her death.

The estate argues that, notwithstanding our adoption of the Restatement standard in the prior appeal, the sufficiency of Ruth's assets is irrelevant in Nebraska. It bases this argument upon our holding in *Roats v. Roats*.[16] In that case, we held that a trustee who was required to use as much of the trust principal as he deemed necessary for the care and support of the beneficiary had a duty to pay the cost of a new home for the beneficiary. We found that this duty existed regardless of the sufficiency of the beneficiary's other assets. *Roats*, however, was based on the trustee's specific promise to the beneficiary that he would purchase the home for her. Here, there is no evidence that the trustee ever agreed to pay any of the expenses which the estate claims, and *Roats* is therefore distinguishable.

Instead, because Ruth's assets were sufficient to cover her medical expenses and the trustee made no promise to pay those expenses, under the Restatement, the trustee had a duty to pay Ruth's medical expenses only if it "unreasonably delayed in responding to a claim by the beneficiary for which the terms of the trust would have required payment while the beneficiary was alive." There is no evidence that Ruth ever requested that the trustee pay her medical expenses during her lifetime. The first such request was made by Falion and her attorney on or about January 5, 2005, just a few days before Ruth's death. It is clear from the record that Falion had not been appointed Ruth's guardian when she made the request, and there is no evidence that Falion acted pursuant to a power of attorney or any other form of legal authorization. Ruth died before the trustee received the documentation for Falion's claim. These uncontroverted facts do not support a reasonable inference that Wells Fargo "unreasonably delayed" in responding to the claim. And in any event, the claim as a matter of law was not one "for which the terms of the trust would have required payment while the beneficiary was alive." As we stated in our prior opinion, the "trustee had discretion to determine whether and how much additional support Ruth properly required as

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[16] *Roats v. Roats*, 128 Neb. 194, 258 N.W. 264 (1935).

the result of an . . . illness."[17] The same discretionary standard applied to the trustee both before and after Ruth's death, and we have already held that the trustee did not have a duty to pay Ruth's medical expenses under this standard. We conclude that the evidence establishes as a matter of law that the trustee did not have a duty to pay Ruth's last-illness expenses under the Restatement standard adopted in our prior opinion.

Clearly, however, the trustee had the discretion to pay Ruth's medical expenses. The remaining question then is whether the trustee abused that discretion in declining to pay her medical expenses from the trust principal. Under the trust instrument, the trustee's discretionary authority to make payments to Ruth from the trust principal involved an assessment of whether Ruth "'by reason of accident or illness require[d] funds in excess of the net income of the Trust . . . .'"[18] Contrary to the estate's argument, one factor in this determination was Ruth's ability to meet her expenses without a payment from the trust principal. As we noted in our prior opinion, the trust instrument "limited Ruth's interests in the trust's principal to the support she needed upon the happening of a designated event."[19] Whether Ruth "needed" a disbursement from the trust principal to pay her medical expenses depended upon what other resources were available to her. The trustee initially declined the request made by Falion and her attorney to pay the last-illness expenses, based in part upon its understanding that the estate had "sufficient assets to pay those expenses," and the record shows that that understanding was correct.

The estate argues that the trustee breached a fiduciary duty to inquire as to Ruth's health and her possible need for payments from the trust principal and that it had improper communications with the remainder beneficiaries. We consider these arguments only to the extent that they pertain to the issue of whether the trustee abused its discretion in declining to pay the last-illness expenses, because the estate has made no other

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[17] *In Re Trust Created by Hansen, supra* note 1, 274 Neb. at 209, 739 N.W.2d at 179.

[18] *Id.* at 201, 739 N.W.2d at 174.

[19] *Id.* at 210, 739 N.W.2d at 179.

claim against the trustee. We find no language in the trust instrument which requires the trustee to make specific inquiries regarding the health of a beneficiary. But even if such a duty did exist, there is no indication that inquiries made in 2002, 2003, or 2004 would have disclosed facts different from those in the record, i.e., that Ruth's health was deteriorating but that she was able to meet the increased health care expenses from her existing resources without the need for payments from the trust principal. We find no basis in the record for the estate's argument that the trustee's communications with the remainder beneficiaries were improper or that they resulted in an abuse of discretion with respect to the trustee's decision not to pay Ruth's last-illness expenses. In summary, we find no evidence in the record which would support a reasonable inference that the trustee abused its discretion in declining to pay the last-illness expenses.

[5] Finally, the estate argues that the county court erred in construing article II of the trust instrument as creating separate and distinct "divisions" of the trust principal for the daughters' benefit. This issue is not material to our disposition of the appeal, and because an appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it, we need not address it.[20]

CONCLUSION

Applying the legal standard adopted in our prior appeal, the county court concluded that there was no genuine issue of material fact and that the trustee and remainder beneficiaries were entitled to judgment as a matter of law. For the reasons discussed, we find no error and therefore affirm.

JUDGMENT IN NO. S-10-537 AFFIRMED.
APPEAL IN NO. S-10-902 DISMISSED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[20] *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

R and B Farms, Inc., a Nebraska corporation, appellee, v. Cedar Valley Acres, Inc., a Nebraska corporation, appellant.

798 N.W.2d 121

Filed June 10, 2011. No. S-10-568.

1. **Contracts: Reformation: Equity.** An action to reform a contract sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Rules of the Supreme Court: Pleadings.** The key inquiry of Neb. Ct. R. Pldg. § 6-1115(b) for "express or implied consent" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.
5. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
8. **Contracts: Reformation.** The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation.
9. **Reformation: Intent.** If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
10. **Parol Evidence: Contracts.** 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.

Appeal from the District Court for Boone County: Michael J. Owens, Judge. Reversed and remanded with directions.

John B. McDermott, of Shamberg, Wolf, McDermott & Depue, for appellant.

John C. Hahn and Brent C. Stephenson, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case arose from a boundary dispute between R and B Farms, Inc. (R and B), and Cedar Valley Acres, Inc. (Cedar Valley). R and B sought reformation of the contract which conveyed the land and an order quieting title in it as owner of the property. The district court determined that mutual mistake had occurred which necessitated reformation of the written agreement. Cedar Valley appeals. The issues on appeal are whether the theory of mutual mistake was properly before the district court, whether parol evidence was properly admitted, and whether R and B's recovery is precluded under the doctrine of conscious ignorance. Although the issue of mutual mistake was properly before the district court, the record does not support a finding of mutual mistake in the instant case. Accordingly, we reverse, and remand with directions.

BACKGROUND

Reginald Dobson, Sr. (Reginald Sr.), and his sons, Reginald Dobson, Jr. (Reginald Jr.); Daniel Dobson; and David Dobson, farmed together operating under a corporation known as Reginald Dobson & Sons, Inc. (Dobson & Sons). In 1993, the farming operations were divided among Reginald Jr., Daniel, and David. Reginald Jr. formed R and B, and Daniel formed Cedar Valley. David formed a third corporation not at issue in this appeal. Reginald Jr. and Daniel act as president for their respective corporations.

In 1993, the three newly formed corporations executed a written "Agreement and Plan of Reorganization" (written agreement) with Reginald Sr. on behalf of Dobson & Sons. The written agreement provided for the division of Dobson & Sons' property among the corporations. The cropland was valued at $1,100 per acre, and the pastureland was valued at $300 per acre. R and B was to receive 348 acres of cropland, and Cedar

Valley was to receive 119 acres of cropland and 240 acres of pastureland. Respectively, R and B paid $382,800, and Cedar Valley paid $202,900 in consideration for the land.

The disputed property in this matter consists of a parcel of cropland located north of a fence on property previously belonging to Dobson & Sons (hereinafter referred to as "the cropland"). The cropland was encompassed by the legal description deeded to Cedar Valley under the written agreement, but R and B claims that all parties decided that a fence line would serve as the boundary for the property. The fence line does not conform to the legal description of the land contained in the written agreement. The parties never conducted a survey on the land described in the written agreement. Reginald Jr. stated that everyone "[f]igured the fenceline was close enough" and that "[e]verybody [gave] their word [the] fenceline would be the boundary."

The written agreement contained the following provisions:

> Entire Agreement. This Agreement and the schedules delivered herewith and the other agreements specifically provided for herein represent the entire agreement of the parties and no provision or document of any kind shall be included in or form a part of this Agreement unless in writing and delivered to the other parties by the party to be charged.
>
> . . . Prior Negotiations. All prior negotiations and discussions by and among the parties hereto which are not reflected or set forth in this Agreement or the schedules delivered herewith are merged into this Agreement and said schedules have no force or effect.

The cropland has been irrigated by three center pivots prior to execution of the written agreement. R and B purchased these pivots from Reginald Sr. pursuant to the written agreement. After the written agreement was executed, from 1993 through 2008, R and B farmed the cropland. During this time, Cedar Valley used pastureland owned by R and B and located south of the fence line for grazing cattle. There was no exchange of rent requested or paid for either parties' use of the respective parcels. Both parties paid taxes on their

respective property as specified under the legal description in the written agreement.

Cedar Valley claimed that R and B was allowed to farm the cropland north of the fence in exchange for Cedar Valley's use of the pastureland south of the fence. From 1993 through 2008, R and B filed paperwork with the U.S. Department of Agriculture which certified that R and B had a rental agreement with Cedar Valley. The rent certification statement was signed by Reginald Jr. and certifies Cedar Valley's status as the owner of the cropland and R and B's status as tenant. To receive government payments for the land, the local Farm Service Agency required both Cedar Valley and R and B to sign documentation to allow R and B to receive such payments, which payments R and B retained. Reginald Jr. disputed that any agreement was in place regarding the exchanged use of land and claimed that the representations made to the Farm Service Agency and the U.S. Department of Agriculture were necessary because "[t]hey had it all tangled up at the courthouse" and "[t]hat's what they had to go by."

In 2008, Cedar Valley provided notice of its intent to terminate what it considered to be the rental agreement with R and B. Thereafter, R and B initiated this suit. In R and B's amended complaint, it alleged three specific causes of action: (1) declaratory judgment, (2) quiet title on the theory of adverse possession, and (3) mutual recognition and acquiescence. The operative complaint did not explicitly plead mutual mistake as a theory of recovery. But R and B listed "Facts Common to All Causes of Action" in the complaint, which included that "the fence was the intended division of the two tracts of land at the time of the sale" and that "the Subject Property was incorrectly, contrary to the intent of the parties, deeded to [Cedar Valley] by its legal description, as opposed to a legal description based on the correct metes and bounds description of the Fence."

Prior to trial, Cedar Valley filed a motion for summary judgment. In R and B's brief in opposition to the motion, it addressed the issue of mutual mistake. Hearing on the motion was held, and R and B argued it was entitled to recovery

under, among other things, the theory of mutual mistake. Cedar Valley addressed R and B's first cause of action as one of mistake. It stated, "The first cause of action is somehow there was a mistake. Well, there was no mistake." Cedar Valley argued there was no mutual mistake as a matter of law, but it did not object to the court's consideration of the issue, argue that it was surprised by the theory, or request a continuance. The court overruled Cedar Valley's motion for summary judgment. Cedar Valley subsequently filed a motion in limine seeking to prevent R and B from presenting any evidence regarding discussions between the parties prior to entering into the written agreement. The court overruled Cedar Valley's motion in limine.

The district court ultimately found in favor of R and B on the theory of mutual mistake. The order stated that the theory was adequately raised by the pleadings and that the evidence adduced established that a mutual mistake had occurred which necessitated reformation of the written agreement previously entered into by the parties. The court determined that it was the parties' mutual intention that R and B receive the cropland north of the fence. R and B was determined to be the owner of the disputed property. Cedar Valley appeals.

ASSIGNMENTS OF ERROR

Cedar Valley assigns, restated and renumbered, that the district court erred in (1) finding that the theory of mutual mistake was properly pled; (2) admitting extrinsic evidence of negotiations and agreements made prior to the execution of the written agreement, in violation of the parol evidence rule; (3) finding that the evidence was sufficient to establish mutual mistake; and (4) reforming the written agreement on the basis of mutual mistake.

STANDARD OF REVIEW

[1,2] An action to reform a contract sounds in equity.[1] In an appeal of an equitable action, an appellate court tries factual

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[1] See *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988).

questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[2]

[3] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[3]

ANALYSIS

Adequacy of Pleadings

On appeal, Cedar Valley argues that the district court erred in admitting evidence relating to an alleged mutual mistake because R and B failed to properly plead this theory. Cedar Valley asserts that it was prejudiced when the district court allowed R and B to proceed on the theory of mutual mistake and that the court did not allow it adequate time to prepare a proper defense.

[4] Neb. Ct. R. Pldg. § 6-1115(b) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the

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[2] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[3] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

> party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The key inquiry of this rule for "express or implied consent" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.[4] Implied consent may arise in two situations. First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.[5]

R and B did not expressly use the phrase "mutual mistake" to describe a cause of action in its complaint. But in both its complaint and amended complaint, R and B pled that "the fence was the intended division of the two tracts of land at the time of the sale" and that "the Subject Property was incorrectly, contrary to the intent of the parties, deeded to [Cedar Valley] by its legal description, as opposed to a legal description based on the correct metes and bounds description of the Fence."

At the hearing on its motion in limine, Cedar Valley did object to evidence presented on the issue of mutual mistake on the basis of the parol evidence rule. It also argued that mutual mistake was not properly pled. But previously, at the hearing on the motion for summary judgment, Cedar Valley conceded that R and B had raised the issue of mistake and proceeded to address the theory of mutual mistake on the merits. In general, a finding of implied consent depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.[6] During pretrial hearings, both parties argued on the issue of mutual mistake. Cedar Valley specifically argued in response to R and B's theory of mistake and stated that "it doesn't make any sense whatsoever to take [R and B's]

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[4] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[5] *Id.*

[6] See *id.*

position that, well, it was a mutual mistake. No, it wasn't a mutual mistake."

The facts pled by R and B were sufficient to place the theory of mutual mistake at issue. R and B did not use the words "mutual mistake," but this failure did not affect the substantial rights of Cedar Valley. Cedar Valley was aware from the complaint and the amended complaint that R and B sought reformation on the basis that the written agreement did not reflect the intentions of the parties—a theory of mutual mistake. And Cedar Valley was put on notice that it would have to defend against that theory based on the issues addressed at the hearing on its motion for summary judgment. Cedar Valley addressed this issue on the merits; the record thus indicates that the issue of mutual mistake was tried by the implied consent of the parties. We therefore determine that the claim of mutual mistake was properly before the district court.

In its brief, Cedar Valley states that the court "opted to proceed—over arduous objection from Cedar Valley . . . without adequate pleadings on file and without allowing Cedar Valley . . . time to respond thereto."[7] But nothing in the record indicates either that Cedar Valley requested a reformation of the pleadings to reflect the theory of mutual mistake or that it requested a continuance. The pretrial conference makes clear that it had notice of R and B's intent to proceed on this theory. Had Cedar Valley requested the pleadings be amended and it be granted a continuance to prepare, this remedy would clearly be allowed under § 6-1115(b). Cedar Valley's failure to request a continuance indicates that it was not prejudiced when the court allowed R and B to proceed on the theory of mutual mistake.

Because mutual mistake was properly before the court, we also determine that parol evidence was properly admitted to enable the trier of fact to ascertain the parties' actual intent at the time of entering into the contract.[8] The district court

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[7] Brief for appellant at 19.

[8] See *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984). Cf. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007) (extrinsic evidence properly admitted to resolve ambiguity or mistake under Uniform Trust Code for reformation in conformity with settlor's intent).

therefore did not err when it determined that parol evidence was admissible to show that because of mutual mistake, the written agreement did not reflect the intention of the parties.[9] The district court did not abuse its discretion in admitting extrinsic evidence relevant to the theory of mutual mistake, and Cedar Valley's arguments to the contrary are without merit.

Mutual Mistake

An action to reform a contract sounds in equity.[10] Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.[11] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[12]

[5,6] The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.[13] To overcome the presumption that the agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.[14] Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[15]

[7,8] Cedar Valley argues that the district court erred in finding sufficient evidence to prove that a mutual mistake occurred

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[9] See, *Thirty and 141, L.P. v. Lowe's Home Centers, Inc.*, 565 F.3d 443 (8th Cir. 2009); *Johnson v. Stover, supra* note 8.

[10] *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra* note 1.

[11] *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989).

[12] *Ottaco Acceptance, Inc. v. Larkin, supra* note 2.

[13] *Id.*

[14] See, *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

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

which necessitated the reformation of the written agreement. A mutual mistake is:

> "'[A] belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties."'"[16]

The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation.[17] However, based upon our de novo review, we find that the record does not support a finding of mutual mistake in the instant case.

[9] A mutual mistake is a belief shared by the parties, which is not in accord with the facts.[18] It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument.[19] Mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.[20] If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.[21]

[10] The parol evidence rule states that if negotiations between the parties result in an integrated agreement which

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[16] *Records v. Christensen, supra* note 14, 246 Neb. at 916, 524 N.W.2d at 761.

[17] *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

[18] *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

[19] *Id.*

[20] *Id.*

[21] *Omaha Door Co. v. Mexican Food Manuf. of Omaha*, 232 Neb. 153, 439 N.W.2d 776 (1989).

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.[22] 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.[23]

The written agreement executed by the parties contained an "Entire Agreement" provision and a "Prior Negotiations" provision, which specifically provided that all prior negotiations were merged into the written agreement and that the written agreement represented the entire agreement of the parties. R and B does not contend that the legal description contained in the written agreement granted R and B ownership of the cropland. Under the legal description, Cedar Valley is the legal owner of the parcel.

It appears that no witness unequivocally knew what property boundaries the legal description in the written agreement provided. But R and B did not present any testimony or other evidence that the parties mistakenly believed that the legal description in the written agreement separated the parcels at the fence line. In fact, Reginald Jr. testified that though a survey was not conducted, they "[f]igured the fenceline was close enough" and that "[e]verybody [gave] their word [the] fenceline would be the boundary." This fails to demonstrate that the legal description in the written agreement was transcribed or included by mistake or that either party believed that it described the fence line as a boundary.

It is understandable that laypersons could read a legal description of realty and not know whether the property was accurately described. However, R and B did not produce clear and convincing evidence that the parties mistakenly believed the contract to mean one thing when in reality it did not. The record does not indicate that the legal description at issue was inserted by mistake or that the parties intended the legal

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[22] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[23] *Id.*

description to reflect the fence line as the property boundary. The record therefore does not support a finding of mutual mistake. In the absence of such mistake, the four corners of the written agreement must control.[24]

A court may reform a written agreement only when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.[25] Because the record does not support a finding of mutual mistake, we find that the district court erred in reforming the contract.

CONCLUSION

For the foregoing reasons, the district court erred in finding that the evidence established a mutual mistake, because there was not clear and convincing evidence that the parties had a mistaken understanding of the term at issue. As such, reformation on the basis of mutual mistake was also erroneous. Accordingly, we reverse the judgment and remand the cause with directions to the district court to enter judgment consistent with this opinion, reinstating and upholding the January 25, 1993, written agreement with respect to all parties.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[24] See *id.*

[25] *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

STATE OF NEBRASKA, APPELLEE, V.
ELEAZAR OCEGUERA, JR., APPELLANT.
798 N.W.2d 392

Filed June 10, 2011. No. S-10-605.

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. **Constitutional Law: Double Jeopardy: Sentences: Appeal and Error.** The Double Jeopardy Clause of the federal Constitution is not offended if an appellate court remands a cause for resentencing.

3. **Double Jeopardy: Sentences: Proof.** A failure of proof at an enhancement hearing is not analogous to an acquittal, and such a failure of proof does not trigger double jeopardy protections.
4. **Prior Convictions: Drunk Driving: Habitual Criminals: Sentences: Evidence.** The use of prior convictions to enhance a sentence for driving under the influence is similar to the use of prior convictions to enhance a sentence under our habitual criminal scheme, in which evidence of prior convictions must be introduced.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Sentence vacated, and cause remanded with directions.

Timothy J. Wollmer, of Egr & Birkel, P.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

Eleazar Oceguera, Jr., appeals his convictions and sentences from the Colfax County District Court. Oceguera pled guilty to driving under the influence (DUI), charged as a fourth offense, a Class III felony, as well as operating a motor vehicle to avoid arrest, a Class IV felony. Oceguera alleges that the State presented evidence of only two valid prior DUI convictions at his enhancement and sentencing hearing. Oceguera asks that we vacate his sentence and remand the cause for sentencing on DUI, third offense. The State agrees that only two valid prior offenses were proved, but requests that we remand for a new enhancement hearing. We agree that the State failed to present sufficient evidence of three valid prior convictions for DUI, and we remand the cause with directions for a new enhancement and sentencing hearing.

BACKGROUND

On January 1, 2010, an officer of the Colfax County Sheriff's Department witnessed Oceguera driving on U.S. Highway 30 in Colfax County, Nebraska. Oceguera's vehicle traveled onto the shoulder of the road twice, then crossed the divided white line.

Oceguera refused to stop when the officer attempted to pull him over. Oceguera finally stopped his vehicle and fled on foot, at which point a second officer of the Colfax County Sheriff's Department arrived. The officers apprehended Oceguera shortly thereafter. Oceguera resisted arrest by trying to physically fight off the officers.

Once Oceguera was apprehended, one of the officers detected the odor of alcoholic beverages on Oceguera's breath and observed that Oceguera's eyes were bloodshot. The officer asked Oceguera to perform field sobriety test maneuvers, which showed impairment, and a preliminary breath test showed a result of .159. Oceguera refused a blood test and was taken into custody.

Oceguera was originally charged with one count of DUI, fifth offense, and with seven other offenses. But pursuant to a plea bargain, on February 10, 2010, Oceguera was charged with DUI, fourth offense, and operating a motor vehicle to avoid arrest. The district court found that Oceguera entered his pleas knowingly and voluntarily and found him guilty of both charges. Oceguera was given a 90-day evaluation prior to sentencing.

At the sentencing and enhancement hearing on May 26, 2010, the State offered three certified copies of prior convictions. The district court found that those three exhibits were valid prior convictions of DUI. In fact, the first exhibit was a certified prior conviction for "Operating [a] Motor Vehicle During 15 Year Revocation." Oceguera did not object to the use of that exhibit to enhance his sentence.

The district court sentenced Oceguera to 7 to 15 years' imprisonment for DUI, fourth offense, and 20 to 60 months' imprisonment for operating a motor vehicle to avoid arrest, with the sentences to be served concurrently. The court also ordered Oceguera's driver's license to be revoked for a period of 15 years, with the period of revocation to run concurrently with his sentence for DUI.

Oceguera appealed to the Nebraska Court of Appeals. Because he did not object to the use of the State's first exhibit before the district court, Oceguera was limited to arguing that the district court had committed plain error by using a

prior conviction for driving under revocation to enhance his sentence. The State agreed that the district court had erred, and it filed a motion for remand, which the Court of Appeals denied. The Court of Appeals then asked the State to address in its brief the application of *State v. Hense*[1] and *State v. Head*[2] to the present case. We subsequently moved the case to our docket.

ASSIGNMENTS OF ERROR

Oceguera assigns that the district court erred by (1) enhancing his DUI sentence to that of a fourth offense absent proof of three prior DUI convictions, (2) failing to sentence him to a term of probation, and (3) imposing an excessive sentence. Oceguera also argues that his trial counsel was ineffective for failing to exercise reasonable due diligence, which failure resulted in an improper plea bargain, plea, and enhancement.

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.[3]

ANALYSIS

The primary issue in this case is whether we should remand Oceguera's cause for sentencing on DUI, third offense, or whether we should remand for a new enhancement hearing. Because insufficient evidence existed to enhance Oceguera's conviction to a fourth offense, the State urges us to remand for another enhancement hearing in order to allow the State to present sufficient evidence of the third prior conviction. Oceguera argues that we should remand for sentencing for DUI, third offense.

As noted, the Court of Appeals asked the State to address the application of *Hense* and *Head* to the present case. Both

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

[2] *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[3] *Head, supra* note 2.

cases involved an appeal taken by a prosecuting attorney under Neb. Rev. Stat. §§ 29-2315.01 and 29-2316 (Reissue 2008). Section 29-2315.01 provides in part:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court.

Section 29-2316 states in part:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state.

In *Hense*, the defendant pled guilty to the felony charge of operating a motor vehicle while his license was revoked. The district court sentenced the defendant to 2 years' probation but did not order a further revocation of his license as part of the sentence. The State appealed, arguing that a 15-year revocation was mandatory under Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2008). We found that the further revocation was mandatory, but because of the limitations set forth in §§ 29-2315.01 and 29-2316, we determined that jeopardy had attached and the defendant could not be resentenced.[4]

In *Head*, the defendant pled guilty to DUI and the State produced evidence of four prior convictions. The district court rejected one of the prior convictions based on the defendant's argument that it was invalid. The State appealed. We held

[4] *Hense, supra* note 1.

that the defendant's argument was an impermissible collateral attack and that the prior conviction was valid for enhancement purposes. But we also found that § 29-2316 precluded a remand.[5]

The State argues that *Hense* and *Head* are inapplicable here because those two cases involved the State's taking exception to a judgment of conviction and sentence. We agree. Our analysis of *Hense* and *Head* rested in large part on our interpretation of §§ 29-2315.01 and 29-2316. Specifically, we found that in an appeal taken pursuant to § 29-2315.01, "'[t]he judgment of the court . . . shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy.'"[6] We went on to note that our interpretation of the language "placed legally in jeopardy" in § 29-2316 is more stringent than the Double Jeopardy Clause of the federal constitution, but we also stated that the analysis under § 29-2316 was not a double jeopardy analysis.[7]

[2,3] Even if Oceguera had raised a double jeopardy argument, which he did not, he would be unable to prevail. We recognized in *Head* that the Double Jeopardy Clause of the federal Constitution "is not offended if an appellate court remands a cause for resentencing."[8] The U.S. Supreme Court has said that a failure of proof at an enhancement hearing is not analogous to an acquittal and that such a failure of proof does not trigger double jeopardy protections.[9] Therefore, neither our prior case law, specifically *Hense* and *Head*, nor any federal constitutional law prohibits a new enhancement hearing.

Having concluded that double jeopardy concerns are not implicated here, we agree with the State that this case is more analogous to those habitual criminal cases where we have remanded for a new enhancement hearing. The State

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[5] *Head, supra* note 2.

[6] *Id.* at 357, 754 N.W.2d at 614.

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

[8] *Head, supra* note 2, 276 Neb. at 357, 754 N.W.2d at 614.

[9] *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998).

cites *State v. King* (*King III*),[10] the last in a series of appeals wherein the defendant's cause was repeatedly remanded for enhancement under the habitual criminal provision. The State also points to an unpublished case, *State v. Rose*,[11] involving three attempts at enhancing the defendant's sentence as a habitual criminal.

In *State v. King* (*King I*),[12] the State attempted to enhance the defendant's sentence under Neb. Rev. Stat. § 29-2221(2) (Reissue 1995). Section 29-2221(2) (Reissue 2008) requires that after a defendant is convicted of a felony, a prosecuting attorney seeking the habitual criminal enhancement must submit evidence of two or more prior felony convictions. The court is required to give notice to the defendant at least 3 days in advance of the enhancement hearing. If the court finds sufficient evidence of two prior convictions, the defendant is sentenced as a habitual criminal.

In *King I*, we found the State had not met its burden to show that the defendant had been convicted of two prior felonies and that he had been represented by counsel at all critical stages for those prior convictions. In *State v. King* (*King II*),[13] the State conceded that it had not presented sufficient evidence that the defendant had been represented by counsel during all stages of one prior conviction, and it asked this court to remand the cause for a new enhancement hearing. And, in *King III*, the district court had determined that the State failed to provide sufficient evidence of two prior convictions.[14] Unlike the circumstances of *Hense* and *Head*, wherein we determined that a change in sentence is prohibited under § 29-2316,[15] no such prohibition exists where a defendant appeals from an alleged deficiency in the prior convictions used for enhancement.

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[10] *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008).

[11] *State v. Rose*, No. A-05-707, 2006 Neb. App. LEXIS 175 (Neb. App. Oct. 3, 2006) (not designated for permanent publication).

[12] *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[13] *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

[14] *King III, supra* note 10.

[15] *Hense, supra* note 1; *Head, supra* note 2.

We note that the procedure used for a habitual criminal enhancement hearing is similar to the procedure for enhancement of a DUI sentence. Under Neb. Rev. Stat. § 60-6,197.02(2) (Reissue 2010), the prosecutor is required to present court-certified or authenticated copies of the defendant's prior convictions for DUI. The prior convictions are to be produced before sentencing, and the defendant is to be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

[4] We conclude that the use of prior convictions to enhance a sentence for DUI is similar to the use of prior convictions to enhance a sentence under our habitual criminal scheme, in which evidence of prior convictions must be introduced.[16] We have not hesitated to remand for a new enhancement hearing when the State has failed to produce sufficient evidence of the requisite prior convictions for habitual criminal purposes. The same procedure should be utilized here, because we are not bound by the restrictions of § 29-2315.01 or § 29-2316 in this case as we were in *Hense* and *Head*. Therefore, we vacate Oceguera's sentence for DUI, fourth offense, and remand the cause with directions for another enhancement hearing. Because we are remanding the cause, we need not reach the remainder of Oceguera's assignments of error.

CONCLUSION

We find that the district court erred when it used a prior conviction for driving under revocation to enhance Oceguera's sentence for DUI. But because the limitations of §§ 29-2315.01 and 29-2316, which were applicable in *Hense* and *Head*, are inapplicable here, we remand the cause with directions for another enhancement hearing.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[16] See *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

McLaughlin Freight Lines, Inc., an Iowa corporation, appellant, v. Marvin Gentrup, appellee.

798 N.W.2d 386

Filed June 10, 2011. No. S-10-637.

1. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Negligence: Presumptions.** The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.
5. **Negligence: Proof.** There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.
6. **Courts: Negligence: Proof.** The trial court should not weigh the evidence to determine whether res ipsa loquitur applies. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event.

Appeal from the District Court for Cuming County: Robert B. Ensz, Judge. Reversed and remanded for further proceedings.

Damien J. Wright, of Welch Law Firm, P.C., for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellee.

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

Gerrard, J.

This appeal rises out of a collision between a semi-trailer truck owned by McLaughlin Freight Lines, Inc. (McLaughlin),

and cattle owned by Marvin Gentrup. After the accident, McLaughlin filed this suit, seeking recovery for damages to its truck. McLaughlin's sole theory of recovery was premised on the doctrine of res ipsa loquitur. Gentrup moved for summary judgment. After a hearing, the district court determined that pursuant to Neb. Rev. Stat. § 25-21,274 (Reissue 2008), the fact that Gentrup's livestock escaped was not by itself sufficient to raise an inference of negligence against Gentrup, and sustained Gentrup's motion.

McLaughlin appeals. The primary issues presented on appeal are (1) whether the district court correctly applied the common-law principles of res ipsa loquitur and (2) whether § 25-21,274, which provides that the fact of escaped livestock is insufficient to raise an inference of negligence, supplants those common-law principles.

BACKGROUND

On the evening of May 13, 2009, Gentrup placed six cattle into a holding pen near his residence. Shortly after midnight on May 14, McLaughlin's truck collided with Gentrup's cattle on Nebraska State Highway 32. Though the driver of the truck was unharmed, the truck sustained damage. McLaughlin then filed this suit. Gentrup filed a motion for summary judgment, citing § 25-21,274 as support, and the following evidence was adduced at hearing:

The holding pen in which Gentrup had confined his cattle was 50 by 80 feet, constructed of steel, and secured to the ground by steel posts which were cemented into the ground. Gentrup testified that to secure the pen's gate, he wraps a chain around the gate once and places the chain into a latch. Gentrup stated that he then hangs the excess chain on the outside of the pen to prevent the cattle from disturbing it. Gentrup testified that on May 13, 2009, he put six cattle in the pen and secured the gate in his usual manner. Gentrup stated that though none of his cattle had ever "licked" or "rubbed [the chain] off" previously, he had heard of it happening to other ranchers and believed this was the most probable explanation for the escape of his livestock. Affidavits submitted by two cattle producers stated that the latching system used by Gentrup was common

in the industry. Gentrup stated that he had used the pen since 1993 without any cattle escaping.

Following the accident, Gentrup inspected the pen and found the fence intact, though the gate was open and all six cattle had escaped. Gentrup found two of his cattle dead on the highway; the other four were found alive in a nearby field.

At hearing, McLaughlin agreed that its sole theory of recovery was based upon res ipsa loquitur, as McLaughlin had no direct evidence of Gentrup's alleged negligence. The court noted that where the defendant presented uncontroverted evidence which indicated that there was no genuine issue of material fact as to whether the cattle would ordinarily escape through the gate in the absence of negligence, § 25-21,274 precluded McLaughlin's suit. McLaughlin appeals.

ASSIGNMENT OF ERROR

McLaughlin assigns, summarized and restated, that the district court erred when it granted summary judgment in Gentrup's favor.

STANDARD OF REVIEW

[1,2] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

ANALYSIS

McLaughlin's argument depends on the common-law tort doctrine of res ipsa loquitur. Gentrup's argument, on the other

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[1] *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010).

[2] *Id.*

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

hand, depends upon § 25-21,274. We begin by reviewing the common-law doctrine and our relevant case law. Then, we must determine the effect that § 25-21,274 has on that analysis.

Res Ipsa Loquitur

[4,5] The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed.[4] Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.[5] There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.[6] We have noted that, in res ipsa loquitur cases,

> "[t]he plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply."[7]

[6] When deciding whether res ipsa loquitur applies, a court must determine whether evidence exists from which reasonable

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[4] See *Roberts v. Weber & Sons,* Co., 248 Neb. 243, 533 N.W.2d 664 (1995).

[5] See *id.*

[6] See *id.*

[7] *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 880, 485 N.W.2d 170, 176 (1992) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39 (5th ed. 1984)).

persons can say that it is more likely than not that the three elements of res ipsa loquitur have been met. If such evidence is presented, then there exists an inference of negligence which presents a question of material fact, and summary judgment is improper.[8] The court should not weigh the evidence to determine whether res ipsa loquitur applies. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event.

In *Roberts v. Weber & Sons, Co.*,[9] we decided that res ipsa loquitur could apply in escaped livestock cases, and because of factual similarities that will become apparent, *Roberts* bears examining in some detail. The *Roberts* plaintiff's vehicle hit several of the defendant's cattle on a public highway at night, and filed suit, proceeding on a res ipsa loquitur theory. According to the defendant, the pen from which his cattle escaped was constructed of 2-inch steel pipe embedded in concrete with a 2-inch toprail and a "sucker rod" welded on the inside to the pen. The defendant claimed that his cattle pressed up against a gate, breaking the top hinge on the gate, which allowed the cattle to crawl over the gate and escape. The district court submitted the issue of res ipsa loquitur to the jury, which returned a verdict in favor of the plaintiff.

On appeal, we upheld the submission of a res ipsa loquitur instruction to the jury, holding that res ipsa loquitur could be applicable in escaped livestock cases depending on the factual situation presented. We noted that in order to determine whether res ipsa loquitur was applicable, the three elements of the doctrine must be examined. We then analyzed the first element, whether the occurrence was one which would not, in the ordinary course of things, happen in the absence of negligence. We determined that there was evidence that the construction of

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[8] See *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

[9] *Roberts v. Weber & Sons, Co., supra* note 4.

the pen was state of the art and that when the pen was inspected the day before the accident, everything was secure. Noting that cattle would not ordinarily escape such an enclosure in the absence of negligence, we held that the plaintiff satisfied his burden with regard to the first element.

The *Roberts* defendant conceded that the second element was met, so we next examined whether the plaintiff presented evidence to satisfy the third element, the absence of an explanation by the defendant as to how the cattle escaped. Though the defendant claimed that he had such an explanation—that the cattle escaped after breaking the top hinge on the gate—we noted that the plaintiff presented evidence regarding the condition of the gate, the bottom hinge, and the chain securing the gate from which the jury reasonably could have concluded that the defendant's explanation was not credible.

Though the instant case is similar to *Roberts*, the court here determined that Gentrup's fencing and gates were not shown to be a state-of-the-art system as discussed in *Roberts*, and determined that Gentrup satisfied his burden of showing that there was no genuine issue of material fact because he established that cattle *could* escape through the gate in the absence of negligence. But the record does not unambiguously support the court's determination.

The record reflects that Gentrup stated that he had used the cattle pen since 1993 without any cattle escaping, that he did not notice his cattle behaving out of the ordinary when the cattle were placed in the pen, that he did not notice any animals in the vicinity which may have spooked the cattle, and that his inspection of the pen after the accident revealed that the pen's fences were intact, though the chain to the gate was unlatched and the gate was open. And the fence at issue here is a steel cattle fence with "sucker rods," which is secured to the ground with posts embedded in cement, similar to the fence in *Roberts*. Affidavits also indicated that Gentrup's cattle pen was standard in the industry. From those facts, a reasonable jury could determine that cattle do not escape enclosures such as Gentrup's in the absence of negligence. And though the record also reflects that Gentrup stated that he secured and latched the chain to the gate and placed the excess chain outside of the fence so that

the cattle could not lick or rub it, ultimately, the question is one properly decided by a jury.

On appeal, we review the evidence in the light most favorable to the party against whom summary judgment was granted, giving that party the benefit of all reasonable inferences deducible.[10] As the party moving for summary judgment, it was Gentrup's burden to establish that there was no genuine issue of material fact with regard to one or more of the elements of res ipsa loquitur. Because evidence exists from which a reasonable person could determine that it was more likely than not that the escape of Gentrup's cattle was an occurrence which would not, in the ordinary course of things, happen in the absence of negligence, the trial court's order granting summary judgment in Gentrup's favor was incorrect—unless § 25-21,274 changes the principles of common-law res ipsa loquitur upon which that conclusion depends.

§ 25-21,274

Gentrup argues that § 25-21,274 prevents the application of res ipsa loquitur in this case. Section 25-21,274 reads, in relevant part:

> In any civil action brought by the owner, operator, or occupant of a motor vehicle or by his or her personal representative or assignee or by the owner of the livestock for damages resulting from collision of a motor vehicle with any domestic animal or animals on a public highway, the following shall apply:
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> . . . .
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> . . . [t]he fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant[.]

Gentrup argues that § 25-21,274 effectively abolished the application of res ipsa loquitur to escaped livestock cases where there is no other evidence of negligence. But here, McLaughlin has other evidence which, in conjunction with the fact that livestock escaped, raises an inference of negligence. Section 25-21,274 states that "escaped livestock is not, *by*

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[10] See *Perez v. Stern, supra* note 1.

itself, sufficient to raise an inference of negligence." (Emphasis supplied.) As described above, there is more evidence here than simply the fact of escaped livestock: There is evidence of the construction of the pen, its successful use over a number of years, and Gentrup's inspection of the pen following the escape. And, as described above, that evidence, together with the fact of the escape, *would* support an inference of negligence.

Our interpretation is consistent with the legislative history of § 25-21,274. After our decision in *Roberts*, 2001 Neb. Laws, L.B. 781, was introduced and was intended to codify the state of our res ipsa loquitur law after the *Roberts* decision in order to resolve some apparent confusion in the Legislature and among members of the public about what *Roberts* had actually meant. So, at the beginning of the floor debate for L.B. 781, the chairman of the Judiciary Committee explained:

> Now I want to be clear for the record . . . the committee amendments which become the bill, are essentially a codification of existing case law as decided by the Nebraska Supreme Court, and that is the intent. The amendment does not prohibit the principle or the application of the doctrine of res ipsa loquitur . . . but this does provide a codification and clarification responsive to the concerns of any number of Nebraskans, particularly those in the livestock industry. The committee amendment strikes a balance on the subject. The amendment does not reverse the Supreme Court decision, I say again. The committee amendment will provide guidance for courts . . . on these negligence claims and will specify that the plaintiff is to prove the plaintiff's claim under ordinary negligence law. Additionally, the amendment clarifies that escaped livestock in and of itself is not a . . . sufficient fact to raise an inference against the defendant.[11]

Section 25-21,274 therefore does not displace the three elements of res ipsa loquitur as discussed in *Roberts* and does not prevent a res ipsa loquitur jury instruction in appropriate circumstances. Section 25-21,274 simply clarifies (consistent with

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[11] Floor Debate, 97th Leg., 1st Sess. 4957-58 (Apr. 18, 2001).

Roberts) that the fact of escaped livestock is, standing alone, insufficient to raise an inference of negligence against Gentrup. However, as discussed, because McLaughlin presented other evidence in conjunction with the fact of escaped livestock, § 25-21,274 does not bar McLaughlin's claim.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

SYLVIA DEVESE, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN O'BRYANT, DECEASED, APPELLANT, V. TRANSGUARD INSURANCE COMPANY OF AMERICA, INC., A FOREIGN CORPORATION, APPELLEE.

798 N.W.2d 614

Filed June 17, 2011. No. S-10-250.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **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.
4. **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.
5. **Insurance: Contracts: Words and Phrases.** A condition subsequent is a provision that allows insurers to suspend or avoid coverage for a loss that occurs while a failure of the condition exists after the risk has attached.
6. **Insurance: Contracts.** Regardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, LEIGH ANN RETELSDORF, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Betty L. Egan and Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Walter E. Zink II and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Stephen O'Bryant was a commercial truckdriver. He was killed during the course of his employment as the result of a motor vehicle accident. The representative of his estate sought to recover under O'Bryant's occupational accident policy with Transguard Insurance Company of America, Inc. (Transguard). Transguard denied the claim on the ground that O'Bryant did not have a valid commercial driver's license (CDL) at the time of the accident, and the personal representative brought this action against Transguard for breach of contract and bad faith. The policy stated that no benefits would be paid for any "[i]njury, loss or claim caused or contributed to by or resulting from . . . any loss occurring while the Insured Person . . . is operating a Vehicle without a valid [CDL]." The trial court granted summary judgment in favor of Transguard, and the personal representative appeals. We find that Neb. Rev. Stat. § 44-358 (Reissue 2010) applies so as to require a showing of causation between the breach and the loss, despite the language of the policy.

BACKGROUND

On September 19, 2003, O'Bryant, a member of the National Association of Independent Truckers, LLC, entered into a group vehicle master policy with Transguard. The policy,

which was effective until July 1, 2004, included occupational accident coverage.

An insured person is defined under the policy as an independent contractor who is a member of the National Association of Independent Truckers in good standing and who is a certificate holder of the coverage. Under the "General Exclusions and Limitations" section, the policy states: "This Coverage Part does not cover and no benefits will be paid for any Injury, loss or claim caused or contributed to by or resulting from: . . . any loss occurring while the Insured Person, covered Co-Driver, Partner or Helper is operating a Vehicle without a valid [CDL]." On April 14, 2004, O'Bryant's CDL was suspended due to an unsatisfied judgment arising out of an automobile accident.

On June 30, 2004, O'Bryant was involved in a semi-truck collision and sustained injuries resulting in his death. It is undisputed that O'Bryant's CDL was still suspended at the time of the accident. O'Bryant's beneficiaries made a claim with Transguard for benefits under the occupational accident coverage of the policy. Transguard denied the claim, and Sylvia Devese, as the personal representative for O'Bryant's estate, brought this action against Transguard for breach of contract and bad faith.

Relying on the CDL provision quoted above, Transguard moved for summary judgment. Devese responded that Transguard was required to show causation between the absence of a valid CDL and the accident and that Transguard had failed to present any such evidence. The trial court granted summary judgment in favor of Transguard.

Devese appealed. On December 20, 2010, the Nebraska Court of Appeals summarily affirmed the judgment in favor of Transguard, citing *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.* (*Omaha Sky Divers*).[1] We granted Devese's petition for further review on the ground that *Omaha Sky*

[1] *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973).

Divers was recently overruled by *D & S Realty v. Markel Ins. Co.* (*D & S Realty*).[2]

ASSIGNMENTS OF ERROR

Devese asserts that the Court of Appeals erred in (1) affirming the order of the trial court granting Transguard's motion for summary judgment and (2) holding that *Omaha Sky Divers* was controlling.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence 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.[3]

[2] 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.[4]

[3] 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.[5]

ANALYSIS

In *Omaha Sky Divers*,[6] we addressed an aircraft insurance policy clause which stated, under the exclusions section, that the policy did not apply to any occurrence while the aircraft was operated by someone other than a pilot as set forth under the declarations section. The declarations section, in turn, specified that only pilots having a valid medical certificate will operate the aircraft. We held that the exclusion was clear

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[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[3] *Riggs v. Nickel, ante* p. 249, 796 N.W.2d 181 (2011).

[4] *Id.*

[5] *State v. Peterson*, 280 Neb. 641, 788 N.W.2d 560 (2010).

[6] *Omaha Sky Divers, supra* note 1.

and unambiguous. Despite the fact that the accident was not contributed to by any medical issues of the pilot, the insurance company was not required under the contract to show causation between the breach and the accident.

We further held that the exclusion did not constitute a warranty or a condition within the meaning of § 44-358. Section 44-358 states in part:

> 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.

Because § 44-358 did not apply to impose a causation requirement as a matter of law, the plain language of the policy controlled and we affirmed judgment in favor of the insurer.

At the hearing on its motion for summary judgment, Transguard argued that the language of the policy in this case was similar to the one discussed in *Omaha Sky Divers.* We agree. Both policies clearly make coverage dependent upon the existence of valid, specified licenses. We do not read the policies as requiring causation between those licenses and the loss.

But in *D & S Realty*,[7] we overruled *Omaha Sky Divers* to the extent that we had concluded § 44-358 did not apply so as to require, as a matter of law, a showing of causation between the absence of the required license and the accident. *D & S Realty* involved a property insurance contract which stated that the carrier would not pay for loss caused by water damage if the building was vacant for more than 60 consecutive days prior to the loss. Looking at the provision's purpose and function, we found that the relevant clause was a "condition," as contemplated by § 44-358, and not an "exclusion." Therefore, despite the plain language of the insurance contract, the insurer was required by § 44-358 to demonstrate a causal connection between the condition and the loss in order to avoid liability.

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[7] *D & S Realty, supra* note 2.

[4-6] We explained in *D & S Realty* that a condition subsequent is distinct from an exclusion. An exclusion is a limitation of liability, or a carving out of certain types of loss, to which the insurance coverage never applied.[8] A preloss condition subsequent, in contrast, is a provision that allows insurers to suspend or avoid coverage for a loss that occurs while a failure of the condition exists after the risk has attached.[9] We held that "increased hazard" clauses, such as the vacancy clause of the property insurance policy in issue in that case, were conditions subsequent and not exclusions. We said, "[R]egardless of an insurer's labeling, a clause that requires an insured to avoid an increased hazard is a condition subsequent for coverage."[10]

We said that *Omaha Sky Divers* 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."[11] We overruled *Omaha Sky Divers* to the extent that it could be read to hold that increased hazard conditions are exclusions.[12]

As explained, the policy provision in *Omaha Sky Divers* avoided coverage for an occurrence while the plane was operated by a pilot without a medical certification. And the risk of loss had clearly attached. Thus, as a postattachment, preloss condition (subsequent) to the insurer's obligation to pay benefits, the insured was required to maintain proof of a pilot's medical fitness.

Maintaining proof of an insured's qualification to perform a covered activity is the type of condition subsequent that § 44-358 was intended to address. The policy in *Omaha Sky Divers* did not provide that coverage would be voided for loss

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[8] See *id.*

[9] See *id.*

[10] *Id.* at 581, 789 N.W.2d at 13.

[11] *Id.* at 580, 789 N.W.2d at 13.

[12] *D & S Realty, supra* note 2.

caused by the plane's being operated by a medically unfit pilot. Clearly, the insurer could limit its coverage to loss occurring when the plane was operated by a qualified and medically fit pilot. That was the insured risk. But by requiring the insured to maintain *proof* of a pilot's medical fitness regardless of any causal connectedness to the loss, the insurer avoided liability for a failure of condition that "in no way contributed to the accident,"[13] which was caused by a brake failure.

As we explained in *D & S Realty*, § 44-358 was intended to limit an insurer's ability to avoid liability for a failure of preloss conditions subsequent that are "so broad that an insured's violation of them is not causally relevant to the loss."[14] Thus, we erred in *Omaha Sky Divers* by holding that the contribute-to-the-loss standard under § 44-358 did not apply to a preloss condition subsequent that required the insured to maintain proof of a pilot's medical fitness to fly a plane.

Similarly, the issue here involves the distinction between an insured's qualification to perform an activity and proof of the insured's qualification. "License" has more than one meaning. It can be authorization to do what would otherwise be illegal.[15] But a license is also proof that the holder is qualified to perform an activity.[16] It is the latter sense that is relevant here. The policy does not purport to avoid coverage if the insured violated a motor vehicle statute.

We agree that an insurer can require an insured to have a valid CDL as a condition for coverage, because the license functions as proof that the insured is qualified to operate commercial vehicles. But if licensure is a requisite to being a qualified insured, the insurer would have presumably required this proof as part of the application process. Further, if an

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[13] *Omaha Sky Divers, supra* note 1, 189 Neb. at 612, 204 N.W.2d at 163.

[14] *D & S Realty, supra* note 2, 280 Neb. at 580, 789 N.W.2d at 13.

[15] See *Syracuse Rur. Fire Dist. v. Pletan*, 254 Neb. 393, 577 N.W.2d 527 (1998).

[16] See, *Mulholland v DEC Int'l*, 432 Mich. 395, 443 N.W.2d 340 (1989); *Osborn v. Hertz Corp.*, 205 Cal. App. 3d 703, 252 Cal. Rptr. 613 (1988); *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P.2d 95, 211 Cal. Rptr. 703 (1985).

insured had falsely represented his or her qualifications in the application, then the insurer would have had reason to seek a revocation.

The availability of a revocation defense shows that the license provision was not intended to relieve Transguard of liability because an insured was never qualified to operate a commercial vehicle. Instead, the unlicensed driver provision operated to avoid liability for a loss, after the risk attached, if an insured was operating a commercial vehicle while he or she had failed to *maintain* a valid CDL. An insurance provision that conditions benefits based solely on whether the insured has failed to comply with a licensing or certification requirement seeks to broadly control a potential cause of loss—an unqualified insured.[17]

We conclude in this case that Transguard sought to avoid the risk of loss of an unqualified driver. As applied to the insured, the license requirement functions as a condition for coverage that the insured maintain proof of his or her continuing qualification. Because the provision imposes conditions for coverage on the insured's conduct after the risk has attached, it is a preloss condition subsequent. As we explained in *D & S Realty*, there is no meaningful difference between a policy that excludes coverage unless specified conditions are met and one that provides coverage if specified conditions are met.[18]

But the lack of the license, in itself, did not show that O'Bryant was unqualified to operate a commercial vehicle. Transguard's failure of a condition defense illustrates that the condition was broader than necessary to protect Transguard from assuming liability for the risk that O'Bryant was unqualified to operate commercial vehicles.[19] A significant difference exists between a suspension of a license for failure to pay a judgment and a revocation or refusal of a license for reasons

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[17] 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).

[18] See, *D & S Realty, supra* note 2; Works, *supra* note 17.

[19] See Works, *supra* note 17.

that show the licensee is unfit to drive a commercial vehicle. By requiring O'Bryant to maintain his CDL as a condition for coverage without any requirement that the loss occurred because the insured was unqualified to operate a commercial vehicle, Transguard could avoid liability for technical reasons. That is, it could avoid liability if O'Bryant's license lapsed or was suspended for reasons that were unrelated to his qualifications.

Because of the condition's excessive breadth and its failure to require any causal connectedness to the loss, it is the type of condition to which § 44-358 was intended to apply. Thus, Transguard could not avoid liability unless it showed that O'Bryant's breach of the condition contributed to the loss.

We also disagree with Transguard that it has demonstrated a causal link between the breach and the loss because it was undisputed that O'Bryant was driving when he was not supposed to. The mere act of driving was not a breach of the condition. The breach was failing to maintain a valid CDL. Under § 44-358, Transguard was required to demonstrate a causal connection between the breach and the loss.

Transguard did not present any evidence as to the cause of the accident or O'Bryant's abilities as a commercial driver. Therefore, viewing the evidence in the light most favorable to Devese, it was inappropriate to issue summary judgment in favor of Transguard. We reverse the decision of the Court of Appeals summarily affirming the trial court's order of summary judgment and remand the cause to the Court of Appeals with directions to remand the cause to the trial court for further proceedings consistent with this opinion.

CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the cause with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

American Central City, Inc., a Nebraska corporation, appellant, v. Joint Antelope Valley Authority (JAVA), a joint administrative entity, and City of Lincoln, Nebraska, a municipal corporation, appellees.

American Central City, Inc., a Nebraska corporation, appellant, v. Joint Antelope Valley Authority (JAVA), a joint administrative entity, appellee.

807 N.W.2d 170

Filed June 17, 2011. Nos. S-10-646, S-10-647.

1. **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.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **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.
4. **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.
5. **Zoning.** The mere issuance of a permit to use land gives no vested rights to the permittee, nor does he or she acquire a property right in the permit.
6. **Contracts: Specific Performance: Fraud.** An oral contract to buy land falls under the statute of frauds. Despite the statute of frauds, an oral contract may be specifically enforced in cases of part performance.
7. **Contracts: Specific Performance: Real Estate: Proof.** A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.
8. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.

9. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.
10. **Eminent Domain: Witnesses.** An owner who is shown to be familiar with the value of his or her land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation. Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless such owner possesses, as must any other witness as to value, an acquaintance with the property and is informed as to the state of the market.
11. **Damages: Proof.** A plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.
12. **Eminent Domain: Real Estate: Valuation.** There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.
13. **Eminent Domain: Evidence: Damages.** Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. Such land must be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action, especially when the price paid depends upon the market or going value rather than other considerations.
14. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
15. **Constitutional Law: Due Process: Property.** Under Neb. Const. art. I, § 3, the state cannot deprive any person of life, liberty, or property without due process of law. The protections of this procedural due process right attach when there has been a deprivation of a significant property interest.
16. **Constitutional Law: Due Process: Property: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the case.
17. **Motions to Dismiss: Directed Verdict.** A motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.
18. **Motions to Dismiss.** A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.

19. **Trial: Evidence: Directed Verdict: Motions to Dismiss: Words and Phrases.** A "prima facie case" means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition.

Appeals from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Barbara J. Morley for appellant.

Rodney Confer, Lincoln City Attorney, and Christoper J. Connolly for appellees.

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

HEAVICAN, C.J.

I. INTRODUCTION

American Central City, Inc. (ACC), appeals from two separate decisions of the Lancaster County District Court. The cases were consolidated before this court for oral argument and disposition, and both cases involve complaints regarding the condemnation of three properties located in Lincoln, Nebraska. In case No. S-10-646, a civil suit for damages apart from the condemnation award, ACC claims that it had compensable property interests for which it was not paid when the Joint Antelope Valley Authority (JAVA) and the City of Lincoln (the City) took its land through condemnation. In case No. S-10-647, an appeal from the condemnation award, ACC alleges that it did not receive adequate compensation for its land. We affirm the decision of the district court granting JAVA's motion for summary judgment in the civil suit and granting JAVA's motion to dismiss in ACC's appeal from the condemnation award.

II. FACTS

Edward H. Patterson is the owner and sole shareholder of ACC, and for simplicity, we will hereinafter refer to the appellant as "Patterson" rather than "ACC." The current cases involve three properties in Lincoln owned by Patterson: 2041 and 2047 S Street and 2100 Q Street. In addition, Patterson claims that

he held a compensable property interest in properties owned by Edward and Dorothy Schwartzkopf (Schwartzkopf properties), which properties were located in the same neighborhood. The properties on Q and S Streets and the Schwartzkopf properties are all near the city campus of the University of Nebraska-Lincoln (UNL), between 19th and 22d Streets east and west, and between Q and S Streets north and south. Patterson's properties and the Schwartzkopf properties were eventually condemned as part of the Antelope Valley project. The project was designed and implemented to provide Lincoln with flood control, transportation improvement, and community revitalization. The two cases before us originally involved three separate cases filed in the district court, the first of which we discuss only briefly to give the reader a complete procedural history of the proceedings in the district court.

1. Case No. CI04-4604: Injunction

Patterson and other parties filed an action for an injunction in the Lancaster County District Court under case No. CI04-4604 in December 2004. They requested an injunction against JAVA and the City to prevent the condemnation of their properties, but it was denied. In that same case, the parties also claimed that their properties were taken for an improper nonpublic purpose and that there was no proper neighborhood redevelopment plan. This action was earlier consolidated with the two cases currently on appeal, but it has not been appealed and is not now before us.

2. Case No. CI05-3468: Condemnation Award Action

After the injunction was denied, JAVA filed a condemnation petition with the Lancaster County Court seeking to acquire Patterson's properties on Q and S Streets. The Lancaster County Board of Appraisers returned to Patterson an award totaling $128,750 for all the properties. Patterson appealed to the district court from that award, claiming inaccurate valuation, failure to negotiate in good faith on the part of JAVA, excessive taking, and taking for an improper purpose. Patterson claimed damages of $350,000. All but two claims in this action were disposed of through an "Order on Partial Summary

Judgment" filed November 30, 2009. A trial was held on the remaining claims. At the close of Patterson's case, JAVA made a motion to dismiss, which the district court subsequently granted. Patterson appealed, and this case is before us now as case No. S-10-647.

3. Case No. CI08-1164: Civil Suit for Damages

In March 2008, Patterson also filed a third action to recover damages arising out of the condemnation proceedings. Patterson made claims against JAVA and the City for "inverse condemnation," violation of substantive due process rights, and recoupment of costs associated with the renovation of Patterson's properties on Q and S Streets. In the same suit, Patterson also claimed a property interest in the Schwartzkopf properties and in a building permit he claims was denied. JAVA filed a motion for summary judgment, which was granted. Patterson appealed, and this case is before us now as case No. S-10-646.

4. Further Proceedings and Appeals

All three cases were consolidated after the civil suit was filed. The district court's "Order on Partial Summary Judgment" was entered on November 30, 2009, disposing of all claims in the injunction action, all claims in the civil suit, and all but two claims in the condemnation award action.

A bench trial was held on the remaining issues in the condemnation award action on March 18 and 19, 2010. After Patterson rested his case, JAVA made a motion to dismiss. The district court later granted that motion and found for JAVA. Patterson appealed. Other facts pertaining to the two cases will be discussed as needed in the analysis section.

III. ASSIGNMENTS OF ERROR

In the civil suit for damages, Patterson assigns, consolidated and restated, that the district court erred in (1) granting JAVA's motion for summary judgment, (2) finding that Patterson did not have a compensable property interest in a building permit, (3) finding that Patterson did not have a property interest in his contract with the Schwartzkopfs, and (4) finding that there was no "inverse condemnation" or condemnation blight.

In the condemnation award action, Patterson assigns that the district court erred in (1) not granting Patterson the right to a full trial, (2) not permitting Patterson to testify to the "Highest and Best Use" of the properties taken, (3) not allowing Patterson to value his land using comparable sales of properties, (4) not allowing Patterson to use the City Web site to show aerial photographs, (5) not allowing Patterson to value the removable structures on the condemned land as an element of fair market value, and (6) not permitting Patterson to proffer evidence of "value-depressing actions" by JAVA and the City to decrease the true market value of his land.

IV. STANDARD OF REVIEW

[1] 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.[1]

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[2]

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[3]

V. ANALYSIS

1. Case No. S-10-646: Civil Suit for Damages

In the appeal from the dismissal of his civil suit, Patterson assigns that he had a property interest in a building permit that the City denied, that he had a property interest in the contract

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[1] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[2] *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[3] *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

to buy the Schwartzkopf properties, and that JAVA engaged in "inverse condemnation."

(a) Patterson Did Not Have Property Interest in Building Permit

Patterson first argues that he had a property interest in a building permit he sought to obtain. He claims that he spent considerable time and money designing a building that would sit on the land he owned as well as on the Schwartzkopf properties. Patterson also claims that city officials informed him he could not build underground parking or place underground telecommunications in a flood plain and that hence, it would be futile to apply for a building permit for the Schwartzkopf properties. Patterson argues that because city officials told him it would be futile to apply for a building permit, his substantive due process rights were affected. He also argues that because of the allegedly false statement city officials made regarding building underground parking, he could not fulfill the contract with the Schwartzkopfs, and that he was prevented from going forward with his plans. Patterson also claims that if a building plan is code compliant, the City cannot refuse to issue a permit.

[4] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4] The record establishes that Patterson had a building design that both Patterson and his architect believed met the building codes. Patterson spoke to city officials who informed him that he could not build underground parking or place telecommunications in a flood plain, but according to Patterson, that information was in error. Without a building permit, Patterson could not continue with his plans to acquire the Schwartzkopf properties.

[5] The record is devoid of any evidence that Patterson ever *applied* for a building permit, however. We have stated before that "[t]he mere issuance of a permit gives no vested rights to

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[4] *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008).

the permittee nor does he [or she] acquire a property right in the permit."[5] If a person has no property interest in a building permit that has been granted, he or she cannot claim a property interest in a permit that was never granted and for which he or she never applied. Patterson's first assignment of error is without merit.

(b) Patterson Did Not Have Property Interest in Schwartzkopf Properties

Patterson also claims that he had a compensable property interest in the contract he had with the Schwartzkopfs to buy their properties. The record reflects that Patterson entered into a contract to purchase the Schwartzkopf properties in May 1995, contingent upon Patterson's obtaining a building permit. After Patterson failed to obtain a permit, all parties signed a release excusing them from performance on the contract. In 2004, the Schwartzkopf properties were sold to JAVA. Patterson claimed that he had a continuing oral agreement to buy the Schwartzkopf properties after the release was signed in 1995.

The district court found that there was no compensable interest in the contract because it would not be enforceable in a court of law. Neb. Rev. Stat. § 36-103 (Reissue 2008), Nebraska's statute of frauds applicable to the sale of an interest in land, provides:

> No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

[6,7] An oral contract to buy land falls under the statute of frauds. Despite the statute of frauds, however, an oral contract may be specifically enforced in cases of part performance.[6]

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[5] *County of Saunders v. Moore*, 182 Neb. 377, 383, 155 N.W.2d 317, 321 (1967).

[6] *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993).

A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.[7]

By Patterson's account, he invested considerable time and expense in designing the structure that he wanted to build on the Schwartzkopf properties. He argues that this expense constituted part performance on the contract and that therefore, the oral contract falls within the exception to the statute of frauds.[8] Patterson's written contract to buy the Schwartzkopf properties was contingent upon obtaining the building permit, but that written contract ended when both parties signed the release excusing performance. Patterson's alleged oral contract gave him the right to buy the properties if he could procure a building permit. But, as the party who was to benefit from the contractual right to buy the Schwartzkopf properties, Patterson cannot exercise that right against JAVA or the City.[9] Any contractual right Patterson may have had would be against the Schwartzkopfs. Even assuming that Patterson had a suit in equity for specific enforcement against the Schwartzkopfs, he cannot claim a property interest against JAVA and the City for properties he did not own. Patterson's second assignment of error in this case is without merit.

(c) There Was No Evidence of Inverse Condemnation

Patterson's final assignment of error in this case is that JAVA engaged in inverse condemnation. "Inverse condemnation" is

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[7] *Reifenrath v. Hansen*, 190 Neb. 58, 206 N.W.2d 42 (1973).

[8] See *Campbell v. Kewanee Finance Co.*, 133 Neb. 887, 277 N.W. 593 (1938).

[9] See *Burnison v. Johnston*, 277 Neb. 622, 764 N.W.2d 96 (2009).

shorthand for a governmental taking of a landowner's property without the benefit of condemnation proceedings.[10] Patterson's claim rests partially on the recognition that he had a property interest in the Schwartzkopf properties and in a building permit. As noted above, however, Patterson has failed to state a claim in those respects.

Patterson also claims that JAVA prevented him from putting his S Street properties to their "highest and best use" between the time he purchased them in 1995 and when they were condemned.[11] He claims that that activity also constituted inverse condemnation. Patterson makes the allegation that JAVA, the City, and UNL actively prevented him from developing the three properties on Q and S Streets. Patterson's claim rests on his assertions that JAVA and the City acted in concert to prevent him from obtaining a building permit, thus preventing him from purchasing the Schwartzkopf properties, which in turn prevented him from developing his properties on Q and S Streets.

In support of this argument, Patterson presented the "Radial Reuse Malone Study Area Redevelopment Plan," which he claims demonstrates that UNL had plans to use that area for its own expansion and development. The redevelopment plan is dated 1989, and the plan covers the "sixteen blocks in the western portion of the Malone Neighborhood, bounded by 19th Street on the west, 23rd Street on the east, Vine Street on the north, and Q Street on the south." Patterson claims the map attached to the redevelopment study showed that his land had been "*de facto* deeded over to UNL."[12] The record is devoid of any evidence that UNL exercised control over these properties, however, or that UNL put these properties to use. Patterson has not alleged sufficient facts to establish a genuine issue of material fact as to whether JAVA and the City prevented him from developing the land. Patterson's final assignment of error is without merit.

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[10] *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998).

[11] Brief for appellant in case No. S-10-646 at 19.

[12] *Id.* at 20.

2. Case No. S-10-647: Condemnation Award Action

In his second appeal, Patterson alleges six assignments of error. Generally speaking, Patterson argues that the three lots were inaccurately valued and that he was prevented from offering evidence to demonstrate that fact. Patterson also claims that he was not given a "full trial," but in fact the trial court granted JAVA's motion to dismiss at the close of Patterson's case. JAVA claims that by not assigning as error the district court's decision to grant the motion to dismiss, Patterson has admitted that he did not establish a prima facie case. However, we read Patterson's claim broadly enough to encompass an argument that the district court erred in granting the motion to dismiss.

(a) Trial Court Did Not Err When It Excluded Patterson's Testimony as to Highest and Best Use of His Land

We first address Patterson's claim that the trial court erred by not allowing him to testify as an *expert* as to the highest and best use of his properties. Essentially, Patterson argues that he was an expert by virtue of his experience and education and that he had originally purchased the land with the intention of developing it. Patterson argues that he should have been allowed to give expert testimony that the highest and best use of his properties was for development purposes and that the land should be considered as a whole rather than as individual parcels.

[8,9] It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.[13] A trial court's ruling in receiving or excluding an expert's opinion which is otherwise relevant will be reversed only when there has been an abuse of discretion.[14]

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[13] *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

[14] *Id.*

[10] An owner who is shown to be familiar with the value of his or her land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation.[15] Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless such owner possesses, as must any other witness as to value, an acquaintance with the property and is informed as to the state of the market.[16]

The record demonstrates that the trial court allowed Patterson to testify extensively as to his intentions for the properties, and there is no question that Patterson had hoped to assemble land for development purposes. The trial court also allowed Patterson to testify extensively as to the remodeling and restoration he had done. But the trial court determined that Patterson was testifying as an owner, not as an expert.

Although Patterson did have some experience in buying and developing land, he did not establish sufficient foundation to testify as an expert. Patterson stated that he had a master's degree in finance and that he had served with various neighborhood improvement organizations. Patterson further testified that he had spent a lot of time reading case law, but that he was not a licensed real estate broker or appraiser.

The trial court did not abuse its discretion by allowing Patterson to testify as an owner but not as an expert. Patterson did not offer any evidence other than his own plans for the properties to support his contention that the properties should be considered as a whole rather than as individual parcels. Patterson's first assignment of error is without merit.

(b) Trial Court Did Not Err by Not Allowing Patterson to Value His Land Using Comparable Sales of Properties

Patterson also argues that the trial court erred when it refused to allow him to present testimony as to comparable

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[15] See *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

[16] See *id.*

sales in the area. During the trial, Patterson introduced an exhibit entitled "Liberty Village Land Assembly" in order to testify that the highest and best use would be comparable to an earlier neighborhood redevelopment project. JAVA objected on the basis of foundation. Patterson testified that he was familiar with Liberty Village because he lived across the street from it and that he had estimated the demolition and construction costs for Liberty Village. Other than his estimates and speculation as to the worth of Liberty Village, Patterson could offer no other evidence of comparable sales.

[11,12] It is fundamental that a plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.[17] There are three generally accepted approaches used for the purpose of valuing real property in eminent domain cases: (1) the market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties; (2) the income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income; and (3) the replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation. Each of these approaches is but a method of analyzing data to arrive at the fair market value of the real property as a whole.[18]

[13] When using the comparable sales method, it is well settled that evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned. However, it is equally clear that such land must be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action, especially when the

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[17] *Liberty Dev. Corp., supra* note 13.

[18] *Id.*

price paid depends upon the market or going value rather than other considerations.[19]

We dealt with this issue in *Patterson v. City of Lincoln*,[20] which involved the condemnation of other properties owned by Patterson. We addressed Patterson's argument that an alternate means of valuation should be used. In that case, we said:

> We have stated that in eminent domain proceedings, where the sales prices of other tracts are offered as evidence of market value of the tract taken, a wide discretion must be granted the trial judge in determining the admissibility of the evidence of the other sales. The evidence should not be admitted where there is a marked difference in the situations of the properties. [Citations omitted.] Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.[21]

Patterson did not offer any evidence of comparable land sales, other than his speculations as to the Liberty Village redevelopment project. And, as the district court noted, Liberty Village was a multifamily, multibuilding complex, while Patterson's properties were individual parcels suited for single-family use.

The district court also noted that Patterson testified extensively as to what he had spent in restoration and remodeling. The district court noted that an estimation of expenses for renovations is not one of the accepted methods of valuation in condemnation proceedings. Moreover, other than Patterson's testimony wherein he *speculated* as to how much he had spent

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[19] See *Langfeld, supra* note 15.

[20] *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996).

[21] *Id.* at 387-88, 550 N.W.2d at 654.

in restoration, he presented no evidence as to how much had actually been spent. This assignment of error is also without merit.

(c) Trial Court Did Not Err When It Refused to Admit Aerial Photographs

[14] Patterson next claims that the district court erred when it refused to admit aerial photographs from the "interactive GIS property database website maintained by the [C]ity."[22] During the trial, Patterson attempted to use a "GIS map" to demonstrate the location of the S Street properties, apparently to demonstrate the relative location of Liberty Village and the superior location of Patterson's properties. The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.[23]

The trial court refused to admit the "GIS map" because it could not be printed from the Internet and copies could not be created and preserved for the purposes of appeal. Patterson did not present copies of the images at trial, nor did he lay foundation for when the photographs were taken. JAVA points out that the "GIS map" does not meet the requirements for a self-authenticating document under Neb. Rev. Stat. § 27-902 (Reissue 2008). The trial court did not abuse its discretion by refusing to admit the maps. This assignment of error is also without merit.

(d) Trial Court Did Not Err When It Refused to Allow Patterson to Value Removable Structures on Condemned Land as Element of Fair Market Value

Patterson's fourth assignment of error alleges that the trial court erred in excluding his testimony as an expert of the value of the structures that he claimed were removable. As discussed above, Patterson was allowed to testify as an owner, but not as an expert, and Patterson introduced no evidence of

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[22] Brief for appellant in case No. S-10-647 at 30.

[23] *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

the costs of restoration and remodeling, other than his estimate as to the money spent on materials. The district court noted that Patterson

> offer[ed] no other method by which the court could derive at the value of the real estate (whether as raw ground or as improved property). Certainly the lots at 2041 'S' Street and 2047 'S' Street had value and certainly there had been significant improvement to those properties but the court has no evidence that would lead it to any sort of formulation allowed under the law. [Patterson] offered no expert opinion as to value.

Patterson did not present evidence as to what the value of those structures would be, had he removed them. And, other than estimates as to the cost of the materials used in renovation, Patterson offered no evidence as to what intrinsic value the structures might have. This assignment of error is also without merit.

(e) Trial Court Did Not Err When It Refused to Allow Patterson to Proffer Evidence of Value-Depressing Actions by JAVA and the City to Decrease True Market Value of His Land

Patterson next argues that JAVA and the City engaged in value-depressing actions that resulted in decreased value for his properties. He argues that those value-depressing actions should be considered as an element of damages as well as a factor in determining the date of the taking. Patterson argues that there was a significant amount of delay between the announcement of the Antelope Valley project and the condemnation of his land and that this delay resulted in his being unable to put his land to its highest and best use.

Other than his general allegations of a conspiracy on the part of JAVA, the City, and UNL, Patterson produced no evidence of value-depressing actions. He called no witnesses from JAVA or the City to testify as to when the final plan for the Antelope Valley project was put into place, and Patterson himself testified that he was aware that the plans had changed many times. Patterson made no offer of proof as to what exactly those "value-depressing actions" might be. Even accepting the truth

of all relevant evidence and construing the evidence in a light most favorable to Patterson, he still failed to establish a prima facie case that his properties were undervalued or that JAVA engaged in value-depressing actions. Patterson's final assignment of error is therefore without merit.

(f) Patterson Was Not Deprived of His Due Process Right to Full Trial

Patterson finally argues that by sustaining JAVA's motion to dismiss, the district court denied him "the opportunity to hear and cross examine JAVA's appraiser or offer rebuttal testimony."[24] Patterson claims that this is a denial of his due process right to a full trial. Patterson seems to be arguing that once he had presented his case, JAVA was required to go forward and present its case; but he presented no legal authority for this claim.

[15,16] Under Neb. Const. art. I, § 3, the state cannot deprive any person of life, liberty, or property without due process of law. The protections of this procedural due process right attach when there has been a deprivation of a significant property interest.[25] If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the case.[26] Patterson received notice and an opportunity to be heard, but he failed to present sufficient evidence to overcome JAVA's motion to dismiss.

[17-19] A motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.[27] A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.[28] A "prima

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[24] Brief for appellant in case No. S-10-647 at 18-19.

[25] *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999).

[26] *Id.*

[27] See *Brown v. Slack*, 159 Neb. 142, 65 N.W.2d 382 (1954).

[28] See *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991).

facie case" means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition.[29]

As discussed above, Patterson's evidence consisted mostly of speculation and accusations that JAVA and the City had conspired against him. The only evidence adduced at trial was Patterson's testimony that he had been remodeling the properties. Patterson did not offer any other evidence that he had developed the land, nor did he present testimony from another appraiser. Therefore, he could not establish a prima facie case that his land had been undervalued in the condemnation award. Since Patterson did not present sufficient evidence to establish a prima facie case, JAVA had no obligation to go forward and present evidence. The district court did not err in granting JAVA's motion to dismiss.

VI. CONCLUSION

In his appeal of the civil suit for damages, Patterson did not present sufficient evidence to present a genuine issue of material fact. In the appeal from the condemnation award, Patterson did not offer sufficient evidence to establish a prima facie case. The district court did not err in granting a summary judgment in the civil suit or the motion to dismiss in the condemnation award action. We therefore affirm the decision of the district court.

AFFIRMED.

WRIGHT, J., not participating.

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[29] *Id.*

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

798 N.W.2d 607

Filed June 17, 2011. No. S-10-953.

1. **Administrative Law: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Jurisdiction: Judgments.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
3. **Statutes.** The meaning and interpretation of a statute present a question of law.
4. **Juvenile Courts: Child Custody: Appeal and Error.** When a juvenile court has given the department of Health and Human Services custody of a juvenile, Neb. Rev. Stat. § 43-285(5) (Reissue 2008) authorizes the department to seek review of a juvenile court order denying it requested relief.
5. **Juvenile Courts: Jurisdiction: Statutes.** Juvenile courts are courts of limited and special jurisdiction and have authority to act only if a statute confers such authority on them.
6. **Juvenile Courts: Jurisdiction: Child Custody.** A juvenile court's jurisdiction over an adjudicated juvenile continues even when it commits a juvenile to the Office of Juvenile Services. So for at least some purposes, the court has jurisdiction over the juvenile from the time it adjudicates the juvenile until the Office of Juvenile Services discharges the juvenile.
7. **Juvenile Courts: Final Orders.** When a court adjudicates a juvenile under both subsection (2) and subsection (3)(b) of Neb. Rev. Stat. § 43-247 (Reissue 2008) and commits the juvenile to the Office of Juvenile Services with a placement at a youth rehabilitation and treatment center, it has determined that the subsection (2) adjudication will control the juvenile's disposition.
8. ____: ____. When a juvenile court decides to place a juvenile adjudicated under Neb. Rev. Stat. § 43-247(2) and (3)(b) (Reissue 2008) at a youth rehabilitation and treatment center, the placement decision controls and Neb. Rev. Stat. § 43-278 (Reissue 2008) does not authorize the court to conduct review hearings.
9. **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 or proceeding before the court and the particular question which it assumes to determine.
10. **Jurisdiction.** The question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases. It also involves determining whether a court has authority to address a particular question that it assumes to decide or to grant the particular relief requested.
11. **Juvenile Courts: Jurisdiction.** A juvenile court lacks jurisdiction to conduct or order review hearings to monitor a juvenile's progress while the juvenile is placed at a youth rehabilitation and treatment center.

12. **Judgments: Jurisdiction.** A court action taken without subject matter jurisdiction is void.
13. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on this court.
14. **Judgments: Jurisdiction: Appeal and Error.** An appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.

Appeal from the County Court for Cheyenne County: RANDIN ROLAND, Judge. Vacated and dismissed.

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

Paul B. Schaub, Cheyenne County Attorney, for appellee State of Nebraska.

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

CONNOLLY, J.

In yet another ongoing turf battle between the juvenile courts and the Department of Health and Human Services (Department), a juvenile court determined that it had authority to conduct review hearings for a juvenile placed at a youth rehabilitation and treatment center (YRTC). The Department argues that the juvenile court did not have statutory authority to order the review hearings. After examining the juvenile code's statutory maze, we conclude that a juvenile court lacks subject matter jurisdiction to conduct review hearings for such juveniles. Because the order is void, we vacate the order and dismiss the Department's appeal.

BACKGROUND

In March 2010, the county court for Cheyenne County, sitting as juvenile court, adjudicated Trey H. under Neb. Rev. Stat. § 43-247(2) and (3)(b) (Reissue 2008). The original disposition committed him to the custody of the Office of Juvenile Services (OJS) with placement in his parental home. But in June, after Trey violated his treatment plan, the court changed

his placement to a YRTC. OJS operates the YRTC.[1] OJS is a section of the Department's Division of Children and Family Services.[2] A court's commitment of a juvenile to OJS is a commitment to the Department's care and custody "for the purpose of obtaining health care and treatment services."[3]

In September 2010, the court conducted a review hearing with Trey appearing telephonically. The Department argued that the court lacked jurisdiction to conduct the hearing. The court agreed that under *In re Interest of Jorge O.*,[4] it could not order Trey's release or a different disposition. But it concluded that it could monitor Trey's progress and determine what his attorney and guardian ad litem knew about Trey's progress at the YRTC. It concluded by scheduling another review hearing for a date 3 months later.

ASSIGNMENT OF ERROR

The Department assigns that the juvenile court erred in ordering a review hearing for a juvenile residing at the YRTC.

STANDARD OF REVIEW

[1-3] We independently review questions of law decided by a lower court.[5] A jurisdictional issue that does not involve a factual dispute presents a question of law.[6] The meaning and interpretation of a statute present a question of law.[7]

ANALYSIS

[4] When a juvenile court has given the Department custody of a juvenile, Neb. Rev. Stat. § 43-285(5) (Reissue 2008) authorizes the Department to seek review of a juvenile court

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[1] See Neb. Rev. Stat. § 43-404 (Reissue 2008).

[2] See Neb. Rev. Stat. §§ 81-3113 and 81-3116(2) (Reissue 2008).

[3] Neb. Rev. Stat. § 43-408(1) (Reissue 2008).

[4] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[5] See *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000).

[6] *Middle Niobrara NRD v. Department of Nat. Resources, ante* p. 634, 799 N.W.2d 305 (2011).

[7] *Id.*

order denying it requested relief.[8] The Department argues that § 43-408(2) precludes review hearings for these juveniles.

The county attorney views it differently. It contends that (1) juvenile courts have jurisdiction to hold review hearings every 6 months for juveniles adjudicated under § 43-247(3)(b) and (2) the court can conduct review hearings for juveniles committed to a YRTC even if the juvenile is not adjudicated under subsection (3).

[5] Juvenile courts are courts of limited and special jurisdiction and have authority to act only if a statute confers such authority on them.[9] The Nebraska Constitution explicitly permits the Legislature to define a juvenile court's jurisdiction and its powers.[10] The Legislature, however, has not been consistent. It has sometimes sent mixed messages by withholding the statutory authority to act in areas for which it has conferred jurisdiction on juvenile courts.

[6] Section 43-247 gives a juvenile court continuing jurisdiction over an adjudicated juvenile:

> 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.

A juvenile court's jurisdiction over an adjudicated juvenile continues even when it commits a juvenile to OJS. Section 43-408(2) provides that "[t]he court shall continue to maintain jurisdiction over any juvenile committed to [OJS] until such time that the juvenile is discharged from [OJS]." So for at least some purposes, the court has jurisdiction over the juvenile from the time it adjudicates the juvenile until OJS discharges the juvenile.

But despite this grant of jurisdiction, the Legislature has limited the court's authority to review the progress of a juvenile

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[8] See *In re Interest of C.G. and G.G.T.*, 221 Neb. 409, 377 N.W.2d 529 (1985).

[9] See *In re Interest of Jorge O., supra* note 4.

[10] See Neb. Const. art. V, § 27.

committed to OJS when the court approves placement of the juvenile at a YRTC. On further examining § 43-408(2), the next sentence states, "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*]." (Emphasis supplied.) Section 43-408(2) also gives a court authority to determine that an out-of-home placement is not in the juvenile's best interests. But the court is handcuffed if it has placed the juvenile at a YRTC. In that circumstance, it cannot conduct review hearings to determine if it is in the best interests of the juvenile to be placed at a YRTC.

Recently, we addressed a juvenile court's lack of authority to conduct review hearings in *In re Interest of Jorge O.*[11] That case involved two consolidated appeals. In one case, the court sustained OJS' request to transfer a juvenile, who was already committed to OJS' custody, to a YRTC. In the other, the court committed the juvenile to OJS for placement at a YRTC in the original disposition order. In both cases, the court ordered OJS not to discharge the juvenile without the court's approval and to schedule a review hearing after the juvenile's discharge from the YRTC.

We held that only OJS has the statutory authority to determine whether a juvenile will be discharged from a YRTC. We further held that a juvenile court lacks authority to conduct review hearings for juveniles after OJS has discharged them from a YRTC. We stated that § 43-408(2) precludes a juvenile court from conducting review hearings while the juvenile is placed at a YRTC. We also stated that Neb. Rev. Stat. § 43-412(2) (Reissue 2008) precludes the court from conducting review hearings after the juvenile's discharge from a YRTC. We concluded that a juvenile's discharge from a YRTC is a "'complete release'" that precludes a juvenile court from exercising jurisdiction over a juvenile after the discharge.[12] Because the court had exceeded its powers, we reversed and vacated those portions of the court's orders that required OJS

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[11] *In re Interest of Jorge O., supra* note 4.

[12] *Id.* at 417, 786 N.W.2d at 347.

to obtain the court's approval for discharge and to schedule a review hearing.

But we did not view the court's order as an action taken without subject matter jurisdiction. The juvenile code authorizes a court to approve a transfer to a YRTC for juveniles already placed in OJS' custody[13] or to commit a juvenile age 12 or older to a YRTC in a disposition order.[14] In other cases, we have similarly vacated or reversed a juvenile court's order if the order included requirements that exceeded the court's authority or if the court failed to comply with prerequisites for taking the action.[15] We have not treated these orders as nullities that fail to confer jurisdiction on an appellate court if the juvenile statutes authorized the court to take an action. But here, the statutes do not authorize the action that the juvenile court purported to take—conducting or ordering a review hearing for juveniles committed to OJS and placed at a YRTC.

We recognize that the court adjudicated Trey under subsections (2) (felonious conduct if committed by an adult) and (3)(b) (uncontrolled conduct) of § 43-247. But we disagree with the county attorney that Neb. Rev. Stat. § 43-278 (Reissue 2008) is controlling here. It is correct that § 43-278 requires a juvenile court to conduct review hearings at least every 6 months for juveniles adjudicated under § 43-247(3) (neglected or uncontrolled). We also note that Neb. Rev. Stat. § 43-251.01(2) (Reissue 2008) prohibits a court from committing a juvenile adjudicated under subsection (3) (neglected or uncontrolled) to OJS or placing them in a YRTC.

[7] But these statutes do not prohibit a court from placing a juvenile at a YRTC if the court also adjudicated the juvenile under § 43-247(2) (felonious conduct). As noted, the court also adjudicated Trey under subsection (2), and § 43-286(1)(b)

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[13] See § 43-408(4).

[14] See Neb. Rev. Stat. § 43-286 (Reissue 2008).

[15] See, *In re Interest of Jorge O., supra* note 4; *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010); *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008); *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008). See, also, *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

explicitly permitted the court to place him at a YRTC in that circumstance. So when a court adjudicates a juvenile under both subsection (2) and subsection (3)(b) of § 43-247 and commits the juvenile to OJS with a placement at a YRTC, it has determined that the subsection (2) adjudication will control the juvenile's disposition.

[8] It follows that when a court determines that a juvenile's adjudication under § 43-247(2) controls the juvenile's disposition, the disposition must necessarily control which review hearing statute applies. Obviously, § 43-278's requirement for 6-month review hearings for juveniles adjudicated under § 43-247(3) and § 43-408(2)'s prohibition of review hearings for juveniles placed at a YRTC cannot both be enforced. We conclude that when a juvenile court decides to place a juvenile adjudicated under § 43-247(2) (felonious conduct) and (3)(b) (uncontrolled conduct) at a YRTC, the placement decision controls and § 43-278 does not authorize the court to conduct review hearings. This lack of statutory authorization raises the issue of the court's subject matter jurisdiction.

[9-11] 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 or proceeding before the court and the particular question which it assumes to determine.[16] But the question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases. It also involves determining whether a court has authority to address a particular question that it assumes to decide or to grant the particular relief requested.[17] We conclude that a juvenile court lacks jurisdiction to conduct or order review hearings to monitor a juvenile's progress while the juvenile is placed at a YRTC.

[12-14] Here, the juvenile court lacked subject matter jurisdiction to conduct or order review hearings for Trey. A court

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[16] See *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

[17] See, *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994).

action taken without subject matter jurisdiction is void.[18] A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on this court.[19] But an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.[20]

Because the juvenile court's order was void, the Department has not appealed from a final order or judgment. We therefore vacate the juvenile court's order and dismiss the appeal for lack of jurisdiction.

VACATED AND DISMISSED.

WRIGHT, J., not participating.

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[18] See, *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

[19] See, *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002); *Bracey, supra* note 18; *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

[20] See, *Bracey, supra* note 18; *Rieger, supra* note 19.

DAVID A. MAYCOCK, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MARTY A. MAYCOCK, DECEASED, APPELLANT, V. STEVE HOODY, M.D., ET AL., APPELLEES.

799 N.W.2d 322

Filed June 24, 2011. No. S-09-944.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **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.
4. **Limitations of Actions: Mental Competency: Words and Phrases.** A person with a mental disorder under Neb. Rev. Stat. § 25-213 (Reissue 2008) is one

who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. A mental disorder within the meaning of § 25-213 is an incapacity which disqualifies one from acting for the protection of one's rights.

5. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Michael F. Kinney and Kathryn J. Cheatle, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Nichole Liebentritt.

David L. Welch and Ashley E. Dieckman, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Alegent Health.

Michael J. Mooney, of Gross & Welch, P.C., L.L.O., for appellee Steve Hoody.

Mark E. Novotny and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellees James Frock et al.

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

MILLER-LERMAN, J.

INTRODUCTION

This case involves a complaint alleging medical malpractice and wrongful death filed under the Nebraska Hospital-Medical Liability Act (NHMLA) by the appellant, David A. Maycock (Maycock), in his capacity as special administrator of the estate of Marty A. Maycock, against various doctors and against Alegent Health, doing business as Bergan Mercy Medical Center, based on their treatment of Marty prior to and until his death on November 22, 2005. One doctor named in the complaint was not served, and any reference to "doctors" in this opinion does not pertain to him.

The district court dismissed the case against certain doctors based on their unrebutted affidavit evidence showing that they had met the standard of care. Alegent Health was also dismissed. These rulings were affirmed by the Court of Appeals, and those doctors and Alegent Health are not involved in the proceeding now before this court.

At the district court, doctors James Frock, Louis Violi, Sylvia Rael, and James Bowers (the doctors) moved for summary judgment on the sole basis that the claims against them were barred by the statute of limitations. The district court granted the motion and dismissed the claims against the doctors based on the professional negligence 2-year statute of limitations found at Neb. Rev. Stat. § 25-222 (Reissue 2008). It is this ruling involving the doctors that is the subject of this case on appeal. The Court of Appeals determined, inter alia, that there were genuine issues of material fact whether Marty was under a mental disorder as described in Neb. Rev. Stat. § 25-213 (Reissue 2008) at the time he was treated by the doctors and that therefore, pursuant to § 25-213, the statute of limitations was tolled until the removal of his mental disorder. In a memorandum opinion filed August 3, 2010, the Court of Appeals reversed the summary judgment which had been entered in favor of the doctors. See *Maycock v. Hoody*, No. A-09-944, 2010 WL 3137338 (Neb. App. Aug. 3, 2010) (selected for posting to court Web site). The doctors petitioned for further review, which we granted. Because we agree with the reasoning of the Court of Appeals, we affirm.

STATEMENT OF FACTS

Maycock brought this suit on behalf of his son, Marty, against the doctors; against doctors Nicole Liebentritt, Steve Hoody, and Thomas Connolly; and against Alegent Health, alleging that they committed medical malpractice in caring for Marty on November 17, 2005, until his death on November 22 and caused Marty's wrongful death. The district court granted summary judgment in favor of Liebentritt, Hoody, and Connolly after it concluded that these defendants had established by their affidavit evidence that they had met the requisite standard of care and Maycock had failed to rebut their prima facie case. Alegent Health was also dismissed. The Court of Appeals

affirmed these decisions. Maycock petitioned for further review of these rulings, and we denied his petition.

The district court also dismissed the claims against the doctors as time barred based on the professional negligence 2-year statute of limitations found at § 25-222. On appeal, the Court of Appeals concluded, inter alia, that the 2-year statute of limitations under the NHMLA, Neb. Rev. Stat. § 44-2828 (Reissue 2010), controlled and that there were genuine issues of material fact regarding whether this 2-year period had been tolled pursuant to § 25-213 for the period during which Marty was suffering from a "mental disorder." The Court of Appeals reversed the summary judgment in favor of the doctors, and it is this decision which is before us on further review.

The facts relevant to the issues on further review are recited below. On November 17, 2005, Frock, a board-certified nephrologist, saw Marty for a consultation at the request of Hoody, a defendant who has been dismissed from this case. In Frock's consultation report, he indicates that "[u]pon further questioning of [Marty] he did admit to drinking almost a whole bottle of antifreeze after it was noted that the [nasogastric] aspirate looked like antifreeze." Frock's diagnostic impression of Marty was "[s]uspected antifreeze overdose with oliguria [diminished urine production], acute renal failure, severe increased anion gap metabolic acidosis and hyperkalemia." Other records from November 17 indicated that at 12:35 p.m., Marty was "continu[ing] to have no verbal response to questions when asked and moving arms about in restless manner." The nurse's notes on November 18 at 12:05 a.m. reported that Marty was "able to identify his name" but "[s]till mumble[d] unintelligibly when asked his location or the year." On November 18 at 8 a.m., the nurse's notes stated, "[Marty] resting quietly in bed, eyes closed. Opens eyes to sound, does not follow commands, no response to questions of orientation." On November 18 at 3:05 p.m., Marty was intubated by Bowers, and ventilation was started at 3:19 p.m.

There is evidence in the record that when Liebentritt saw Marty on November 19 and 20, 2005, he "was, at all times . . . , unconscious [during her observations]." From the time

Liebentritt saw Marty on November 19 until his death, the basic entry in the nurse's notes at approximately hourly intervals was "assessment essentially unchanged." Doctors' notes state that on November 22, Marty was "in septic shock and comatose with some jerking movements of his head and legs." Marty died on November 22 at 5:30 p.m.

Given the Thanksgiving holiday, this case, filed on Monday, November 26, 2007, was effectively brought by Maycock on Friday, November 22. In their affidavits in support of their motions for summary judgment, the doctors stated that the last dates they provided treatment to Marty were as follows: November 17 for Frock and Violi, November 18 for Rael, and November 21 for Bowers. Given this evidence, the treatments provided by the doctors were rendered more than 2 years prior to the November 22, 2007, date on which the complaint was effectively filed and the cases against the doctors would appear to be time barred in the absence of tolling. The Court of Appeals determined that there were questions of fact whether Marty suffered from a mental disorder which permits tolling under § 25-213, and it reversed the summary judgment entered in favor of the doctors. The doctors petitioned for further review of the Court of Appeals' decision, and we granted further review.

ASSIGNMENTS OF ERROR

The doctors claim, summarized and restated, that the Court of Appeals erred when it (1) concluded that Maycock's claim was subject to the tolling provisions found in § 25-213; (2) concluded that there were genuine issues as to when Marty was suffering from a mental disorder, where Maycock failed to present expert testimony to prove that Marty was suffering from a mental disorder at any time during his hospitalization; and (3) did not affirm the summary judgment based on the doctors' interrogatory answers.

STANDARDS OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the

benefit of all favorable inferences deducible from the evidence. *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010).

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

ANALYSIS

Maycock's Claim Is Subject to the 2-Year Statute of Limitations in the NHMLA, § 44-2828, and the Tolling Provisions of § 25-213 Apply.

The district court concluded that the 2-year professional negligence statute of limitations in § 25-222 controlled this case. The district court determined that the case had been filed after the 2-year period and that the case was therefore time barred. The district court granted summary judgment in favor of the doctors and dismissed the case on this basis.

Contrary to the rulings of the district court, the Court of Appeals concluded that the 2-year statute of limitations in the NHMLA, § 44-2828, controlled this action and that § 25-213, which tolls the statute of limitations for a person with a "mental disorder," applied to this action. The Court of Appeals determined that there were issues of fact as to the duration during which Marty suffered from a mental disorder and his action against the doctors was tolled. The Court of Appeals reversed the summary judgment and remanded the cause for further factual development on matters to which § 25-213 tolling would apply.

The doctors claim on further review that the Court of Appeals erred as a matter of law when it concluded that § 25-213 tolling applied to this case. The doctors assert that the tolling provisions of § 25-213 do not apply to a case brought by the representative of an individual suffering from a mental disorder, as distinguished from a case brought by the individual himself or herself. We reject this argument.

As initial matters, we note that this action is brought under and governed by the NHMLA, Neb. Rev. Stat. §§ 44-2801

through 44-2855 (Reissue 2010), and further note that § 25-213 tolling was raised in various forms before the district court, including in an affidavit filed in response to the doctors' motion for summary judgment. We therefore consider the NHMLA and § 25-213 as we resolve this assignment of error.

In *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000), we concluded in an NHMLA case involving the death of a patient that the 2-year statute of limitations in § 44-2828 controlled the statute of limitations rather than the wrongful death statute of limitations in Neb. Rev. Stat. § 30-810 (Reissue 2008). Thus, the 2-year provision of § 44-2828 applies to the wrongful death allegations in the instant suit. We apply the same reasoning as articulated in *Alegent Health Bergan Mercy Med. Ctr.* and conclude that the NHMLA's 2-year limitations period covering "malpractice or professional negligence," set forth in § 44-2828, is the specific statute of limitations applicable to the malpractice allegations in this action, rather than the professional negligence statute of limitations in § 25-222. Section 44-2828 provides generally for a 2-year statute of limitations "[e]xcept as provided in section 25-213."

Section 25-213 provides for tolling of the statute of limitations in relevant part as follows:

> [I]f a person entitled to bring any action mentioned in Chapter 25, the Political Subdivisions Tort Claims Act, the [NHMLA], the State Contract Claims Act, the State Tort Claims Act, or the State Miscellaneous Claims Act, except for a penalty or forfeiture, for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times . . . after such disability is removed.

The tolling in § 25-213, by its terms, may be invoked by "a person entitled to bring any action mentioned in . . . the [NHMLA]."

Section 44-2822 identifies who is entitled to file an action under the NHMLA. Section 44-2822 of the NHMLA provides:

> Subject to the requirements of sections 44-2840 to 44-2846, a patient or his or her representative having a claim under the [NHMLA] for bodily injury or death on account of alleged malpractice, professional negligence, failure to provide care, breach of contract, or other claim based upon failure to obtain informed consent for an operation or treatment may file a petition or complaint in any court of law having requisite jurisdiction. No dollar amount or figure shall be included in the demand in any malpractice petition or complaint, but the petition shall ask for such damages as are reasonable in the premises.

Under § 44-2822, a "representative" of a patient with a claim under the NHMLA can file an action "in any court of law having requisite jurisdiction." A "representative" for NHMLA purposes is defined in § 44-2808 as follows: "Representative shall mean the spouse, parent, guardian, adult child, executor, *administrator*, trustee, attorney, or other legal agent of the patient." (Emphasis supplied.)

[3] Section 44-2828 of the NHMLA refers to § 25-213, and § 25-213 refers to the NHMLA. Both statutes relate to the time during which an action should be filed. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010). Reading the foregoing statutes together, it is clear that a "representative" is entitled to bring an action under the NHMLA within 2 years, which action, pursuant to § 44-2828, is subject to tolling under § 25-213. As special "administrator" of Marty's estate, Maycock is a "representative" as described in § 44-2808 of the NHMLA and entitled to bring an action which is subject to the tolling provisions of § 25-213. Our reading of these related statutes gives them a sensible and consistent construction.

It has been observed that generally, "[w]hile the statute of limitations is suspended for as long as plaintiff's mental incompetency exists, it begins to run against the cause of action when the disabled person dies." 51 Am. Jur. 2d *Limitations of Actions* § 234 at 601 (2000). Our reading of the statutes which

were quoted above is consistent with the foregoing observation and the proposition that the representative of the deceased steps into the shoes of the deceased and assumes whatever rights he or she had, including the ability to assert tolling that occurred during the life of the deceased and prior to the representative's appointment. See, e.g., *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001) (observing in contract action that personal representative inherits the benefits and burdens connected with running of any applicable statute of limitations applicable to decedent).

Notwithstanding the foregoing statutory authority permitting the filing of the NHMLA action by a representative subject to § 25-213 tolling, the doctors assert that under case law, a representative of a patient cannot take advantage of the mental disorder tolling in § 25-213. In this regard, the doctors rely primarily on *Sherwood v. Merchants Mut. Bonding Co.*, 193 Neb. 262, 226 N.W.2d 761 (1975). The doctors misread *Sherwood*, and we reject this argument.

Sherwood was an action to recover on the bond of a guardian under Neb. Rev. Stat. § 25-210 (Reissue 2008). The plaintiff in *Sherwood* contended that the provisions in § 25-210 which granted an out-of-state or legally disabled plaintiff an additional 5 years after discharge of the guardian to bring suit extended to executors or administrators. We rejected this argument, stating that § 25-210 "does not toll the statutes of limitations for the benefit of executors or administrators." *Sherwood v. Merchants Mut. Bonding Co.*, 193 Neb. at 264, 226 N.W.2d at 762. Our statement that certain tolling provisions did not apply to executors or administrators referred to the scope of extensions of time available in an action under § 25-210 and not to tolling under § 25-213, the latter of which was mentioned only incidentally in *Sherwood* as a source for a definition of "legal disability" as that term is used in § 25-210.

The Court of Appeals did not err when it concluded that § 25-213 tolling applied to this action brought by a representative subject to and governed by the 2-year statute of limitations in § 44-2828 of the NHMLA.

The Court of Appeals Did Not Err When It Found Genuine Issues of Material Fact With Respect to the Duration of Marty's Mental Disorder.

The Court of Appeals reviewed and quoted extensively from the medical records in evidence. The salient facts are recited earlier in this opinion. The Court of Appeals determined that Marty "undisputedly was suffering from a mental disorder, i.e., incapacitated," on November 22, 2005, but that there were genuine issues of material fact, warranting reversal and remand, regarding whether Marty suffered from a mental disorder before November 22. *Maycock v. Hoody*, No. A-09-944, 2010 WL 3137338 (Neb. App. Aug. 3, 2010) (selected for posting to court Web site). This suit was effectively filed on November 22, 2007. Determination of the dates on which Marty suffered a "mental disorder" as that term is used in § 25-213 will determine the days on which the statute of limitations will be tolled and whether claims should be dismissed as time barred against certain doctors. The doctors claim that the Court of Appeals erred when it determined that Marty suffered a mental disorder, in the absence of expert opinion to that effect. We reject this argument.

[4] The Court of Appeals has repeatedly considered the meaning of "mental disorder" under § 25-213. In *Vergera v. Lopez-Vasquez*, 1 Neb. App. 1141, 1147, 510 N.W.2d 550, 554 (1993), the Court of Appeals held that a person with a mental disorder under § 25-213 is "one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action" and that a mental disorder within the meaning of § 25-213 is "an incapacity which disqualifies one from acting for the protection of one's rights." See, also, *Anonymous v. St. John Lutheran Church*, 14 Neb. App. 42, 703 N.W.2d 918 (2005). This definition is comparable to that expressed in our opinion in *Sacchi v. Blodig*, 215 Neb. 817, 822, 341 N.W.2d 326, 330 (1983), decided under an earlier version of § 25-213, in which we observed in a medical malpractice case that "the purpose of § 25-213 is to lift the burden of severe time restrictions or limitations from those under legal disability, that is,

from those who do not have the ability and capacity to protect their rights existing under our laws."

The Court of Appeals properly invoked and applied the definition of "mental disorder" under § 25-213 announced in *Vergera v. Lopez-Vasquez, supra*. See *Maycock v. Hoody, supra.* Referring to an EEG study of brain activity, the Court of Appeals quoted from the doctor's notes dictated on November 22, 2005, as follows: "'[Marty] is currently in septic shock and comatose with some jerking movements of his head and legs.'" *Id.* at *10. The Court of Appeals stated that "[c]omatose is a commonly understood condition of both mental and [physical] '"incapacity which disqualifies one from acting for the protection of one's rights"'" and that thus, Marty had a mental disorder under § 25-213 on November 22 if not earlier. *Id.* In further support of its determination that Marty suffered a "mental disorder" on November 22, the Court of Appeals quoted from "'Physician Orders/Progress Notes'" of November 22 which stated, "Neurological consensus is that [Marty] has irreversible brain damage." *Id.* at *11.

The doctors assert that the Court of Appeals erred when it found that Marty suffered from a mental disorder on November 22, 2005, without Maycock's supplying an expert opinion to that effect. The doctors rely on *Anonymous v. St. John Lutheran Church, supra*, in support of their argument that an expert opinion was required. In *Anonymous*, the Court of Appeals indicated that an expert opinion was necessary because the mental disorder claimed by the plaintiff for which tolling was invoked involved "'a variety of medical and physical ailments including post-traumatic stress disorder,'" 14 Neb. App. at 52, 703 N.W.2d at 927, and such ailments could not readily be equated with an inability to institute legal action. We believe the facts in *Anonymous* are distinguishable from those in the instant case.

Whereas the disorder claimed in *Anonymous* was vague with respect to its impact on the plaintiff's ability to institute legal action, the facts in the instant case, at least on November 22, 2005, are obvious and lead readily to the Court of Appeals' determination that Marty was comatose and suffered from a

mental disorder as understood under § 25-213 on November 22 if not sooner. We have stated that "'expert testimony is not legally necessary when the conclusion to be drawn from the facts does not require specific, technical, or scientific knowledge and the circumstances surrounding the injury are within the common experience, knowledge, and observation of laymen.'" *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 785, 387 N.W.2d 486, 488 (1986).

It is common knowledge that an individual who is comatose is unable on that occasion to institute legal action, and an expert opinion is not required to so determine where evidence supports this determination.

Our resolution of this issue is consistent with authorities elsewhere. In deciding a case applying Texas law, the court in *In re Mirapex Products Liability Litigation*, 735 F. Supp. 2d 1113, 1122 (D. Minn. 2010), stated: "To survive summary judgment, plaintiff must come forward with either (1) evidence permitting the Court to conclude he lacked the mental capacity to pursue litigation, or (2) a fact-based expert opinion to the same effect." The record in this case shows that Maycock presented evidence contained in hospital records which permitted a court to determine without expert opinion that Marty suffered a mental disorder under § 25-213 on November 22, 2005, if not earlier, and, therefore, his representative can take advantage of tolling under § 25-213 in this suit brought under the NHMLA. Because there is evidence to support the determination of the Court of Appeals, an expert opinion was not required under the facts of this case. We conclude that the Court of Appeals did not err when it ordered reversal and remand based on its determination that there were genuine issues of material fact regarding whether Marty was under a mental disorder prior to November 22, as such condition related to the statute of limitations issue.

The Court of Appeals Did Not Err When It Did Not Affirm the Summary Judgment Based on the Doctors' Interrogatory Answers.

The doctors assert that the record would support a grant of, and the affirmance of a grant of, summary judgment in their

favor by the district court based on their interrogatory answers which indicated that they had met the standard of care. They claim that the Court of Appeals erred when it did not consider their interrogatory answers and thus failed to affirm the summary judgment on the basis of those answers. We find no error by the Court of Appeals in this regard.

The district court granted summary judgment to the doctors based on their claim that Maycock's action was time barred. The doctors submitted affidavits regarding treatment dates in support of this argument. Unlike Liebentritt, Hoody, and Connolly, the doctors did not submit affidavits asserting that they had met the standard of care and did not urge the district court to rule in their favor on that basis.

Maycock appealed to the Court of Appeals. The doctors did not cross-appeal and claim before the Court of Appeals that an alternative basis for affirming summary judgment in their favor might be found within each doctor's 27 pages of answers to interrogatories.

No assignment of error before the Court of Appeals sought consideration of the doctors' assertion made to this court that summary judgment in their favor could be affirmed on the basis that they had made a prima facie case in their interrogatory answers that they met the standard of care and were entitled to judgment on a basis unrefuted by Maycock. For completeness, we note that in a motion for rehearing, the doctors claimed that the Court of Appeals committed plain error by not granting the doctors relief on the basis of the standard of care issue. The motion for rehearing was denied by the Court of Appeals.

[5] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). We find no error by the Court of Appeals when it rejected the motion for rehearing or when it did not consider sua sponte the standard of care issue.

CONCLUSION

On further review, we conclude that the Court of Appeals correctly concluded that the 2-year statute of limitations in

§ 44-2828 of the NHMLA was applicable to this case and subject to tolling under § 25-213 for a mental disorder and that there were genuine issues of material fact regarding whether and on what dates the action was tolled. The Court of Appeals correctly reversed the summary judgment entered in favor of the doctors and remanded the cause for further proceedings.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., not participating.

APRIL PALMER, APPELLANT, V. LAKESIDE WELLNESS CENTER, DOING BUSINESS AS ALEGENT HEALTH, AND PRECOR, INC., APPELLEES.

798 N.W.2d 845

Filed June 24, 2011. No. S-10-974.

1. **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.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **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.
4. **Contracts: Parties.** The right of a third party benefited by a contract to sue must affirmatively appear from the language of the instrument when properly interpreted or construed.
5. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
6. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.
7. **Negligence: Summary Judgment.** The issue of gross negligence is susceptible to resolution in a motion for summary judgment.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Heather Voegele-Andersen and Brenda K. George, of Koley Jessen, P.C., L.L.O., for appellant.

David L. Welch and Ashley E. Dieckman, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Lakeside Wellness Center.

Albert M. Engles and Cory J. Kerger, of Engles, Ketcham, Olson & Keith, P.C., for appellee Precor, Inc.

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

HEAVICAN, C.J.

INTRODUCTION

The appellant, April Palmer, was injured while on a treadmill at Lakeside Wellness Center (Lakeside). The district court granted summary judgment in favor of Lakeside, doing business as Alegent Health, and Precor, Inc. Palmer appeals. We affirm.

FACTUAL BACKGROUND

Palmer's Accident.

Palmer and her husband joined Lakeside in November 2006. The accident occurred several months later, on March 7, 2007. On that date, Palmer approached the treadmill in question to begin her workout. Unaware that the treadmill belt was running, Palmer stepped onto the treadmill from the back and was thrown off the belt and into an elliptical training machine located behind her. During her deposition, Palmer stated that she looked at the treadmill's control panel before getting on, but did not look at the belt of the treadmill. Palmer indicated that had she looked at the belt, she probably would have been able to see that it was operating, but that since she assumed the treadmill was off, she did not look further. According to Palmer, she thought the area was poorly lit, though she had never complained about it to any Lakeside staff members. And Palmer indicated that the facility was loud and that she was unable to hear whether the machine was operating.

This treadmill was located in a row of treadmills, and the treadmills to the right and left of the machine in question were

being used at the time of the accident. In Palmer's husband's deposition, he testified that the woman on a neighboring treadmill told him she had been on that treadmill briefly before switching to the neighboring machine and had mistakenly thought she had turned it off.

Palmer's Familiarity With Treadmills.

During her deposition, Palmer was asked about her exercise history and her familiarity with treadmills. Palmer testified that she and her husband had been members of other gyms prior to joining Lakeside. Palmer testified that she received instruction from a trainer after joining Lakeside, though she stated that she did not need specific instruction on how to operate a treadmill. According to Palmer's testimony, she had been using treadmills for approximately 21 years. At the time of the accident, Palmer had been using the Lakeside facility at least 5 times a week and had used that actual treadmill 10 to 15 times total prior to the accident. Palmer also testified that she had a treadmill in her home.

Palmer's Membership Agreement and Health History Questionnaire.

At the time Palmer and her husband became members at Lakeside, Palmer filled out and signed a membership agreement and a health history questionnaire. The membership agreement provided:

> WAIVER AND RELEASE—You acknowledge that your attendance or use of [Lakeside] including without limitation to your participation in any of [Lakeside's] programs or activities and your use of [Lakeside's] equipment and facilities, and transportation provided by [Lakeside] could cause injury to you. In consideration of your membership in [Lakeside], you hereby assume all risks of injury which may result from or arise out of your attendance at or use of [Lakeside] or its equipment, activities, facilities, or transportation; and you agree, on behalf of yourself and your heirs, executors, administrators, and assigns to fully and forever release and discharge [Lakeside] and affiliates and their respective officers, directors, employees, agents,

> successors and assigns, and each of them (collectively the "Releasees") from any and all claims, damages, rights of action or causes of action, present or future, known or unknown, anticipated or unanticipated, resulting from or arising out of your attendance at or use of [Lakeside] or its equipment, activities, facilities or transportation, including without limitation any claims, damages, demands, rights of action or causes of action resulting from or arising out of the negligence of the Releasees. Further, you hereby agree to waive any and all such claims, damages, demands, rights of action or causes of action. Further you hereby agree to release and discharge the Releasees from any and all liability for any loss or theft of, or damage to, personal property. You acknowledge that you have carefully read this waiver and release and fully understand that it is a waiver and release of liability.

The health history questionnaire signed by Palmer stated in relevant part as follows:

> 1. In consideration of being allowed to participate in the activities and programs of [Lakeside] and to use its facilities, equipment and machinery in addition to the payment of any fee or charge, I do hereby waive, release and forever discharge [Lakeside] and its directors, officers, agents, employees, representatives, successors and assigns, administrators, executors and all other [sic] from any and all responsibilities or liability from injuries or damages resulting from my participation in any activities or my use of equipment or machinery in the above mentioned activities. I do also hereby release all of those mentioned and any others acting upon their behalf from any responsibility or liability for any injury or damage to myself, including those caused by the negligent act or omission of any way arising out of or connected with my participation in any activities of [Lakeside] or the use of any equipment at [Lakeside]. . . .
>
> 2. I understand and am aware that strength, flexibility and aerobic exercise, including the use of equipment are a potentially hazardous activity. I also understand that fitness activities involve the risk of injury and even death,

> and that I am voluntarily participating in these activities and using equipment and machinery with knowledge of the dangers involved. I hereby agree to expressly assume and accept any and all risks of injury or death. . . .

Palmer sued Lakeside and Precor for her injuries, which generally consisted of an injured hand and chest. Both Lakeside and Precor filed motions for summary judgment, which were granted. Palmer appeals.

ASSIGNMENTS OF ERROR

Palmer assigns that the district court erred in (1) granting summary judgment in favor of Lakeside and Precor; (2) holding that the waiver and release contained in the membership agreement and health history questionnaire signed by Palmer were clear, understandable, and unambiguous; and (3) holding that Palmer assumed the risk of using the treadmill.

STANDARD OF REVIEW

[1] 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.[1]

[2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

Waiver and Release.

Palmer first argues that the district court erred in finding that the waiver and release contained in the membership agreement and health history questionnaire she completed and signed when joining Lakeside were clear, understandable, and unambiguous. We read Palmer's argument as contending that the waivers, while perhaps applicable to instances of ordinary negligence,

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[1] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[2] *Id.*

could not operate to relieve Lakeside or Precor from gross negligence or willful and wanton misconduct. We further understand Palmer to argue that both Lakeside and Precor committed gross negligence or willful and wanton misconduct—Precor by delivering a treadmill without proper safety features, and Lakeside by not providing adequate space or lighting around the treadmill and by modifying the treadmill's belt such that the treadmill became unsafe.

[3,4] Before reaching the merits of Palmer's argument, we note that contrary to Precor's argument, Precor is not protected from liability as a result of the waivers signed by Palmer. Precor contends in its brief that it is a third-party beneficiary of these waivers. This court recently addressed a similar issue in *Podraza v. New Century Physicians of Neb.*[3] In *Podraza*, we noted that we have traditionally 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. 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.
>
> 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. 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.[4]

A review of the record shows that Precor was not explicitly mentioned in the language of the waiver. Nor is there any other evidence that Precor was an intended third-party beneficiary. Precor has the burden to show its status as a third-party beneficiary, and it has failed to meet that burden. As such, Precor

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[3] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[4] *Id.* at 686, 789 N.W.2d at 267.

is not shielded from liability as a result of the waivers signed by Palmer.

Lakeside's Gross Negligence or Willful and Wanton Conduct.

At oral argument, Palmer conceded that by virtue of these waivers, Lakeside was not liable to Palmer for damages caused by ordinary negligence. But, as noted above, Palmer contends that Lakeside is nevertheless liable, because its actions were grossly negligent or were willful and wanton.

Having examined the record in this case, we find that as a matter of law, Palmer's allegations against Lakeside do not rise to the level of gross negligence. Palmer alleges that the Lakeside facility had inadequate lighting and inadequate spacing between equipment and that Lakeside's employees modified the treadmill in question by installing a treadmill belt that did not contain markings.

[5-7] Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.[5] Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.[6] The issue of gross negligence is susceptible to resolution in a motion for summary judgment.[7] We simply cannot conclude that the allegations against Lakeside—inadequate lighting and spacing and the installation of a new treadmill belt—rise to such a level. We therefore conclude that as a matter of law, any negligence by Lakeside was not gross negligence or willful or wanton conduct. As such, the district court did not err in granting Lakeside's motion for summary judgment.

Precor's Negligence.

We next turn to the question of whether the district court erred in granting summary judgment in favor of Precor. Because we concluded above that the waiver signed by Palmer did not

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[5] *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003).

[6] *Id.*

[7] *Id.*

act to relieve Precor from liability, we address whether there was a genuine issue of material fact on the issue of whether Precor breached any duty it had to Palmer.

In arguing that Precor was liable, Palmer alleges that Precor breached its duty by not equipping the treadmill with (1) a safety feature that would prevent the treadmill from operating when no one was on it and (2) handrails extending down the sides toward the back of the treadmill. Palmer originally argued that Precor was also liable because the belt on its treadmill failed to contain adequate markings, but it is this court's understanding that Palmer no longer makes such allegations with regard to Precor because the belt on the treadmill at the time of the incident was not original to the treadmill and had been installed by Lakeside.

In response to Palmer's allegations, Precor introduced evidence in the form of an affidavit from its director of product development, Greg May. May averred that at the time of manufacture and delivery, the treadmill met or exceeded the voluntary guidelines set by the American Society for Testing and Materials in that group's international standard specifications for motorized treadmills in all ways, including handrails. Though there was no specific feature on this treadmill designed to stop the treadmill from running when no one was operating it, the machine was manufactured with a clip to be attached to the user's clothing. The manual for this treadmill noted that "by taking this precaution, a tug on the safety switch cord trips the safety switch and slows the running speed to a safe stop." May also averred that the treadmill in question left Precor's control on July 29, 1999, or over 7 years prior to the date of the incident.

In addition to May's affidavit, Precor also introduced photographs of the treadmill at issue, which photographs showed that the treadmill did have front handrails, though not side handrails.

In an attempt to rebut May's affidavit and show a genuine issue of material fact, Palmer introduced the affidavit of a fitness consultant. That affidavit noted in part that

> based on [the consultant's] experience, in order for treadmills to meet appropriate safety standards from the late

> 1990s forward, treadmills should contain adequate safety features, emergency/safety stop mechanisms, warning labels, and markings on a treadmill belt. A treadmill should contain a safety stop mechanism such that the treadmill will turn off if no one is currently on the treadmill, adequate handrails extending towards the back of the treadmill and warning labels at the rear of the treadmill.

Even after drawing all reasonable inferences in favor of Palmer, we conclude that there is no genuine issue of material fact as to Precor's alleged breach of duty. While the fitness consultant's affidavit indicates that treadmills "should" contain various safety features, he does not speak in absolutes and does not refer specifically to this treadmill. On the other hand, May's affidavit references the treadmill at issue in this case and details the safety features this treadmill possessed, as well as Precor's compliance with all applicable, though voluntary, safety standards when manufacturing the treadmill. Because the record affirmatively shows that Precor did not breach any duty it owed to Palmer, we conclude that the district court did not err in granting Precor's motion for summary judgment.

Assumption of Risk.

Palmer also argues that the district court erred in finding that she assumed the risk of injury when she used the treadmill. Because we conclude that the district court did not err in granting Lakeside's and Precor's motions for summary judgment for the foregoing reasons, we need not address Palmer's assignment of error regarding the assumption of the risk.

CONCLUSION

The district court's order granting summary judgment in favor of Lakeside and Precor is affirmed.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

KIMBERLY COTTON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

810 N.W.2d 132

Filed July 1, 2011. No. S-10-114.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Trial: Evidence.** An objection based upon insufficient foundation is a general objection.
4. **Trial: Evidence: Appeal and Error.** If an objection based on foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.
5. ____: ____: ____. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
7. **Judgments: Appeal and Error.** In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Robert S. Keith, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Kimberly Cotton appeals from the order and judgment entered in favor of the State of Nebraska by the district court

for Sarpy County in which the district court determined that because no vehicular pursuit occurred under Neb. Rev. Stat. § 81-8,215.01(5) (Reissue 2008) of the State Tort Claims Act and that, in any event, the actions of the driver of the vehicle under investigation were the sole proximate cause of the accident in which Cotton was injured, the State was not liable to Cotton as an injured innocent third party. We affirm.

STATEMENT OF FACTS

Cotton was severely injured in an accident that occurred March 8, 2006, when a pickup crossed the centerline and struck her vehicle. The pickup crossed the centerline because it had been struck by a Ford Mustang driven by Aaron Anson at a high rate of speed. Anson testified he was driving the Mustang, a stolen vehicle, and was attempting to evade a Nebraska State Patrol Trooper, Kent Kavan, when he hit the pickup.

Cotton filed the present action against the State of Nebraska under the State Tort Claims Act, in particular § 81-8,215.01, which makes the State liable for injuries to innocent third parties proximately caused by a vehicular pursuit by a state-employed law enforcement officer.

Section 81-8,215.01(1) provides: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during vehicular pursuit, damages shall be paid to such third party by the state employing the officer."

Section 81-8,215.01(5) defines "vehicular pursuit" as

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

The state trooper, Kavan, testified that he initially saw a Mustang pass on a highway near where he was parked. Kavan thought that the Mustang might be one that had been reported stolen but, because he did not have a good view of the license

plate, he did not have enough information for a traffic stop. The Mustang continued on the highway. Kavan decided to catch up to the Mustang in order to read the license plate and run the numbers to determine whether it was the stolen vehicle.

When Kavan reached the stop sign at the entrance to the highway, he had to wait for other vehicles to pass before he could enter the highway. In the time it took to get onto the highway, Kavan lost sight of the Mustang and various other vehicles had come between Kavan and the Mustang. Kavan testified that he did not activate his vehicle's emergency lights or siren, but that he drove at an increased rate of speed in his unsuccessful attempt to catch up to the Mustang.

Before he succeeded in approaching the Mustang, the accident occurred at some distance in front of Kavan. The record shows that there were several vehicles between Kavan and the Mustang at the time of the accident. Kavan activated his vehicle's emergency lights after he saw the accident, and he briefly stopped to assess the accident scene. When Kavan saw the Mustang drive out of the ditch and take off, he began to chase it and continued this pursuit for a short time before he discontinued the pursuit in order to return to the accident scene. The stolen Mustang and its driver were later apprehended by other law enforcement officers.

During Kavan's testimony, the State offered into evidence a copy of a videotape made from a camera inside Kavan's vehicle. The court admitted the videotape into evidence over Cotton's objection based on foundation. Kavan testified that the camera was set up such that it would automatically begin recording when he turned on the emergency lights on top of his vehicle. The videotape was consistent with Kavan's testimony that he did not turn on his vehicle's emergency lights until after the accident occurred and that there were still vehicles between Kavan and the Mustang when he turned on the lights.

Kavan's testimony conflicted in important respects with the testimony of Anson, the driver of the stolen Mustang. Anson admitted that he was driving a stolen vehicle. He testified that he did not see the trooper parked by the side of the highway and that the first time he saw the trooper's vehicle on the highway, it was about three or four vehicles behind him. He stated

he considered turning off the highway to avoid the trooper. Anson testified that soon after he initially saw the trooper's vehicle, it was directly behind him with its emergency lights flashing. Anson stated that he began speeding in order to get away and that the accident happened when he was trying to pass other vehicles.

During the trial, Kavan and a sergeant with the State Patrol attempted to testify regarding the meaning of the word "apprehend" in § 81-8,215.01(5). This testimony was excluded. However, Cody Paro, another state trooper, did testify in a manner similar to the excluded evidence.

In its findings of fact, the court discounted Anson's testimony and generally credited Kavan's testimony. The court found that "[t]he greater weight of the evidence demonstrates that . . . Anson accelerated his vehicle to high speeds and drove his car erratically, if not recklessly, prior to Trooper Kavan engaging his emergency lights and siren." The court also found that there "is no credible evidence that Trooper Kavan was directly behind Anson prior to the accident as contended by Anson." The court determined that Kavan had not turned on his vehicle's emergency lights or siren prior to the accident and that Kavan was investigating the matter prior to the accident.

The court concluded that Kavan's actions did not constitute an "active attempt to apprehend" Anson under the statute and therefore concluded that a "vehicular pursuit" as defined in § 81-8,215.01(5) had not occurred prior to the accident. The court also found that, even if there had been a pursuit,

> the proximate cause of the accident was due solely to the decision of . . . Anson to operate his vehicle in a reckless manner. Anson made the decision to flee even though he had no firm basis to believe that the trooper was pursuing or trying to apprehend him. It is telling that no other vehicles on the road made any attempt to flee from Kavan, even though Kavan was clearly accelerating in an attempt to catch up to someone or get somewhere quickly.

Because there was no vehicular pursuit and, in any event, Anson's actions were the sole proximate cause of the injuries to Cotton and Cotton "failed to prove that . . . Trooper Kavan's

actions were a proximate cause of the accident," the court determined that the State was not liable to Cotton. The district court entered judgment in favor of the State.

Cotton appeals.

ASSIGNMENTS OF ERROR

Cotton claims that the district court erred when it admitted into evidence the videotape from the camera in Kavan's vehicle and excluded certain opinion testimony regarding the meaning of the word "apprehend" under § 81-8,215.01(5). For a variety of reasons, Cotton also claims, summarized and restated, that the district court erred when it concluded that there was not a vehicular pursuit under § 81-8,215.01(5) and that Anson's actions were the sole proximate cause of her injuries.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009).

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Travelers Indem. Co. v. Gridiron Mgt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

ANALYSIS

Admission of the Videotape Was Not Error.

Cotton claims that the district court erred when it admitted the videotape taken by the camera in Kavan's vehicle which depicted events at the accident scene. We find no merit to this assignment of error.

The videotape was offered by the State at trial as support for Kavan's testimony that the camera automatically begins recording when the emergency lights are activated and that Kavan did not activate his lights until after the accident occurred. The videotape also supported Kavan's testimony that there were several vehicles between Kavan's vehicle and the Mustang when Kavan activated his vehicle's emergency lights.

At trial, Cotton objected to admission of the videotape solely on the basis of foundation. The objection was overruled, and the videotape was received in evidence. On appeal, Cotton claims that receipt of the videotape was error for a variety of reasons.

[3,4] An objection based upon insufficient foundation is a general objection. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). If such an objection is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Id*. We understand Cotton's appellate argument to be that the videotape was not admissible for any purpose.

Under the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-1001(2) (Reissue 2008), photographs include videotapes. Videotapes are authenticated or identified where the trial court is satisfied by sufficient evidence that the matter in question is what its proponent claims. Neb. Rev. Stat. § 27-901 (Reissue 2008). The record shows that the testimony surrounding the videotape was sufficient to establish that the videotape accurately recorded the images and events in question, that it had not been edited, and that the matter in question was what the proponent purported it to be. Contrary to Cotton's objection, the foundation for receipt of the videotape was sufficient.

There was a dispute at trial regarding whether Kavan had activated his vehicle's emergency lights prior to the accident. The videotape included footage from the end of a previous stop prior to and unrelated to the accident in question, followed immediately by the accident scene. The videotape was consistent with Kavan's testimony that after the preceding unrelated stop, the next time he activated the lights, thus turning on the camera, was after the accident. Contrary to Kavan's testimony, Anson testified that the lights were on prior to the accident. According to Cotton, Anson's testimony regarding the lights provides some evidence that a vehicular pursuit was in progress. The videotape was relevant to the issue of whether a vehicular pursuit occurred.

The foundation for admitting the videotape was sufficient, and the subject matter was relevant. The district court did not err when it admitted the videotape.

Exclusion of Testimony Regarding Opinions as to the Statutory Definition of "Apprehend" Was Not Error.

Certain testimony was successfully objected to by the State or otherwise stricken during the trial. Cotton claims it was error for the district court to exclude the testimony of Kavan and the State Patrol sergeant concerning their understanding of the word "apprehend" as used in § 81-8,215.01(5). We find no error in the district court's rulings.

By various procedural means prior to and during the trial, Cotton sought to elicit the opinions of Kavan and the State Patrol sergeant with respect to their understanding of "apprehend" as used in § 81-8,215.01(5). The purpose of this proposed testimony was to demonstrate to the court that "apprehend" was defined by experienced law enforcement people as including "the act or investigation to catch someone in the wrongdoing." Cotton argues that this definition establishes that even if Kavan was merely investigating or catching up to Anson, such acts amount to an active attempt to apprehend, thus satisfying the "apprehend" element in § 81-8,215.01(5). A review of the record shows that the district court did permit another state trooper, Paro, to give opinion testimony comparable to that excluded above.

[5] The district court did not err when it excluded Cotton's proposed evidence regarding the meaning of "apprehend" as used in § 81-8,215.01(5). The evidence sought to be entered consisted of a legal opinion as to statutory interpretation. It is generally not error to exclude evidence which calls for a legal conclusion. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004) (expert testimony concerning question of law generally not admissible). Further, even if evidence is erroneously excluded, such error is reversible only if the complaining party was prejudiced by the exclusion of such evidence. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). An improper exclusion of evidence is

ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Id.*

Here, Paro's testimony was substantially similar to the excluded testimony and, regardless of the propriety of admitting Paro's testimony or the correctness of such opinion, Cotton was not prejudiced by the rulings complained of. Cotton sought to put before the trial court a certain understanding of "apprehend," and she was able to do so. This assignment of error is without merit.

The District Court Did Not Err When It Determined That Anson's Actions Were the Sole Proximate Cause of Cotton's Injuries and That the State Was Not Liable Under § 81-8,215.01.

The substance of this case is Cotton's claim that she was entitled to damages under the State Tort Claims Act because she was an innocent third party whose injuries were proximately caused by a vehicular pursuit conducted by a state law enforcement officer. There is no dispute that she was an innocent third party. Cotton claims the district court erred when it concluded that a "vehicular pursuit" under § 81-8,215.01(5) had not occurred prior to the accident, that her injuries were not proximately caused by Kavan's actions, and that the State was not liable. She makes numerous arguments in support of these claims.

Cotton focuses considerable attention in her appellate brief on the issue of whether there was a vehicle pursuit under § 81-8,215.01(5). However, even assuming without deciding that there was a pursuit, we determine the court's factual findings and conclusions to the effect that Anson's actions were the sole proximate cause of Cotton's injuries and that Cotton failed to prove that Kavan's actions proximately caused the accident are determinative of this appeal and without error. Accordingly, we find no merit to this assignment of error.

This case is brought under the State Tort Claims Act. The controlling provisions of § 81-8,215.01 provide:

> (1) In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during

> vehicular pursuit, damages shall be paid to such third party by the state employing the officer.
>
> . . . .
>
> (5) For purposes of this section, vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

[6] The quoted statutes essentially provide that the State is liable for injuries to an innocent third party proximately caused by a state law enforcement officer during a vehicular pursuit. See *Meyer v. State*, 264 Neb. 545, 650 N.W.2d 459 (2002). Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

The appellate courts of this State have decided numerous cases under Neb. Rev. Stat. § 13-911 (Reissue 2007), which is the comparable statute under the Political Subdivisions Tort Claims Act, and we have previously indicated that we may look to cases under both § 13-911 and § 81-8,215.01 in analyzing law enforcement vehicular pursuit issues. See *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

In *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992), we reviewed the factual findings of the trial court and affirmed the denial of recovery sought under § 13-911 based on the absence of proximate cause. In *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003), we indicated that for liability to attach under § 81-8,215.01, the actions of the law enforcement officer need to be merely a proximate cause of the damages, not the sole proximate cause. We apply the reasoning of these cases to the facts of the present case.

[7] The court's opinion is 17 pages in length. In its findings of fact, the court describes competing testimony and even

inconsistencies within testimony. In making the determination as to factual questions, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous. *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009). In a section entitled "Resolution of Facts," the court generally found Anson's testimony not to be credible, because "[b]y his own admission, . . . Anson's memory is far from exact, is blurred, and full of gaps. He was under the influence of methamphetamine at the time of the incident. Many of his statements are clearly rebutted by the videotape and the weight of the evidence."

The court heard testimony surrounding the accident and found that Anson drove the Mustang "erratically, if not recklessly." The court elsewhere stated that Anson operated the Mustang "in a reckless manner." We cannot say these findings are clearly erroneous. See *Cingle v. State, supra*. The court logically concluded that "the accident was due solely" to Anson's conduct and that Cotton failed to prove that Kavan's actions were a proximate cause of her injuries. The court's findings and conclusions are supported by the record and properly apply the principles enunciated in our jurisprudence described above. The court's proximate cause analysis was not error.

In sum, we find no error in the district court's determinations that "the proximate cause of the accident was due solely to the decision of . . . Anson to operate his vehicle in a reckless manner" and that Cotton "has failed to prove that . . . Trooper Kavan's actions were a proximate cause of the accident." Even assuming without deciding that there was a vehicular pursuit under § 81-8,215.01(5), the law enforcement officer's actions were not a proximate cause of Cotton's injuries and the court did not err when it entered judgment in favor of the State.

CONCLUSION

We find no error in the evidentiary rulings challenged on appeal. Further, the district court did not err when it determined that, even if there had been a vehicular pursuit under § 81-8,215.01(5), Kavan's actions were not a proximate cause of Cotton's injuries. We affirm the district court's order entering judgment in favor of the State.

AFFIRMED.

AMERICAN NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE AND CROSS-APPELLEE, V. MICHAEL MEDVED, AN INDIVIDUAL, APPELLANT, HIGHWAY LEASING, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, AND GET GOING, LLC, DOING BUSINESS AS MPG CARRIERS, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEES, AND LAURA MEDVED, APPELLEE AND CROSS-APPELLANT.

801 N.W.2d 230

Filed July 1, 2011. Nos. S-10-611, S-10-616.

1. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Parties: Words and Phrases.** An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
4. **Parties: Jurisdiction.** If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
5. **Contracts: Judgments: Merger.** As a general rule, when a claim on a contract is reduced to judgment, the contract between the parties is voluntarily surrendered and canceled by merger in the judgment and ceases to exist.
6. **Actions: Damages: Judgments: Merger.** When a cause of action for the recovery of money damages is merged in a valid and final judgment in favor of the plaintiff, the cause of action is extinguished and a new cause of action on the judgment is created.

7. **Courts: Jurisdiction: States.** Before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.
8. ____: ____: ____. In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.
9. **Jurisdiction: States.** In conflict-of-law analysis, an actual conflict exists when a legal issue is resolved differently under the law of two states.
10. **Interventions.** The interest required as a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2008) is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
11. ____. To be filed as a matter of right, a petition in intervention under Neb. Rev. Stat. § 25-328 (Reissue 2008) must be filed before the trial.

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

Patrick R. Guinan and Heather B. Veik, of Erickson & Sederstrom, P.C., and Paul Sala and Leslie Hendrix, of Allen, Sala & Bayne, P.L.C., for appellant.

Aaron D. Weiner and Nicole Seckman Jilek, of Abrahams, Kaslow & Cassman, L.L.P., for appellee American National Bank.

Steven E. Achelpohl for appellee Laura Medved.

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

STEPHAN, J.

These consolidated appeals arise from actions taken by American National Bank (ANB) to execute on a judgment against Michael Medved, an Arizona resident with business interests in Nebraska. Medved's wife, Laura Medved (Laura), unsuccessfully sought to intervene in an action ANB filed against Medved in the district court for Douglas County. This action resulted in the issuance of charging orders against Medved's transferable interest in three Nebraska limited liability companies. Laura also unsuccessfully sought to intervene in an action filed in the district court for Sarpy County. The Sarpy County action resulted in a garnishment of Medved's wages. In Medved's appeals and Laura's cross-appeals, they argue that

the Nebraska orders violated their rights under Arizona community property law. We conclude that under either Arizona or Nebraska law, there was no error in the enforcement of the judgment.

I. FACTS

1. Case No. S-10-611 (District Court for Douglas County)

In a 2008 complaint, ANB alleged that Medved; Paul Gardner; Highway Leasing, LLC (Highway); and Get Going, LLC, had defaulted on various loans and guaranties. Three of the loans had been guaranteed by Medved, Gardner, and Get Going (collectively Highway Loans). Medved and Gardner had also guaranteed a loan for Get Going (Get Going Loan). In addition, Medved had allegedly defaulted on a personal loan evidenced by a promissory note (Medved Loan). Approximately $2 million was alleged due on the Highway Loans, $76,580 was alleged due on the Get Going Loan, and $565,801 was alleged due on the Medved Loan. ANB sought judgments on all the loans and recovery of costs and attorney fees.

On November 14, 2008, Medved, Highway, and Get Going entered into a stipulation to settle the litigation and to enter judgment in the amounts agreed to be past due. The Douglas County District Court entered a judgment for ANB against Medved, Highway, and Get Going in the amount of $2,097,609.20 plus interest for the Highway Loans (Highway Judgment). The court entered a separate judgment for ANB against Medved personally in the amount of $574,068.38 plus interest for the Medved Loan (Medved Judgment).

On April 20, 2010, ANB filed three applications for charging orders with the Douglas County District Court.[1] The applications sought to charge any transferable interest that Medved had in three limited liability companies—MMMM Holdings, LLC; MM Finance, LLC; and Medved Properties, LLC—with payment of the judgments entered against Medved. As of that date, ANB alleged that Medved owed $2,594,117.04

[1] See Neb. Rev. Stat. § 21-2654 (Supp. 2009).

on the Highway Judgment and $704,421.22 on the Medved Judgment.

Medved filed a resistance to the applications. He alleged that he alone, and not Laura, had signed the underlying promissory note, guaranties, and stipulated judgment. He alleged that ANB was not entitled to relief against his earnings and distributions from the limited liability companies, because they were community property belonging to him and Laura and protected under Arizona law.

Laura sought to intervene in the action. In her intervention complaint, she alleged that she was married to Medved, that both were residents of Arizona, and that Medved's earnings and distributions from the limited liability companies were community property and, as such, were protected under Arizona law from satisfying Medved's sole and personal debt. Laura asked for an order finding that the community property assets could not be charged or executed upon to satisfy ANB's judgment and an order denying the applications for charging orders. Medved filed a motion to dismiss the applications, alleging that the court lacked jurisdiction because ANB failed to join Laura as a necessary party.

The district court conducted a hearing at which it received evidence from ANB, Medved, and Laura. ANB's evidence established that the Medved Loan, the Highway Loans, and all related guaranties were executed in Omaha, Nebraska, and contained provisions stating that they would be governed by Nebraska law. Laura stated in an affidavit that she and Medved had been married since 1987 and were residents of Arizona at all relevant times relating to the litigation and judgment. Laura further stated that ANB did not name or serve her in either the Nebraska litigation or "the domestication of the Nebraska judgment in Arizona," which she referred to by a specific Arizona case number. During the hearing, ANB orally informed the court that it was no longer seeking a charging order in relation to the guaranty judgment. ANB stated that it was pursuing the charging order only with respect to the judgment for the amount due on the Medved Loan.

After the hearing, the district court entered an order denying Laura's motion to intervene. The court reasoned that Nebraska law applied to all issues, that Arizona law did not apply, and that Laura had no interest affected by the action and was not an indispensable or necessary party. In a separate order, the court overruled Medved's motion to dismiss, again finding that Laura was not an indispensable and necessary party, that Nebraska law applied, and that the property sought to be charged was not community property under Arizona law.

The court then entered three charging orders directing Medved Properties, MMMM Holdings, and MM Finance to transfer Medved's transferable interest to ANB. The charging orders referred only to the Medved Judgment. Medved perfected a timely appeal from these orders, and Laura cross-appealed.

2. Case No. S-10-616 (District Court for Sarpy County)

On April 22, 2010, ANB filed two praecipes and affidavits for garnishee summons, alleging that ANB had recovered a judgment against Medved in the amount of $574,068.38, which with interest currently totaled $704,421.22. We understand this amount to refer to the judgment on the Medved Loan entered by the district court for Douglas County on November 14, 2008. ANB alleged that both MMMM Holdings and MM Finance had property of and were indebted to Medved. Summonses and orders of garnishment in aid of execution to both companies were entered on April 23. Medved requested hearings and alleged that the funds asked for were exempt from garnishment.

MM Finance submitted answers to interrogatories in which it stated that it owed Medved wages and that $1,982.11 was subject to garnishment. MM Finance stated it did not have any property belonging to Medved. MMMM Holdings submitted answers to interrogatories in which it stated that it did not owe Medved any earnings, but that it held $30,000 in retained earnings.

Medved filed a motion to quash the summonses and orders of garnishment. He alleged the same defenses he raised in the Douglas County proceeding on the applications for charging orders. Laura filed a motion to intervene and quash summonses and orders of garnishment in which she raised the same arguments asserted in her intervention complaint and motion to intervene in Douglas County.

On May 28, 2010, the district court for Sarpy County entered an order denying the intervention and sustaining the motion to quash garnishment. The court found that a charging order is the sole method of attachment for limited liability company distributions. ANB filed a motion to alter or amend, arguing that the court's ruling that a charging order is the sole method of attachment to limited liability company distributions should apply only to the garnishment directed to MMMM Holdings but not to the garnishment directed to MM Finance, which sought to garnish wages. The court sustained the motion to alter or amend to the extent that the previous order should not apply to the garnishment of wages owed to Medved by MM Finance. Medved filed a timely appeal, and Laura cross-appealed.

II. ASSIGNMENTS OF ERROR

In case No. S-10-611, Medved assigns, restated, that the district court for Douglas County erred in (1) denying his motion to dismiss ANB's applications for charging orders; (2) entering charging orders against Medved's interests in MMMM Holdings, MM Finance, and Medved Properties; (3) finding that the property which was the subject of the charging orders was not community property under Arizona law and that Arizona's community property laws did not apply; (4) denying Laura's motion to intervene; and (5) finding that Laura had no interest affected by the action and that she was not an indispensable or necessary party to the action. In her cross-appeal, Laura assigns the same errors.

In case No. S-10-616, Medved assigns, restated, that the district court for Sarpy County erred in (1) sustaining ANB's motion to alter or amend the judgment, (2) permitting ANB to garnish wages owed to Medved by MM Finance, (3) failing

to apply Arizona's community property laws, and (4) denying Laura's motion to intervene. In her cross-appeal, Laura assigns the same errors.

III. STANDARD OF REVIEW

[1,2] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.[2] An appellate court reviews questions of law independently of the lower court's conclusion.[3]

IV. ANALYSIS

1. Contractual Choice-of-Law Provision

The Medveds argue that enforcement of ANB's judgment would violate their rights under the community property law of Arizona, where they reside. ANB argues that Arizona law does not apply, because the promissory note signed by Medved specifically provided that it is to be governed by Nebraska law. We begin by addressing the applicability and scope of the contractual choice-of-law provision.

The promissory note executed solely by Medved on November 13, 2006, reflects his Arizona address but makes no reference to Arizona law. Under the heading "GOVERNING LAW," the note provides: "This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Nebraska without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Nebraska."

We have recognized that persons residing in different states may select the law of either state to govern their contract and that the parties' choice of law will govern.[4] This principle is consistent with Restatement (Second) of Conflict of Laws § 187,[5] which provides:

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[2] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009); *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

[3] *In re Margaret Mastny Revocable Trust, ante* p. 188, 794 N.W.2d 700 (2011).

[4] See *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995).

[5] Restatement (Second) of Conflict of Laws § 187 at 561 (1971).

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

We adopt § 187 and conclude that pursuant to the explicit choice-of-law provision of the promissory note, ANB's action against Medved on the note was governed by Nebraska law.

[3,4] That being so, we find no merit in Laura's argument that she was an indispensable or necessary party to the action and that the court lacked jurisdiction to adjudicate Medved's liability on the note because she was not joined. An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[6] If necessary parties to a proceeding are absent, the district court has no

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[6] *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009); *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

jurisdiction to determine the controversy.[7] Laura was not a comaker on the note and therefore could have no joint and several liability on the note.[8] Her presence as a party was not necessary to determine Medved's liability on the note under Nebraska law.

[5,6] But this does not end the inquiry, because these are not appeals from the judgment on the promissory note but from orders entered to enforce the judgment. As a general rule, "[w]hen a claim on a contract is reduced to judgment, the contract between the parties is voluntarily surrendered and canceled by merger in the judgment and ceases to exist."[9] Applying this principle, the New Mexico Supreme Court held that a choice-of-law provision in a promissory note does not apply in proceedings to enforce a judgment entered on the note, because the note merged into the judgment and it constitutes a new obligation.[10] We agree with this reasoning, which is consistent with the statement found in Restatement (Second) of Conflict of Laws § 95 that when a cause of action for the recovery of money damages is merged in a valid and final judgment in favor of the plaintiff, "the cause of action is extinguished and a new cause of action on the judgment is created."[11]

Because the promissory note merged into the judgment, the choice-of-law provision in the note does not control the question of whether the law of Nebraska or that of Arizona should apply to ANB's attempt to enforce its judgment against Medved, an Arizona resident with property situated in Nebraska.

2. Law Applicable to Enforcement of Judgment

[7-9] The Medveds argue that because Arizona is the matrimonial domiciliary state and the Nebraska judgment was domesticated there, its law should apply to ANB's attempts to

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

[8] See Neb. U.C.C. § 3-116 (Reissue 2001).

[9] 46 Am. Jur. 2d *Judgments* § 459 at 750 (2006). See, also, *Glissman v. Orchard*, 152 Neb. 500, 41 N.W.2d 756 (1950).

[10] *Huntington Nat. Bank v. Sproul*, 116 N.M. 254, 861 P.2d 935 (1993).

[11] Restatement, *supra* note 5, § 95, comment *c*. at 283.

enforce its judgment in Nebraska. We have noted that before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.[12] Thus, in answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.[13] An actual conflict exists when a legal issue is resolved differently under the law of two states.[14] Enforcement of ANB's judgment against Medved through charging orders and wage garnishment is clearly permissible under Nebraska law. We must therefore determine whether the result would be different if Arizona law were applied.

(a) Absence of Laura's Signature on Promissory Note

The Medveds pled the applicability of two Arizona statutes, Ariz. Rev. Stat. Ann. §§ 25-214 and 25-215 (2007), and we take judicial notice of them pursuant to Neb. Rev. Stat. § 25-12,101 (Reissue 2008). Ariz. Rev. Stat. Ann. § 25-214 provides as follows:

> **A.** Each spouse has the sole management, control and disposition rights of each spouse's separate property.
>
> **B.** The spouses have equal management, control and disposition rights over their community property and have equal power to bind the community.
>
> **C.** Either spouse separately may acquire, manage, control or dispose of community property or bind the community, except that joinder of both spouses is required in any of the following cases:
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> 1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

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[12] *Christian v. Smith, supra* note 2; *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

[13] *Erickson v. U-Haul Internat., supra* note 2; *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[14] *Erickson v. U-Haul Internat., supra* note 2*; Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

2. Any transaction of guaranty, indemnity or suretyship.

3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

Ariz. Rev. Stat. Ann. § 25-215 provides:

A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent agreement of the property owner to the contrary.

B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.

C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.

D. Except as prohibited in § 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

For purposes of our analysis, we assume that Medved's Nebraska wages and his transferable interests in the Nebraska limited liability companies constitute community property under Arizona law. Medved argues that because he alone signed the promissory note, the judgment could not bind the community property. But he cites no Arizona law in support of his argument. Ariz. Rev. Stat. Ann. § 25-214(C) specifically provides that either spouse may separately bind the community except in certain circumstances, none of which include the execution of a promissory note. We do not understand this Arizona statute to require the signature of both spouses on a promissory

note in order to bind the marital community. In *National Union Fire Ins. Co. v. Greene*,[15] an Arizona court upheld the enforceability against community property of a New York judgment on a promissory note executed by only one spouse. We conclude that under Arizona law, the absence of Laura's signature on the promissory note would not bar the enforcement of a judgment on the note against community property.

(b) Effect of Failure to Join Laura in Nebraska Action

The Medveds argue that even if Laura was not a necessary party, ANB's failure to join her in its action on the promissory note precludes enforcement of the resulting judgment against their community property. Their argument is based on the provision of Ariz. Rev. Stat. Ann. § 25-215(D), which requires that "the spouses shall be sued jointly" in an action on a debt or obligation contracted by either of them. The question before us is whether, under Arizona law, this provision would preclude the enforcement of a judgment entered by a court of another state in an action where both spouses were not joined.

Although we have not been directed to any authority from the Arizona Supreme Court on this point, several Arizona appellate courts have considered it. The Medveds primarily rely on two cases, *Vikse v. Johnson*[16] and *C & J Travel, Inc. v. Shumway*.[17] *Vikse*, decided in 1983, involved an Arizona proceeding to enforce a judgment entered by a Minnesota court against two Arizona residents. After the judgment was domesticated in Arizona, the judgment debtors resisted enforcement on the ground that the joinder requirement of Ariz. Rev. Stat. Ann. § 25-215(D) had not been met, because their spouses were not named as parties in the Minnesota action. The court reasoned that the judgment could not be enforced, because

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[15] *National Union Fire Ins. Co. v. Greene*, 195 Ariz. 105, 985 P.2d 590 (Ariz. App. 1999).

[16] *Vikse v. Johnson*, 137 Ariz. 528, 672 P.2d 193 (Ariz. App. 1983).

[17] *C & J Travel, Inc. v. Shumway*, 161 Ariz. 33, 775 P.2d 1097 (Ariz. App. 1989).

"[t]he obvious purpose of joining the spouses is to give each notice and an opportunity to defend."[18] In *C & J Travel, Inc.*,[19] decided in 1989, the same division of the Arizona Court of Appeals relied on *Vikse* in holding that a New Hampshire judgment against an Arizona resident was unenforceable in Arizona because his spouse had not been joined in the New Hampshire proceeding.

ANB relies on three more recent decisions from a different division of the Arizona Court of Appeals which reach a different result. In *Oyakawa v. Gillett*,[20] the court held that a California judgment could be enforced against community property in Arizona notwithstanding the fact that the judgment debtor's spouse had not been a party to the California suit. The court reasoned that California community property law differed from that of Arizona with respect to the necessity for joinder and that the judgment was therefore not tainted by the fact that the spouse had not been joined and was entitled to full faith and credit in the Arizona courts.

National Union Fire Ins. Co. v. Greene[21] involved the enforceability of a judgment on a promissory note entered by a New York state court and subsequently domesticated in Arizona, where the judgment debtor and his wife had moved after entry of the judgment. The promissory note included a provision that it was to be governed by the law of New York. Rejecting a claim that the judgment was unenforceable in Arizona because the judgment debtor's spouse had not been joined in the New York lawsuit, the court concluded that failure to comply with Ariz. Rev. Stat. Ann. § 25-215(D) in the New York litigation was not a proper ground to refuse to honor the New York judgment. Noting that the original suit had no connection with Arizona, the court concluded that "[a]n Arizona court may not impress Arizona procedural law upon a foreign judgment and refuse to recognize that judgment merely because Arizona law

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[18] *Vikse v. Johnson, supra* note 16, 137 Ariz. at 530, 672 P.2d at 195.

[19] *C & J Travel, Inc. v. Shumway, supra* note 17.

[20] *Oyakawa v. Gillett*, 175 Ariz. 226, 854 P.2d 1212 (Ariz. App. 1993).

[21] *National Union Fire Ins. Co. v. Greene, supra* note 15.

was not followed in obtaining it."[22] This principle was cited by the court in *Alberta Securities Com'n v. Ryckman*[23] in support of its holding that a judgment entered by a Canadian court was enforceable against the defendant's community property in Arizona notwithstanding the fact that his spouse had not been joined in the Canadian lawsuit.

In *Gagan v. Sharar*,[24] a federal appellate court considered whether a judgment entered by a federal court in Indiana could be enforced against Arizona community property where only the husband had been a party to the original suit. The court first noted that the Indiana court had personal jurisdiction over the husband, but not his wife, and that therefore she was not personally liable on the judgment. But the court rejected the wife's argument that the judgment was unenforceable against community property because of noncompliance with Ariz. Rev. Stat. Ann. § 25-215(D). Based upon its review of the Arizona appellate court decisions discussed above, the court concluded that the Arizona Supreme Court would most likely adopt the approach taken in the three more recent cases.

We reach the same conclusion here. Although we acknowledge that this case differs from *National Fire Union Ins. Co.* and *Alberta Securities Com'n* in that the Medveds were residents of Arizona at the time the underlying action was commenced, we do not think that this fact dictates a different result. Despite the Medveds' Arizona residence, the action on the promissory note was governed by Nebraska law, and that law did not require that Laura be joined as a party. There would have been no reason for the district court to apply Arizona law with respect to joinder, and we therefore conclude that noncompliance with the joinder provisions of Ariz. Rev. Stat. Ann. § 25-215(D) would not render the judgment unenforceable against community property under Arizona law.

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[22] *Id.* at 108, 985 P.2d at 593.

[23] *Alberta Securities Com'n v. Ryckman*, 200 Ariz. 540, 30 P.3d 121 (Ariz. App. 2001).

[24] *Gagan v. Sharar*, 376 F.3d 987 (9th Cir. 2004).

(c) Laura's Right to Due Process

In *National Union Fire Ins. Co. v. Greene*,[25] the Arizona appellate court held that while due process did not require prejudgment joinder of the Arizona spouse in the action prosecuted in New York, the spouse was entitled, as a matter of due process, to notice and an "'opportunity to be heard at a meaningful time and in a meaningful manner'" before she could be deprived of her interest in community property. Laura argues that she was deprived of this right because she was not joined in the proceedings to enforce the judgment.

But Laura clearly had notice of the proceedings, because she appeared through counsel and sought to intervene. In the Douglas County proceeding, she filed a motion to intervene and an intervention complaint setting forth the basis for her contention that the charging orders would violate her rights under Arizona's community property law. At a hearing which preceded the issuance of the charging orders, Laura's counsel offered and the court received Laura's affidavit in support of her contentions. The district court heard argument from her counsel with respect to her interests under Arizona community property law. Similarly, Laura filed a motion to intervene in the garnishment proceedings in the district court for Sarpy County. The court received evidence and heard argument from Laura's counsel regarding her position that the proceedings would violate her community property rights under Arizona law. Based on these records, we conclude that Laura was afforded a meaningful opportunity to be heard in both proceedings regarding her contention that enforcement of the judgment would deprive her of community property rights under Arizona law.

(d) Existence of Community Debt

As noted, we assume for purposes of our analysis that the property against which ANB seeks to enforce its Nebraska judgment in Nebraska constitutes community property under Arizona law, which provides that "neither the community

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[25] *National Union Fire Ins. Co. v. Greene, supra* note 15, 195 Ariz. at 110, 985 P.2d at 595, quoting *Huck v. Haralambie*, 122 Ariz. 63, 593 P.2d 286 (1979).

property of spouses nor the separate property of one spouse is liable for the separate debts incurred by the other during marriage."[26] But when only one of the spouses incurs a debt during the marriage, "it does not necessarily follow that the debt is the separate obligation of that spouse. Debt incurred by one spouse while acting for the benefit of the marital community is a community obligation whether or not the other spouse approves it."[27] This is so "irrespective of pecuniary benefit to the community."[28]

Thus, under Arizona law, "debts incurred during marriage are presumed to be community debts, and the party who contends otherwise has the burden of overcoming the presumption by clear and convincing proof."[29] And pursuant to Ariz. Rev. Stat. Ann. § 25-215(C), "community property is liable for a spouse's debts incurred outside of [Arizona] during the marriage which would have been community debts if incurred in [Arizona]."

The Medveds have made no allegation or offered any proof that Medved's indebtedness on the promissory note which formed the basis of the judgment is not a community debt under Arizona law. Thus, we find no basis in the record for the Medveds' argument that the community property against which ANB seeks to enforce its judgment is somehow exempt under Arizona's community property law.

(e) Domestication of Judgment in Arizona

The Medveds argue that the Nebraska judgment was improperly domesticated in Arizona, citing noncompliance with Ariz. Rev. Stat. Ann. §§ 12-1701 to 12-1708 (2003) and 25-215(D). We see no relevance to this argument, in that ANB seeks to

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[26] *Lorenz-Auxier Financial Group v. Bidewell*, 160 Ariz. 218, 220, 772 P.2d 41, 43 (Ariz. App. 1989). See Ariz. Rev. Stat. Ann. § 25-215(A) and (B).

[27] *Lorenz-Auxier Financial Group v. Bidewell, supra* note 26, 160 Ariz. at 220, 772 P.2d at 43.

[28] *Id*. See *Donato v. Fishburn*, 90 Ariz. 210, 367 P.2d 245 (1961).

[29] *Lorenz-Auxier Financial Group v. Bidewell, supra* note 26, 160 Ariz. at 220, 772 P.2d at 43. See, also, *Schlaefer v. Financial Management Service*, 196 Ariz. 336, 996 P.2d 745 (Ariz. App. 2000).

enforce the original Nebraska judgment, not a domesticated Arizona judgment. And to the extent that the Medveds' argument on this point incorporates their position that failure to join Laura in the original action voids the judgment or bars its enforcement under Ariz. Rev. Stat. Ann. § 25-215(D), we reject the argument for the reasons discussed above.

(f) Denial of Motions to Intervene

Pursuant to Neb. Rev. Stat. § 25-328 (Reissue 2008),

> [a]ny person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

[10,11] The interest required as a prerequisite to intervention under § 25-328 is a direct and legal interest—an interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.[30] To be filed as a matter of right, a petition in intervention under § 25-328 must be filed before the trial.[31]

The interest upon which Laura sought to intervene was the same as that upon which her husband resisted enforcement of the judgment—a claim that under Arizona's community property law, ANB is barred from enforcing the judgment against Medved's wages and transferable interest in the Nebraska limited liability companies. For the reasons discussed, we conclude that this argument is without merit, and the judgment on the promissory note is enforceable against the Nebraska

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[30] *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005).

[31] *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007).

property, which we assume to be community property, regardless of whether Nebraska or Arizona law is applied to the Nebraska enforcement proceedings. Accordingly, denial of Laura's motions to intervene did not deprive her of a substantial right[32] and was therefore not prejudicial error.

V. CONCLUSION

For the reasons discussed, we affirm the judgments of the district court in each of the consolidated appeals.

AFFIRMED.

WRIGHT, J., not participating.

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[32] See *Emery v. Mangiameli*, 218 Neb. 740, 359 N.W.2d 83 (1984).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JULIANNE DUNN HERZOG, RESPONDENT.

805 N.W.2d 632

Filed July 8, 2011. No. S-10-018.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Jeffry D. Patterson, Special Counsel for Discipline, for relator.

Julianne Dunn Herzog, pro se.

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

PER CURIAM.

This disciplinary action arose out of guardianship and conservatorship proceedings involving Rosemary Dunn, the mother of the respondent, Julianne Dunn Herzog. For Herzog's conduct in those proceedings, the Counsel for Discipline charged her with violating four sections of the Nebraska Rules of Professional Conduct. After a hearing, the referee determined that Herzog had violated Neb. Ct. R. of Prof. Cond. §§ 3-503.2, 3-504.4, and 3-508.4. The referee recommends that Herzog be disbarred. We find clear and convincing evidence that Herzog violated the rules of professional conduct, and we therefore suspend Herzog from the practice of law for a period of 2 years.

BACKGROUND

This disciplinary action arose out of a longstanding dispute among Herzog and her siblings over guardianship and conservatorship proceedings for their elderly and incapacitated mother, Rosemary. Herzog has disagreed with her siblings about virtually everything related to Rosemary's guardianship and conservatorship, and this is Herzog's third disciplinary action arising out of those proceedings. Before Herzog's first disciplinary action, the county court determined that it was in Rosemary's best interests to appoint Daniel Dunn, Herzog's brother, as Rosemary's guardian, and for Rosemary to live at an assisted living facility in Minneapolis, Minnesota. Daniel was authorized to control visitation and telephone calls in Rosemary's best interests and was to have sole contact with Rosemary's living facility employees. Herzog filed various motions in the guardianship case, claiming to represent Rosemary's interests when in fact she previously had been granted leave to

withdraw. For those actions, a complaint was filed against Herzog with the Counsel for Discipline, and Herzog stipulated to a private reprimand.

In Herzog's second disciplinary action,[1] brought in 2008, the evidence showed that Herzog filed two notices of appeal and a petition for further review on behalf of Rosemary, who was not Herzog's client at the time of the filings. On appeal, we determined that Herzog's actions violated §§ 3-503.2 and 3-508.4(a) and (d). We were most concerned with the fact that Herzog's violations were her second disciplinary action arising out of Rosemary's guardianship and conservatorship proceedings. For her continued unethical behavior, we suspended Herzog from the practice of law for a period of 3 months, following which Herzog was placed on probation for a period of 1 year.

Before our ruling in Herzog's second disciplinary action, on May 22, 2008, we issued a memorandum opinion and judgment on appeal in case No. S-07-781, which was one of Herzog's appeals from a judgment of the county court for Douglas County. In that appeal, Herzog was the interested party and we noted that she did not represent Rosemary's interests. Herzog made numerous assignments of error, which generally related to Rosemary's guardianship and conservatorship proceedings. We found Herzog's arguments to be without merit, with one exception: We determined that the county court erred when it denied, without an evidentiary hearing, Herzog's application to find Rosemary's guardian in contempt or, in the alternative, show cause for removal. Herzog's application had referenced bruising on Rosemary's arms as evidence of possible abuse, indicated that Rosemary had lost weight and had problems with her dental bridge, and alleged that Herzog had been unable to obtain satisfactory information about Rosemary's health from the guardian. Herzog also indicated that there were continued visitation disputes with the guardian. We remanded the cause to the county court, and the current disciplinary charges against Herzog arose out of those proceedings.

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[1] See *State ex rel. Counsel for Dis. v. Herzog*, 277 Neb. 436, 762 N.W.2d 608 (2009).

Upon remand, the county court set a hearing date for July 21, 2008. Before that hearing, Rosemary fell and suffered a hip injury. The guardian informed Herzog that Rosemary might need to be transferred to another assisted living facility after treatment and rehabilitation. On July 18, upon receiving that information, Herzog withdrew her application to find Rosemary's guardian in contempt or, in the alternative, show cause for removal. Though Herzog's application had been withdrawn, the court held the July 21 hearing with respect to the visitation dispute. The court granted Rosemary's guardian absolute discretion with regard to when and where Herzog could exercise her visitation rights with Rosemary. The hearing was continued until November 14.

At the hearing, Herzog's husband revealed on cross-examination that Herzog had registered Douglas County Court documents in Minnesota, where Rosemary resides. The county court, examining copies of those documents, noted that the documents had been filed 3 days before the July 21, 2008, hearing held in Douglas County. The court said it was concerned because the July 21 hearing had addressed the same issues as did the Minnesota filing, but Herzog had not disclosed to the court that she had filed in Minnesota. The court questioned Herzog about her intent in filing the documents in Minnesota and not disclosing such filings at the July 21 hearing. The record reflects that Herzog argued with the court during this inquiry. Herzog stated that she did not know on July 21 that those documents had been filed. Upon further inquiry, Herzog stated:

> Judge, I'm not going to sit here and have you accuse me and then not allow me to answer. I refuse to do that. That's abuse. If you'd like to hear my answer, I will be happy to give it to you, but I will not sit here and be abused first by my brother's lawyer and now by you. If you'd like my answer, I'll give it to you. If you'd like a brief recess so we can all cool down, I'll —
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> . . . — but I will not be abused.

The court then instructed Herzog to lower her voice, to which Herzog responded "Well, I will not be abused." After further discussion, Herzog stated that the court was "repeating what [opposing counsel] has put in his pleadings" and then asked the court whether it was asking Herzog "[opposing counsel's] questions or the Court's questions."

Eventually, Herzog explained that upon being informed that Rosemary possibly would be transferred to another assisted care facility in Minnesota, she withdrew her request for a hearing on her application in Douglas County and sent the Douglas County Court documents to her lawyer in Minnesota. Herzog claimed that though the documents were filed in Minnesota on July 18, 2008, she was not aware of that fact until July 25, when she received notification of the filing. Herzog stated that, on August 29, she filed in the Douglas County Court a motion to transfer to Minnesota, because all of the evidence was in Minnesota and because she sought to enforce a visitation order which Rosemary's guardian was allegedly violating. Later, while the court was making a further inquiry, Herzog stated, "Would you like to file a complaint with the Bar Association? Feel free." Herzog also stated, "I don't know what your concern is, Judge, but it, obviously, isn't my mother. Now, I have to take a brief recess."

The guardian, Daniel, later filed a grievance with the Counsel for Discipline. The Counsel for Discipline charged Herzog with violating the Nebraska Rules of Professional Conduct when she (1) failed to inform the Douglas County Court of the filing of court documents from the underlying guardianship case in Minnesota; (2) caused documents to be filed in Minnesota with the intent to embarrass, delay, or burden a third party or that obviously would serve merely to harass or maliciously injure another; and (3) showed disrespect to the court when she engaged in a shouting match during the November 14, 2008, hearing in the county court. The Counsel for Discipline alleged that Herzog's actions violated §§ 3-503.2 (expediting litigation), 3-504.4 (respect for rights of third persons), and 3-508.4 (misconduct), as well as Neb. Ct. R. of Prof. Cond. § 3-503.3 (candor toward tribunal). After a hearing, the referee determined that Herzog had violated §§ 3-503.2, 3-504.4, and

3-508.4, but had not violated § 3-503.3. The referee recommends disbarment.

ASSIGNMENTS OF ERROR

Herzog filed the following summarized exceptions to the referee's report, stating that the referee had (1) considered evidence in the proceeding that involved conduct not charged in the amended formal charges and which was resolved in prior disciplinary proceedings, (2) incorrectly concluded that clear and convincing evidence proved Herzog had filed documents in Minnesota solely for the purpose of harassing or maliciously injuring another, (3) incorrectly concluded that clear and convincing evidence proved Herzog had filed documents in Minnesota with the intent to embarrass or burden a third person, and (4) incorrectly concluded that clear and convincing evidence proved that Herzog's conversation with the county court rose to the level of misconduct prejudicial to the administration of justice.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which we reach a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[2]

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence.[3]

ANALYSIS

As a preliminary matter, though Herzog argues that the referee erred in considering evidence in the proceeding that involved conduct not charged in the amended formal charges and which was resolved in her prior disciplinary action, her argument is without merit due to our standard of review. We review disciplinary proceedings de novo on the record, so

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[2] *State ex rel. Counsel for Dis. v. Herzog, supra* note 1.

[3] *Id.*

whatever the referee might have improperly considered is immaterial to our review.[4] We therefore only consider which, if any, Nebraska Rules of Professional Conduct were violated and the appropriate sanction for any such violation.

Expediting Litigation and Respect for Rights of Third Parties

The Counsel for Discipline charged Herzog with violating §§ 3-503.2 and 3-504.4 for filing court documents in Minnesota. Section 3-503.2 states:

> In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Section 3-504.4(a) states:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

The documents Herzog filed in Minnesota are an odd assortment, consisting of 44 total pages. They include, among other things, a journal entry from the Douglas County Court finding that Daniel was meeting his obligation to provide permanent guardianship for Rosemary; an order from the Douglas County Court ordering that Rosemary's farm be sold to provide her conservatorship estate with liquidity; Herzog's application in Douglas County to find Daniel in contempt or, in the alternative, show cause for removal; correspondence between Herzog and Daniel regarding Herzog's visitation in regard to Rosemary; correspondence between Herzog and Daniel regarding, among other things, bruising on Rosemary's arms; an order from the Douglas County Court approving the appointment of a conservator, awarding the conservator attorney fees, awarding service fees to the guardian ad litem, dismissing

[4] See *id.*

Herzog's application to find Daniel in contempt or in the alternative show cause for removal, finding that Daniel continued to fulfill his obligation as guardian, granting monthly visitation to Herzog, and withdrawing an earlier mediation requirement; Herzog's notice of appeal from that order; and our mandate in regard to that order.

Herzog contends that she caused the documents to be filed in Minnesota to enforce her right to visitation in Minnesota and, in response to our suggestion in the previous memorandum order and judgment on appeal, that a "visitor" be appointed as an intermediary between Herzog and her family to facilitate Herzog's visits with Rosemary. But as the referee noted, most of the documents Herzog filed have nothing to do with visitation. The documents that do mention visitation recite visits that were scheduled to take place before the filing date of July 18, 2008. In fact, only one document mentioned prospective visits, for July 19 and 20 and August 16 and 17. And none of the documents Herzog caused to be filed requested that the Minnesota court enforce Herzog's right to visitation. Herzog's claim that she filed in Minnesota to enforce her right to visitation is not credible.

Herzog's other explanation—that she filed the documents in response to our suggestion that a visitor be appointed—is also not credible. None of the documents that Herzog filed requested that a visitor be appointed. And, as the referee noted, none of the documents reference our suggestion, and Herzog did not file a copy of our decision. Herzog claims that she intended to file our opinion in Minnesota. Herzog testified that she sent documents to her Minnesota counsel, who chose which documents to actually file. However, neither Herzog nor her counsel provided evidence that Herzog intended to file our prior opinion. And though Herzog's attorney testified that he removed some of the documents from those Herzog provided, neither can remember which documents were removed.

Herzog's explanations for filing in Minnesota are not credible, especially in light of the fact that many of the documents Herzog filed related to Herzog's prior application to find Daniel in contempt or, in the alternative, show cause for his removal as Rosemary's guardian. Herzog withdrew that exact

application from the Douglas County Court prior to July 21, 2008. Herzog explained that she did so because the information on which the application relied was "stale." And though she claimed that her application was "stale," she still caused it to be filed in Minnesota at the same time she withdrew the application in Douglas County Court. Furthermore, Herzog's application, as the referee noted, is not an order to be enforced. It did not illustrate that Herzog was entitled to visitation, nor did it request the appointment of a visitor. And the title page of Herzog's application contained gratuitous photographs of bruising on Rosemary's arms. Though the photographs conceivably could have been entered into evidence at the hearing if supported by sufficient foundation, it was inappropriate for the front page of a court filing. For the foregoing reasons, we determine that there was no legitimate legal purpose for Herzog's Minnesota filing.

As the referee noted, in this disciplinary case, Herzog abused the subpoena process when she subpoenaed Daniel on a week's notice and when she subpoenaed Rosemary, knowing that Rosemary was incapacitated and that Herzog was prevented by court order from entering Rosemary's care facility. Herzog's abuse of the subpoena process, unaccounted-for filing of a "stale" application which contained gratuitous photographs of bruising on Rosemary, inability to articulate a credible legitimate legal purpose for her filing, and the animus between Herzog and Daniel clearly indicate that Herzog's intent in filing the documents in Minnesota could be for no other reason than to harass and embarrass, within the meaning of §§ 3-503.2 and 3-504.4, respectively. We therefore find clear and convincing evidence that Herzog violated §§ 3-503.2 and 3-504.4.

Misconduct

The Counsel for Discipline charged Herzog with violating § 3-508.4 for her confrontation with the Douglas County Court. Section 3-508.4 states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another;

. . . .

(d) engage in conduct that is prejudicial to the administration of justice.

We first note that Herzog violated § 3-508.4(a) by virtue of violating §§ 3-503.2 and 3-504.4 as discussed above. We also find that her confrontation with the Douglas County Court was prejudicial to the administration of justice under § 3-508.4(d).

The record reflects that Herzog was generally disrespectful to the court, raised her voice, accused the court of "abusing" her, accused the court of not caring about Rosemary, and accused the court of parroting opposing counsel's pleadings. Though the court interrupted Herzog several times, the majority of those interruptions were to get a satisfactory answer from Herzog as to why she filed Douglas County Court documents in Minnesota and then attended a hearing in the Douglas County Court without disclosing her actions. Herzog's brash conduct, on the whole, indicates a significant lack of respect for the court. As such, we find that Herzog's actions were prejudicial to the administration of justice within the meaning of § 3-508.4(d).

Appropriate Discipline

[3-5] Neb. Ct. R. § 3-304 states 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[.]

. . . .

(B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[5] This court will consider the attorney's acts both underlying the alleged

[5] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

misconduct and throughout the proceeding.[6] The determination of an appropriate penalty to be imposed also requires the consideration of any aggravating or mitigating factors.[7]

We first consider any mitigating factors. As the referee noted, Herzog's confrontation with the court did not involve obscenity, and to her credit, Herzog requested on multiple occasions that the court grant a recess, even suggesting that such recess would enable everyone to "cool down." And Herzog argues that she was under a great deal of stress at the time of the hearing, claiming emotional, health, and financial problems. We also observe that Herzog's misconduct has also occurred solely in the context of emotionally charged and highly personal matters, which does not excuse her conduct, but does suggest that such misconduct is less likely to occur in the representation of other clients.

We next consider aggravating factors. This proceeding is Herzog's third disciplinary action regarding guardianship and conservatorship proceedings involving Rosemary. In her first disciplinary action, Herzog stipulated that she violated DR 7-102(A)(1), currently codified at § 3-503.2. In Herzog's second disciplinary action, we determined that Herzog had violated §§ 3-503.2 and 3-508.4(a) and (d), and we suspended Herzog from the practice of law for a period of 3 months. In the current action, we find that Herzog violated §§ 3-503.2, 3-504.4, and 3-508.4(a) and (d). Herzog not only has violated our rules on multiple occasions, but she has violated the same rules—§§ 3-503.2 and 3-508.4(a) and (d)—on multiple occasions. And as we noted in Herzog's second disciplinary action, "what we are most concerned with is the fact that these formal charges represent Herzog's second disciplinary action regarding these guardianship proceedings. Even after her previous private reprimand, Herzog continued to engage in unethical behavior in the guardianship proceedings."[8] We note that our opinion in Herzog's second disciplinary action was decided after her

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[6] *Id.*

[7] *Id.*

[8] *State ex rel. Counsel for Discipline v. Herzog, supra* note 1, 277 Neb. at 445, 762 N.W.2d at 615.

actions in the present matter. Nonetheless, repeated acts of misconduct require a significant sanction.[9] Herzog's repeated and obsessive acts of misconduct in Rosemary's guardianship and conservatorship proceedings do not warrant leniency. But, in our opinion, they are not so egregious as to warrant disbarment. We therefore conclude that Herzog should be suspended from the practice of law for a period of 2 years.

CONCLUSION

We find by clear and convincing evidence that Herzog violated §§ 3-503.2, 3-504.4, and 3-508.4(a) and (d). Therefore, it is the judgment of this court that Herzog should be and hereby is suspended from the practice of law for 2 years, effective immediately.

Herzog shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to punishment for contempt of this court. At the end of the 2-year suspension, Herzog may be reinstated to the practice of law, provided that she has demonstrated her compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Herzog has violated any disciplinary rule during her suspension. Herzog is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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[9] See *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).

STATE OF NEBRASKA, APPELLEE, V. STEPHEN M. PULLENS, APPELLANT.

800 N.W.2d 202

Filed July 15, 2011. No. S-09-588.

1. **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.
2. ____: ____: ____. Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception.
3. ____: ____: ____. An appellate court reviews for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Judgments: Appeal and Error.** Under a clearly erroneous standard of review, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
6. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.
7. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.
8. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
9. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
10. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.

11. ____: ____. The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
12. ____: ____. In making a preliminary determination that a shocking or startling event has taken place, a trial judge may consider hearsay evidence which itself fails to satisfy any exception.
13. ____: ____. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
14. **Rules of Evidence: Appeal and Error.** Determinations of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and other considerations described in Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), is a matter within the district court's discretion and will not be reversed on appeal absent an abuse of that discretion.
15. **Rules of Evidence: Other Acts.** The admission of prior bad acts involves three elements: (1) 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) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
16. ____: ____. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
17. **Criminal Law: Words and Phrases.** Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts, or literally, a "method of working."
18. **Evidence: Other Acts.** A prior bad act cannot be independently relevant for a proper purpose if that purpose was not at issue in the case.
19. **Rules of Evidence: Other Acts.** The rule governing the admissibility of evidence of other crimes, wrongs, or acts is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
20. **Trial: Evidence.** Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party; only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
21. **Rules of Evidence: Words and Phrases.** For the purposes of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
22. **Rules of Evidence: Other Acts: Time.** While remoteness in time may weaken the value of prior bad acts evidence, such remoteness does not, in and of itself, necessarily justify exclusion of that evidence.
23. **Criminal Law.** For departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the

leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.

24. **Right to Counsel.** Once the right to counsel attaches, the accused is entitled to counsel at every critical stage of the proceeding.
25. ____. A defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.
26. ____. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.
27. **Right to Counsel: Waiver.** A formalistic litany is not required to show that a waiver of the right to counsel was knowingly and intelligently made, and an intelligent waiver of the right to counsel can be inferred from conduct.
28. **Presentence Reports: Waiver: Notice.** A defendant waives his or her qualified right to review the presentence investigation report by not notifying the trial court that he or she has not personally reviewed the report and that he or she wishes to do so.
29. **Effectiveness of Counsel.** A defendant who elects to proceed pro se cannot thereafter complain of the quality of his or her own defense.
30. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

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

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Stephen M. Pullens, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

A jury found Stephen M. Pullens guilty of killing his mother, Matsolonia Myers (Matsolonia), by throwing her over a balcony. Pullens alleges that the trial court erred by allowing hearsay evidence of a prior attempt by Pullens to throw

Matsolonia off a balcony, admitting into evidence 10 e-mails without proper authentication, and providing a jury instruction on voluntary flight when the evidence was insufficient to support that issue. Pullens also alleges that he was denied effective assistance of counsel at trial, that he was denied his right to counsel at his sentencing hearing after he demanded to proceed pro se, and that the trial court abused its discretion in sentencing him. We affirm.

II. BACKGROUND

Matsolonia died in the early evening hours of December 13, 2004, from injuries sustained after falling four stories off the balcony of her apartment in Omaha, Nebraska. It is undisputed that Pullens was the only witness. He had been staying with Matsolonia for approximately 1 week prior to the incident. It had been 4 years since their last visit, which ended in some acrimony. Pullens claimed that Matsolonia committed suicide.

1. The Fall

Pullens testified that during his visit, he noticed Matsolonia was acting withdrawn and depressed. He described in detail for the jury aspects of Matsolonia's life that might have contributed to her depression, including an alleged gambling problem. Pullens testified that on the night of December 13, 2004, Matsolonia was acting especially odd. Suddenly, she accused Pullens of wanting to hurt her. She then said, "'Well, okay, fine,'" took off her glasses, set them on the table, and inexplicably walked out to the balcony.

Out of concern for Matsolonia's well-being, Pullens followed her. Matsolonia was leaning over the railing, which was about chest high. Pullens testified that when he approached Matsolonia, she unexpectedly stepped on his foot and leaned into his body so as to hoist herself up to a seated position on the railing. She then pushed Pullens away and let herself fall backward.

Pullens testified that he tried to grab onto the lapels of Matsolonia's fleece pullover jacket, but that she slipped

through. He then very briefly tried to hold her by the neck, but he was unable to keep her from falling. According to Pullens, Matsolonia never yelled or screamed as she fell. He testified that she "didn't say a word, like she expected it."

Pullens explained that before going downstairs to where Matsolonia lay on the ground, he may have disturbed some items in Matsolonia's apartment while "running around" looking for his shoes and a key to get back inside. Also, when he was sitting on the sofa putting on his shoes, he found part of Matsolonia's necklace in the sleeve of his shirt and left it on the sofa. He called the 911 emergency dispatch service and was near Matsolonia when paramedics arrived.

The State presented a different version of what occurred the night of December 13, 2004. The pathologist who examined Matsolonia's body gave the opinion that Matsolonia had been strangled and rendered unconscious before being thrown over the balcony. This was based on observations of hemorrhaging in Matsolonia's trachea and larynx. Matsolonia also had an abrasion injury on her neck and chin that matched the zipper of the high-necked jacket lapels of the pullover she was wearing that night. This abrasion, the pathologist explained, could only be caused by placing direct pressure to the zipper against the skin—such as in the act of strangulation. The pathologist explained that the abrasion injury and the injuries to Matsolonia's trachea and larynx could not have been caused by the fall and that the injuries could not have been caused by an attempt to hold onto Matsolonia by her jacket lapels. The pathologist did not specifically rebut Pullens' assertion that he had grabbed Matsolonia by the neck in order to keep her from falling.

The State also presented evidence that a struggle had ensued in Matsolonia's apartment before she fell. In the living room area where the balcony was located, the officers discovered that the glass coffee table top was askew and partially off its base. A piece of a necklace was found under a pillow on the couch, the other pieces of which were found on Matsolonia's body. Matsolonia's glasses were lying on the floor directly in front of the sliding glass doors that lead to the balcony. The contents of her purse had been dumped on her bed.

2. Pullens' Prior Threat

Much of the trial focused on the relationship between Pullens and Matsolonia. Seven letters written by Pullens to Matsolonia were found in Matsolonia's apartment and were entered into evidence. In some of the letters, Pullens accused Matsolonia of being abusive and vindictive, and of playing games with people's lives. In others, he expressed his forgiveness and love for her. Pullens made references to Matsolonia's exaggerating events which occurred during his last visit in 2000.

Pullens explained at trial that the last time he had visited Matsolonia in 2000, he had confronted her about her gambling issues. Pullens stated that he told Matsolonia that if she were going to throw her life away, she might as well "just jump over the balcony." Pullens explained that Matsolonia used that statement "as an excuse to make a big deal out of it." He denied ever yelling or having any physical altercation with her. Pullens explained that Matsolonia was a "very strong woman" and that if he "would have even touched her at any point she would have had the police there . . . immediately." He noted that they had grown closer recently and that he did not think much of the incident.

Prior to this testimony, defense counsel had sought to exclude the State's witness to Matsolonia's alleged excited utterance, in which she reported that Pullens had threatened to kill her during the visit in 2000. The court overruled defense counsel's objections, which were based on hearsay and prior bad acts. Defense counsel did not take issue with the adequacy of the State's notice on these issues. The trial court found that the hearsay fell under the residual hearsay exception, because it was an excited utterance, and it found that, although it was a prior bad act, the 2000 incident was admissible for the proper purposes of intent, identity, modus operandi, and absence of mistake or accident.

Matsolonia's ex-husband, Lawrence Kenneth Myers (Kenneth), testified that one morning during Pullens' 2000 visit, he came home to find Matsolonia extremely upset. Kenneth testified that, while choked with emotion and hardly coherent, Matsolonia explained that Pullens had lifted her up onto the balcony and had threatened to throw her over. He had

eventually dropped her to the floor and left. The State adduced evidence that Matsolonia obtained a protection order against Pullens soon after the incident.

3. Flight, E-Mails, and Confession

The State also sought to show Pullens' voluntary flight from the police. When the police and rescue personnel arrived on December 13, 2004, Pullens had refused to give a detailed statement because he said he was drunk and did not "'want to say anything wrong.'" He was taken directly to the police station for blood and DNA sampling, but he was not placed under arrest at that time. Instead, Officer Ken Kanger agreed to transport Pullens from the police station to a motel. Kanger told Pullens that he would be back early the next morning in order to discuss the facts surrounding Matsolonia's death. When Kanger returned at approximately 10:45 a.m., Pullens had checked out and was gone.

Pullens testified that he knew he was a suspect and had no intention of speaking to Kanger until he found a lawyer. He purchased a car and slept in it until leaving town 3 days later. Pullens stated that during the 3-day period he was in town, he tried, unsuccessfully, to obtain a lawyer and locate his sister. Pullens claimed he had also attempted to call and send e-mails to Kanger because he wanted to get his passport and other belongings from Matsolonia's apartment. He had been living in Switzerland on a short-term assignment before visiting Matsolonia, and he was looking for another job. There is some evidence that he may have still maintained an apartment in Switzerland.

Kanger had no record of Pullens' alleged attempts to contact him while in Omaha. Kanger testified that he did not hear from Pullens until receiving an e-mail from California on December 21, 2004. In the 7-page e-mail, Pullens apologized for not getting back to Kanger sooner. This was the beginning of an e-mail correspondence between Kanger and Pullens that lasted more than a year. Pullens testified that he sent approximately 47 e-mails to Kanger during this time. Most of the e-mails were sent from Switzerland, where Pullens returned in January 2005, as soon as he was able to obtain a replacement passport.

According to evidence submitted by the State, Pullens procured the passport fraudulently after two attempts in which he lied about how the passport had been lost.

Ten e-mails sent from Pullens to Kanger, consisting of 56 pages in total, were entered into evidence by the State. Through the e-mails, the State sought to demonstrate Pullens' conscious flight from the Omaha police, as well as inconsistencies between the multitude of stories recounted by Pullens describing the night of December 13, 2004. In one e-mail, Pullens stated that a stranger had killed Matsolonia and threatened to kill Pullens if he told anyone. In another, Pullens admitted it was he who killed Matsolonia. The e-mails also provided numerous details concerning Matsolonia and Pullens' relationship. The court overruled defense counsel's objection that the State had failed to lay sufficient foundation to show that the e-mails were authored by Pullens. The State presented expert testimony, described in more detail in our analysis section below, which verified Pullens' usage of the e-mail accounts and the personal facts described in the e-mails.

In one of his e-mails written from Switzerland, Pullens explained: "I am . . . aware that you don[']t have a Prima Facia [sic] case or enough to extridite [sic] me to the US from Switzerland or ANY EU country. I am aware that their [sic] is a difference between Switzerland and the EU countries in this matter." In the e-mail, Pullens described Matsolonia as abusive, controlling, and manipulative. He wrote that she had once previously lied about his threatening to throw her over a balcony—simply to deflect criticism of her gambling. Pullens indicated in his e-mails that Matsolonia may have committed suicide. He wrote: "[I]s it not a little too neat to have someone bogus-ly [sic] say that I threatened [Matsolonia] and then have her die in the Exact manner she said she was threatened?"

In later e-mails, Pullens wrote that he suspected the Omaha police had a warrant for his arrest. In an e-mail dated September 3, 2005, Pullens wrote, "I am so tired of running from you and I just want all of this to end." It is in this e-mail that he confessed to throwing Matsolonia off the balcony. At trial, Pullens explained that this e-mail was meant to be read as "scornfully ironic."

In an e-mail dated September 19, 2005, Pullens writes, "I am coming back and know that you are going to arrest me." It appears that by this time, the foreign consulate had confiscated Pullens' passport. Pullens eventually returned to Omaha, where he was arrested.

4. Jury Instructions, Verdict, and Sentencing

Pullens was charged with second degree murder. At trial, the jury was instructed, over Pullens' objection, that it could consider "voluntary flight of a person immediately or soon after the occurrence of a crime" as a "circumstance, not sufficient of itself, to establish guilt." The jury was also instructed that it could consider Kenneth's testimony about the prior threat to Matsolonia only for the limited purpose of establishing Pullens' intent, absence of mistake, identity, and modus operandi, and that it could not consider this testimony to prove Pullens' character and that he acted in conformity therewith. Pullens did not object to the form of the prior bad act instruction. The jury found him guilty.

After the verdict, Pullens became dissatisfied with his privately retained counsel. The facts pertaining to the sentencing hearings will be discussed in further detail below. In summary, Pullens requested that the court appoint him a public defender or that he be granted a continuance to find new, privately retained counsel. The court refused both requests, and Pullens elected to represent himself pro se, with counsel present as standby. There is no record of the court's conducting a specific colloquy with Pullens to determine that his decision to represent himself was made knowingly and intelligently, nor were there explicit findings to that effect. The court sentenced Pullens to a term of imprisonment from 80 years to life. He was appointed new counsel for this appeal.

III. ASSIGNMENTS OF ERROR

Pullens alleges that the trial court erred (1) in allowing Kenneth to testify that in November 2000, Matsolonia told him that she and Pullens had a confrontation and that he tried to throw her off the balcony; (2) in allowing into evidence e-mails without proper authentication as required under Neb. Evid. R.

901, Neb. Rev. Stat. § 27-901 (Reissue 2008); (3) in giving jury instruction No. 14 regarding voluntary flight; (4) in denying Pullens the right to counsel at his sentencing hearing; (5) in abusing its discretion in sentencing Pullens; and (6) in denying him effective assistance of counsel at trial.

IV. STANDARD OF REVIEW

[1] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[1]

[2] Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception.[2]

[3] We review for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

[4] Under a clearly erroneous standard of review, we do not reweigh the evidence but consider the judgment in a light most favorable to the successful party, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[4]

[5] 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.[5]

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

[2] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[3] See, *State v. Draganescu, supra* note 1; *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002).

[4] See *Henriksen v. Gleason, supra* note 3.

[5] See *State v. Epp, supra* note 2.

[6] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.[6]

[7] In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.[7]

[8] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.[8]

[9] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[9]

V. ANALYSIS

1. Prior Threat

We first address Pullens' argument that the trial court should have excluded testimony that during the 2000 visit, Pullens had threatened to throw Matsolonia off a balcony. It has been said to be "a universally established rule" that in prosecutions for murder, prior threats by the defendant against the life of the deceased are competent evidence to demonstrate the defendant's state of mind.[10] Common sense, experience, and logic dictate that evidence of prior quarrels between the same parties is relevant on the issue whether the accused committed the charged acts.[11] Nevertheless, for

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[6] See *id.*

[7] See *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[8] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

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

[10] 40A Am. Jur. 2d *Homicide* § 301 at 161 (2008). See, also, e.g., *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

[11] See *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317 (1986).

such evidence to be admissible, it must satisfy all applicable evidentiary rules.[12] The prior threat in this case crosses paths with two exclusionary rules: the rule against hearsay[13] and the rule against the admission of prior bad acts.[14] We first address hearsay.

(a) Hearsay

The State offered Kenneth's testimony under the residual hearsay exception.[15] We note at the outset, however, that in allowing the testimony, the trial court spent considerable analysis concluding that Matsolonia's hearsay statement satisfied the criteria for the excited utterance hearsay exception found in Neb. Evid. R. 803(1), Neb. Rev. Stat. § 27-803(1) (Reissue 2008). In determining admissibility under the residual hearsay exception, a court may compare the declaration to the "closest" hearsay exception as well as consider a variety of other factors affecting trustworthiness.[16]

Given that the trial court ultimately found that the statement was an excited utterance, we find it unnecessary and redundant to analyze the additional factors of trustworthiness which the court concluded bolstered the statement's admissibility. We agree that the statement was an excited utterance and that it was, for that reason, properly admitted over Pullens' hearsay objection. In so concluding, we review for clear error the trial court's factual findings underpinning the exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[17]

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[12] See *Slakman v. State*, 272 Ga. 662, 533 S.E.2d 383 (2000). See, also, *State v. Watts*, 85 S.D. 638, 188 N.W.2d 913 (1971).

[13] Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008).

[14] § 27-404.

[15] Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2008).

[16] *State v. Epp, supra* note 2, 278 Neb. at 695, 773 N.W.2d at 370. See, also, *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

[17] See, *State v. Draganescu, supra* note 1; *Henriksen v. Gleason, supra* note 3.

Viewing Kenneth's testimony at trial and in the pretrial hearing as a whole, he made the following account: Kenneth testified that sometime in 2000, Pullens spent several days visiting Matsolonia and Kenneth at their home in Omaha. One evening, Kenneth decided to spend the night in a motel. Kenneth explained that he left home around 10 p.m. because he "didn't want to converse any more with . . . the present people that were there." Kenneth stated that to the best of his recollection, it was around 9 a.m. when he arrived back home the next day. He was not completely certain of the time, but explained that he was an early riser and had returned home soon after waking up.

When Kenneth opened the door, Matsolonia immediately came to meet him. She was visibly upset. Kenneth observed that Matsolonia was fully dressed, and he surmised that she had not yet changed from being out all night at the casinos. She had a small "nick" on the side of her eye. Kenneth testified that in the 7 years of their marriage, he had never seen her so emotional.

Unsolicited, Matsolonia began to give Kenneth a "teary-eyed and incoherent, raggedy, choked-up kind of explanation" of what had occurred. Matsolonia indicated that she and Pullens had argued. The argument escalated into a physical tussle, and Pullens physically took Matsolonia out onto the balcony. Matsolonia stated that Pullens then picked her up and threatened to throw her over. But instead, he dropped her onto the cement floor of the balcony and left.

[10,11] For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.[18] The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.[19]

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[18] *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[19] *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

(i) Bootstrapping

Pullens first argues that the statement was improperly admitted, because there was only Matsolonia's hearsay statement to establish the startling event. Pullens asserts that we should not allow hearsay to thus lift itself into admissibility by its own bootstraps.[20] We have never before directly addressed this question. Rule 104 of the Nebraska Evidence Rules,[21] adopted in 1975, generally states that preliminary questions of admissibility shall be addressed to the trial judge and that they shall be addressed outside the presence of the jury in the case of confessions or where the interests of justice so require. But the rules are silent on whether the rules of evidence apply to such determinations or whether so-called bootstrapping is permitted.

Rule 104 omitted the following statement from the corresponding federal rule: "In making its determination [the judge] is not bound by the rules of evidence except those with respect to privileges."[22] The Nebraska Supreme Court Committee on Practice and Procedure, in its comments to the proposed rule 104, explained that the omission was merely intended to avoid "unduly encourag[ing] the trial judge to depart from the usual rules."[23] Because the resolution of this question depends in part on a determination of the "usual rules" as the drafters of rule 104 understood it, we find a historical analysis of preliminary determinations of admissibility to be instructive.

As is the case in determinations of whether evidence satisfies the excited utterance hearsay exception, admissibility of evidence frequently depends on resolution of difficult preliminary questions of fact.[24] Since early common law, those questions were resolved by the trial judge and were not the

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[20] See 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 803.04[2][a] (Joseph M. McLaughlin ed., 2d ed. 2009).

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

[22] Fed. R. Evid. 104(a).

[23] Proposed Nebraska Rules of Evidence, rule 104, comment at 17 (1973).

[24] 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 104.02[1] (Joseph M. McLaughlin ed., 2d ed. 2010).

province of the jury.[25] While actual practice was unclear, the earliest published opinions appeared to generally impose evidentiary rules upon the court's determination of these preliminary questions.[26] However, several exceptions were noted, especially in allowing consideration of inadmissible hearsay for the sake of convenience, and by 1923, Professor Wigmore set forth the general proposition that in preliminary rulings by a judge on the admissibility of evidence, the ordinary rules of evidence simply do not apply.[27]

Around the same time, courts and commentators began to respond to criticism that certain preliminary fact questions closely related to the merits of the case should be given to the jury instead of the judge.[28] A "modern rule" emerged which distinguished between preliminary facts conditioning the logical relevance of other evidence before the trier of fact and preliminary facts conditioning the application of technical evidentiary rules, such as the hearsay doctrine.[29] By the mid-20th century, it seemed well established, at least in academic circles, that preliminary facts conditioning logical relevance were generally matters for the jury and were, accordingly, restricted to the rules of evidence.[30] But facts conditioning whether relevant evidence is excludable under one of the "technical" exclusionary rules were normally to be determined outside the jury's presence by the judge. And the judge was not considered to be constrained to those preliminary

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[25] See, John MacArthur Maguire & Charles S.S. Epstein, Rules of Evidence in Preliminary Controversies as to Admissibility, 36 Yale L.J. 1101 (1927); 45 Am. Jur. *Trials* 1, § 6 (1992).

[26] See Maguire & Epstein, *supra* note 25.

[27] See *id.*, citing 3 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 1385 (2d ed. 1923).

[28] See 45 Am. Jur. *Trials* 1, *supra* note 25, § 7.

[29] See *id.*, § 8. See, also, Edmund M. Morgan, *Functions of Judge and Jury in the Determinations of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929).

[30] See, 1 McCormick on Evidence § 53 (John William Strong et al. eds., 4th ed. 1992); 45 Am. Jur. *Trials* 1, *supra* note 25, § 61.

facts which themselves would be admissible under the rules of evidence.[31]

In *United States v. Matlock*,[32] the U.S. Supreme Court summarized: "[I]t should be recalled that the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence." The Court went on to state:

> There is . . . 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. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . .[33]

Other authorities have explained that traditional exclusionary rules of evidence, such as hearsay, are "'"the child of the jury system"'"[34]; they evolved "because the judges feared that unsophisticated lay jurors would attach undue weight to such evidence."[35] There is no logical necessity to apply such rules at the foundational stage to the judge's determinations.[36] To the contrary, the trial judge's experience and legal training can be relied on to inform crucial distinctions and to reveal the inherent weakness of evidence by affidavit or hearsay.[37]

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[31] See *id.*

[32] *United States v. Matlock*, 415 U.S. 164, 172-73, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974) (citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949), and *Bridges v. Wixon*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945)).

[33] *Id.*, 415 U.S. at 175.

[34] Fed. R. Evid. 104(a), advisory committee's note.

[35] 45 Am. Jur. *Trials* 1, *supra* note 25, § 61 at 94.

[36] Edward J. Imwinkelried, *Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by* Kumho Tire Co. v. Carmichael, 52 Me. L. Rev. 19 (2000).

[37] 1 Weinstein & Berger, *supra* note 24, § 104.11[1][a].

In fact, in certain situations, a suspension of the rules of evidence is a practical necessity, such as where the content of the asserted declaration against interest must be considered in ruling whether it is in fact against interest, or where the testimony of a witness must be considered in determining competency.[38] More generally, elimination of the rules of evidence for preliminary determinations of facts conditioning technical exclusionary rules is desirable because it expedites the preliminary hearing and, therefore, the trial itself.[39]

Pullens recognizes that under these principles, the majority of other state and federal jurisdictions have explicitly held that independent corroborative proof of the startling event is not required in order to admit excited utterance evidence.[40] Furthermore, in *Bourjaily v. United States*,[41] the U.S. Supreme Court held that under the federal rules of evidence, there is no prohibition against so-called bootstrapping in making preliminary determinations. Nevertheless, Pullens argues that in Nebraska, rule 104 mandates a different approach.

As the U.S. Supreme Court in *Matlock* explained, federal rule of evidence 104(a), including the phrase, "[i]n making its determination [the judge] is not bound by the rules of evidence except those with respect to privileges," was transmitted to Congress based on the Court's aforementioned view of common law at that time.[42] While there are no cases squarely addressing this question in Nebraska, it is clear from the Nebraska

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[38] Annot., 39 A.L.R. Fed. 720 (1978 & Supp. 2010-11).

[39] 1 Weinstein & Berger, *supra* note 24, § 104.11[1][a].

[40] See, e.g., *U.S. v. Arnold*, 486 F.3d 177 (6th Cir. 2007); *U.S. v. Brown*, 254 F.3d 454 (3d Cir. 2001); *United States v. Moore*, 791 F.2d 566 (7th Cir. 1986); *Wetherbee v. Safety Casualty Company*, 219 F.2d 274 (5th Cir. 1955); *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1953); *People v. Franklin*, 683 P.2d 775 (Colo. 1984); *Com. v. Alvarado*, 36 Mass. App. 604, 634 N.E.2d 132 (1994); *Johnston v. W. S. Nott Co.*, 183 Minn. 309, 236 N.W. 466 (1931); *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987). See, also, 2 McCormick on Evidence § 272 (John William Strong et al. eds., 4th ed. 1992); 5 Weinstein & Berger, *supra* note 20.

[41] *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

[42] *United States v. Matlock, supra* note 32.

Supreme Court committee's comments that it believed our "usual rules" largely coincided with those articulated by the U.S. Supreme Court and by the federal rules. The Nebraska Supreme Court committee quoted at length the federal advisory committee's notes to its corresponding rule 104,[43] including the following:

> "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase,[44] be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay."[45]

The Nebraska Supreme Court committee's quotation of the federal advisory committee then ends with a summation of a tentative California rule, which was never adopted, and a New Jersey evidence rule, both of which stated in summary that the rules of evidence, other than claims of privilege, are inapplicable to preliminary determinations made by a judge. Directly after this extensive quote, the Nebraska Supreme Court committee concluded: "This rule has always been applied in Nebraska."[46]

[12] Thus, we reject Pullens' contention that Nebraska, by case law or statute, has adopted a position distinct from federal law and the majority of other states.[47] We accordingly find no support for Pullens' argument that in determining a startling event occurred, the trial court clearly erred because a substantial piece of the evidence of such event was Matsolonia's hearsay statement describing what had startled her. As early as 1869, published cases have demonstrated that a trial judge may consider hearsay evidence which itself fails to satisfy any

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[43] Proposed Nebraska Rules of Evidence, *supra* note 23.

[44] James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 266 (1898).

[45] Proposed Nebraska Rules of Evidence, *supra* note 23, comment at 18. See, also, *United States v. Matlock, supra* note 32.

[46] Proposed Nebraska Rules of Evidence, *supra* note 23, comment at 19.

[47] See 2 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 11:21 (7th ed. 1994 & Cum. Supp. 2001).

exception, in making a preliminary determination that a shocking or startling event has taken place.[48] In *State v. Jacob*,[49] we upheld the admission of the victim's declaration, as an excited utterance, that the defendant had come to her house and threatened her, even though there was no independent physical evidence of the visit and threat.

In fact, some commentators have argued that many excited utterance cases do not truly present the hearsay bootstrapping issue that, at first blush, they appear to present.[50] Even in the minority of jurisdictions which prohibit "bootstrapping," courts recognize a fundamental distinction between the statement itself and the outward manifestations of distress observable by the witness to the statement.[51] The witnesses' observations of the declarant's emotional state are independent evidence sufficient to show a startling event.[52] And it is logical to infer that a visibly upset individual was startled by the events he or she described while upset.[53] The question of whether further corroborating evidence is needed in a given case is committed to the discretion of the trial judge.[54]

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[48] See, e.g., *Insurance Company v. Mosley*, 75 U.S. (8 Wall.) 397, 19 L. Ed. 437 (1869); *Stewart v. Baltimore & O. R. Co.*, 137 F.2d 527 (2d Cir. 1943); *Preferred Accident Ins. Co. of New York v. Combs*, 76 F.2d 775 (8th Cir. 1935); *Industrial Com. v. Diveley*, 88 Colo. 190, 294 P. 532 (1930); *National Life & Accident Ins. Company v. Hedges*, 233 Ky. 840, 27 S.W.2d 422 (1930); *Johnston v. W. S. Nott Co., supra* note 40; *Collins v. Ins. Co.*, 122 W. Va. 171, 8 S.E.2d 825 (1940).

[49] *State v. Jacob, supra* note 19.

[50] See, Maguire & Epstein, *supra* note 25; Charles T. McCormick, *The Procedure of Admitting and Excluding Evidence*, 31 Tex. L. Rev. 128 (1952). See, also, 2 McCormick on Evidence, *supra* note 40.

[51] See, *People v. Barrett*, 480 Mich. 125, 747 N.W.2d 797 (2008); *State v. Young*, 160 Wash. 2d 799, 161 P.3d 967 (2007). See, also, *U.S. v. Hadley*, 431 F.3d 484 (6th Cir. 2005). But see *State v. Post*, 901 S.W.2d 231 (Mo. App. 1995).

[52] See *id.* See, also, *Wetherbee v. Safety Casualty Company, supra* note 40; *Wheeler v. United States, supra* note 40; *Stewart v. Baltimore & O. R. Co., supra* note 48.

[53] See, e.g., *U.S. v. Brown, supra* note 40.

[54] See *id.*

We noted in *Jacob* that when the victim made her declaration, she appeared flushed, fidgety, and visibly upset. Similarly in this case, Kenneth described visible manifestations of Matsolonia's excitement. Moreover, Kenneth observed an injury, albeit minor, to Matsolonia's face. The State also introduced evidence that a restraining order was issued around the time of the alleged threat to keep Pullens away from Matsolonia. In concluding that a startling event had occurred, the trial court utilized this evidence in conjunction with Matsolonia's hearsay description of what had occurred. The trial court also specifically found that the hearsay description was "reliable" insofar as Kenneth had no cause to fabricate what he heard Matsolonia say. While Pullens asserts reasons why Matsolonia might have been lying to Kenneth when she made her statements, the trial court did not abuse its discretion in finding those arguments unconvincing. Moreover, Matsolonia's alleged unreliability and the theory that she had lied about Pullens' prior threat was fully explored by the defense at trial, and the jury could consider this in determining what weight to give to the excited utterance.[55]

(ii) Time Between Event and Declaration

Pullens next argues that the declaration fails to satisfy the spontaneity criteria for an excited utterance. He argues there was insufficient evidence that the incident occurred near the time of the declaration.

[13] We have explained that the time interval between the startling event and the statement in question is not, of itself, dispositive of the spontaneity issue.[56] The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.[57]

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[55] See, e.g., *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983).

[56] *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

[57] *State v. Jacob, supra* note 19.

We have never held, as Pullens seems to argue, that there must be definitive and direct evidence of the time of the startling event. Rather, we have upheld the admission of statements as excited utterances despite the fact that the record did not precisely reflect the passage of time between the startling event and the declaration, so long as there was a plausible inference from the totality of the circumstances that the declarant did not have time to calmly reflect upon the event.[58] We have found it to be particularly persuasive evidence that a declarant was still under the stress of the event when he or she was visibly upset at the time of the statement.[59]

Despite the fact that Kenneth did not witness what occurred during the time of his departure the night before the startling event and his arrival the next morning, his testimony supports the inference that it occurred shortly before Kenneth returned home. The trial court did not clearly err in concluding that at the time of her declaration to Kenneth, Matsolonia was still under the stress of nervous excitement and shock produced by her son's picking her up on the balcony and threatening to throw her over. Pullens makes no other argument pertaining to his hearsay objection, and we conclude that it was properly overruled.

(b) Prior Bad Act

[14] We next address Pullens' argument that the evidence of his prior threat to Matsolonia was inadmissible because it did not satisfy the criteria for admission of prior bad acts under rule 404(2) or the overarching protections of rule 403. It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[60] Likewise, determinations of whether the probative value of the evidence is

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[58] *Id.*; *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[59] See *id.* See, also, 2 McCormick on Evidence, *supra* note 40.

[60] See *State v. Epp, supra* note 2.

substantially outweighed by the danger of unfair prejudice and other considerations described in rule 403 is a matter within the district court's discretion and will not be reversed on appeal absent an abuse of that discretion.[61]

[15] The admission of prior bad acts involves three elements: (1) 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) the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[62] The trial court gave a limiting instruction as requested by Pullens, and Pullens does not contest the adequacy of that instruction to focus the jury's attention away from prohibited inferences if the prior bad act had otherwise been admissible. We hold that the prior bad act was properly admitted into evidence.

(i) Was There Clear and Convincing Evidence of Prior Bad Act?

Pullens first argues that the trial court erred in finding that the State had made an adequate showing that a prior bad act occurred. Even if admissible under the three factors listed above, as a preliminary matter, rule 404(2) requires that the State prove the prior bad act by clear and convincing evidence.

The trial court based its finding largely on its assessment that Kenneth was credible and truthful in his report of Matsolonia's condition and as to what she had declared. Pullens questions Matsolonia's credibility and states that there is "no evidence to back up her story."[63] Pullens' argument largely overlaps the "bootstrapping" issue already discussed in our analysis of the hearsay question. Pullens fails to cite any authority for the proposition that a victim's excited utterance is insufficient to prove a prior bad act and must be independently verified.

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[61] *State v. Clark*, 8 Neb. App. 936, 605 N.W.2d 145 (2000).

[62] See *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[63] Brief for appellant at 26.

In fact, other courts have expressly held that a prior bad act, admitted for a proper purpose, may be established through hearsay testimony, so long as the testimony comes within one of the exceptions to the hearsay rules.[64] We have already determined that the testimony came within the excited utterance hearsay exception. Despite Pullens' view of Matsolonia's character, it was within the court's discretion to consider whether Matsolonia was credible. We conclude that the trial court did not abuse its discretion in determining that a prior bad act had been shown.

(ii) Was Prior Bad Act Admitted for Proper Purpose?

Pullens also argues that there was no proper purpose for the bad act evidence. The general rule concerning prior bad acts is that if the proffered evidence invites the jury to focus its attention on the character of the defendant rather than determining what actually happened, it is impermissible character evidence and should be excluded.[65] However, evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[66]

It is commonly held that prior threats or attacks by the defendant upon the victim may be relevant not to show a general propensity toward violence, but, rather, to demonstrate the nature of the relationship between the victim and the defendant and the defendant's feelings toward the victim.[67] This, in turn, may demonstrate proper purposes of intent, motive, and absence of mistake or accident.[68] Identity or modus operandi is also shown where the prior threat makes reference to a

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[64] See *State v. Charo*, 156 Ariz. 561, 754 P.2d 288 (1988).

[65] 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 4:26 (15th ed. 1997).

[66] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[67] See, *Ross v. State*, 676 N.E.2d 339 (Ind. 1996); *State v. Reyes*, 744 N.W.2d 95 (Iowa 2008); *Com. v. Jackson*, 900 A.2d 936 (Pa. Super. 2006).

[68] See *id.* See, also, *State v. Jeffers, supra* note 55; *State v. Parton*, 694 S.W.2d 299 (Tenn. 1985).

peculiar method of violence that in the end is carried out.[69] Furthermore, prior bad act evidence may rebut evidence by the defendant that he or she would never wish to cause the victim harm.[70]

Accordingly, in several cases, we have upheld the admission of prior attacks or threats by the defendant against the victim. For instance, in *State v. Harper*,[71] the defendant was charged with attempted murder of his ex-girlfriend and the murder and attempted murder of her family members by poisoning drinks in the ex-girlfriend's home. On appeal from his conviction, the defendant argued that the trial court had erred in admitting evidence of the prior bad act, committed 3 years before, of driving by the ex-girlfriend's residence and firing a shotgun at the ex-girlfriend and members of her family who were sitting outside. We disagreed. We held that the prior attack was admissible for proper purposes and that its relevancy did not depend on prohibited character inferences.[72]

Nevertheless, Pullens believes that this case is distinguishable from other cases admitting evidence of prior threats or attacks. Pullens' central premise seems to be that because the theory of defense in Pullens' trial was that Matsolonia had committed suicide, there was no proper purpose for which his prior bad act could be admitted into evidence which was not substantially outweighed by the risk of unfair prejudice. We disagree and find that the prior bad act was properly admitted for the purposes of identity, modus operandi, and intent.

a. Identity and Modus Operandi

[16] We first address the trial court's admission of the prior threat to Matsolonia for the purposes of identity and modus operandi. We have stated that other acts evidence may have probative value as to identity where there are overwhelming

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[69] See *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

[70] See, e.g., *State v. Jeffers, supra* note 55.

[71] *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981). See, also, *State v. Canbaz, supra* note 10; *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992).

[72] *Id.*

similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.[73] An absolute identity in every detail cannot, however, be expected.[74] Where there are an overwhelming number of significant similarities, the evidence may be admitted, and any dissimilarities merely go to the weight of the evidence.[75]

[17] Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts, or literally, a "'"method of working."'"[76] Although we have said that the evidentiary function of modus operandi is not restricted to establishing identity,[77] it appears that was its purpose in Pullens' trial. That is how we will address it here.

[18] Pullens does not seem to dispute that the prior act was sufficiently similar to be at least somewhat probative of identity. His principal argument is that identity and modus operandi were not issues at trial, because he never claimed anyone besides himself and Matsolonia were present when she fell to her death. In other words, Pullens believes that identity and modus operandi can only be at issue if the theory of the defense is that some third party, other than the defendant or the victim, perpetrated the crime. We agree that a prior bad act cannot be independently relevant for a proper purpose if that purpose was not at issue in the case.[78] But we find no abuse of discretion in the trial court's determination that identity was at issue, because the jury had to determine *who* was responsible for Matsolonia's death.

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[73] *State v. Epp, supra* note 2.

[74] *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[75] See *id.*

[76] *State v. Craig*, 219 Neb. 70, 77, 361 N.W.2d 206, 213 (1985).

[77] *Id.*

[78] See, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Sanchez, supra* note 66; *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991).

A similar question was addressed by the Court of Appeals of Ohio in *State v. Griffin*,[79] which upheld the admission of prior threats by the defendant to kill his wife before she was ultimately killed by what the defendant claimed was a self-inflicted gunshot wound. In his defense, the defendant presented evidence that his wife had become suicidal due to the deteriorating, turbulent nature of their marriage. The State, in contrast, presented forensic evidence demonstrating that the wound could not have been self-inflicted. But the State also presented prior acts of abuse and threats by the defendant against his wife.

The court held that the prior bad acts were admissible for the proper purpose of identity. The court explained: "[The defendant's] defense was that he was misidentified as the killer—in essence, that someone else did the shooting, not he. By interposing such a defense (as opposed, for example, to accident or self-defense), he put in issue his identity as the killer."[80] The court rejected any argument that the issue was whether a murder was committed, and not who committed the crime. The fact of "the crime—the shooting death of [the wife]—was open and evident."[81] There were two suspects, the defendant and the victim, for this crime. "While it is true that only one of the suspects, the defendant, can be found guilty of murder, evidence of suicide creates a genuine issue concerning the identity of the person who pulled the trigger."[82]

We agree with the reasoning of the court in *Griffin*. Pullens' trial did not present a case where his involvement was undisputed and where his defense instead rested on the question of whether he had acted with legal justification or excuse for his actions. The central issue was the identity of the person who caused Matsolonia to fall to her death. Pullens spent considerable time in his defense pointing the finger at Matsolonia. He described the reasons she might

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[79] *State v. Griffin*, 142 Ohio App. 3d 65, 753 N.E.2d 967 (2001).

[80] *Id.* at 73, 753 N.E.2d at 973.

[81] See *id.*

[82] *Id.* at 74, 753 N.E.2d at 973-74.

have had for killing herself. There was even evidence of Matsolonia's possible motivation for killing herself purposefully in a way to implicate Pullens. While the Legislature has elected not to punish those who have made attempts at their own life,[83] we have described suicide as "self-murder."[84] Assisting a suicide is also designated as a crime.[85] Whatever the act is called, under Pullens' theory of defense, someone intentionally caused Matsolonia's untimely and unjustified death. In that sense, the corpus delicti was not in issue at this trial.[86] The jury had to determine only who the agent was of this unfortunate event. In other words, the jury had to determine identity. Therefore, identity was a proper purpose for the prior bad act evidence.

Pullens also makes oblique reference to rule 404 evidence as being in actuality propensity evidence and of its being more prejudicial than probative. We therefore examine the probative value of the prior threat to the issue of identity and whether that value was substantially outweighed by the danger of unfair prejudice.

[19-21] The rule governing the admissibility of evidence of other crimes, wrongs, or acts is subject to the overriding protection of rule 403, allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[87] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party; only evidence tending to suggest a decision

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[83] See *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979), *modified* 204 Neb. 196, 281 N.W.2d 749.

[84] *Sampson v. Ladies of the Maccabees of the World*, 89 Neb. 641, 646, 131 N.W. 1022, 1024 (1911).

[85] Neb. Rev. Stat. § 28-307 (Reissue 2008).

[86] See Black's Law Dictionary 395 (9th ed. 2009).

[87] See, *State v. McManus, supra* note 66; *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006).

on an improper basis is unfairly prejudicial.[88] Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[89]

The question of whether other conduct is sufficiently similar to the offense charged is a matter left to the sound discretion of the trial court.[90] In both the prior bad act and the crime charged, Pullens lifted Matsolonia up toward the edge of a balcony of a multi-level condominium building in an attempt to throw her over. Whether the first time Pullens intended to follow through or merely scare Matsolonia is unknown. But from all outward appearances, the two incidents are identical in every respect except (1) they were different balconies and (2) the second time, Pullens completed the task.

[22] We are cognizant that these two incidents were separated by a period of 4 years. However, while remoteness in time may weaken the value of prior bad acts evidence, such remoteness does not, in and of itself, necessarily justify exclusion of that evidence.[91] In this case, the years do little to weaken the probative value of the prior act. Indeed, Pullens does not argue that it does.

The prior attempt at lifting Matsolonia over a balcony occurred the very last time Pullens saw her before the visit that ended in her death by the same method. The correspondence from Pullens to Matsolonia indicates that their estrangement between the time of these two events was caused by the prior attempt, or, from Pullens' point of view, Matsolonia's false claims as to this attempt. This was not the case of otherwise random signature crimes separated by a great length of time, but was the prior abuse by the same perpetrator toward the same victim, occurring in the background of a continuing tumultuous familial relationship. Instances of past abuse between the same parties are often given special consideration insofar as the strictures of modus operandi or signature crimes

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[88] See *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

[89] See *State v. Canbaz, supra* note 10.

[90] *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

[91] See *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

are loosened.[92] But, in this case, the method of lifting someone up over a balcony is also in itself sufficiently unique.

Thus, there was a clear connection between the two alleged acts. That connection independently demonstrated identity of the agent of Matsolonia's death in a way that did not depend upon the prohibited inference that because Pullens was a violent or bad character, he was more likely to have committed the crime. The danger of unfair prejudice was no greater here than in any other admission of a prior bad act. But its probative value was substantial.

We find that the trial court did not abuse its discretion in determining that the probative value of the prior threat on the issues of identity and modus operandi was not substantially outweighed by the danger of unfair prejudice. We find no error in the trial court's admission of the prior bad act for those purposes.

b. Intent

We also conclude that the prior bad act was properly admitted to show intent. Intent is the state of mind operative at the time of an action.[93] As early as 1842, the U.S. Supreme Court stated:

> [W]here the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act, directly in judgment.[94]

Pullens concedes that intent was in issue in this case because it is an element of second degree murder, the crime for which Pullens was charged and convicted. Pullens' general denial of guilt put at issue all the necessary elements of the charged

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[92] See, *Rufo v. Simpson*, 86 Cal. App. 4th 573, 103 Cal. Rptr. 2d 492 (2001); *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004). See, also, Annot., 24 A.L.R.5th 465 (1994).

[93] See *State v. Craig, supra* note 76.

[94] *Wood v. United States*, 41 U.S. (16 Pet.) 342, 360, 10 L. Ed. 987 (1842).

offense.[95] In order to obtain a conviction of second degree murder, the State was thus required to show beyond a reasonable doubt that Pullens committed the murder with a specific intent to kill.[96] This is distinguishable, for instance, from voluntary manslaughter, which requires only a killing without malice upon a sudden quarrel.[97]

Pullens' argument is that the probative value of the prior bad act for the purpose of intent was greatly outweighed by its prejudicial effect. He states this is so because, "[T]here could be little argument that if Pullens pushed [Matsolonia] off the balcony, he would not have intended to kill her."[98] We find this unpersuasive.

It seems well established that previous discord between two parties in a close and sustained relationship is relevant to the issue of intent.[99] And, as mentioned, the similarities in this case between the previous bad act and the act for which Pullens was charged were substantial. Also, as already discussed, while Pullens does not specifically raise any issue concerning the remoteness of time between the prior bad act and the crime charged, we conclude that the trial court did not abuse its discretion in determining that the probative value of the prior threat was not markedly reduced by the time between it and the crime charged.

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[95] See, *People v VanderVliet*, 444 Mich. 52, 508 N.W.2d 114 (1993). See, also, e.g., *U.S. v. Walker*, 470 F.3d 1271 (8th Cir. 2006); *U.S. v. Chesney*, 86 F.3d 564 (6th Cir. 1996); *People v. Gillard*, 57 Cal. App. 4th 136, 66 Cal. Rptr. 2d 790 (1997).

[96] See, Neb. Rev. Stat. § 28-304 (Reissue 2008); *State v. Tucker*, 278 Neb. 935, 774 N.W.2d 753 (2009); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992).

[97] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[98] Brief for appellant at 28.

[99] See, *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988); *State v. Kern, supra* note 90; *Gattis v. State*, 637 A.2d 808 (Del. 1994); *Bell v. State*, 278 Ga. 69, 597 S.E.2d 350 (2004); *Phillips v. State*, 719 N.E.2d 809 (Ind. 1999); *State v. Buenaventura*, 660 N.W.2d 38 (Iowa 2003); *State v. Mills*, 562 N.W.2d 276 (Minn. 1997); *Boykins v. State*, 116 Nev. 171, 995 P.2d 474 (2000); *State v. Powell*, 126 Wash. 2d 244, 893 P.2d 615 (1995).

Pullens cites no case law to support what really appears to be his argument: that certain means of killing someone are ipso facto sufficiently indicative of specific intent, thereby rendering any additional evidence of intent through prior bad acts cumulative and unfairly prejudicial. We certainly find no reason to conclude that being strangled and thrown off a balcony represents such means. In this case, for instance, there was evidence from which a jury could have found there was a sudden quarrel. Matsolonia's glasses were lying on the floor and there were various other disturbed items in her living room. Pullens described Matsolonia as a strong and sometimes antagonistic woman. It was conceivable that Pullens could have committed all the acts leading to Matsolonia's death while provoked to such a degree that he had lost normal self-control. The failure of the State to convince the jury, beyond a reasonable doubt, that Pullens did not act in such a capacity would have resulted in an acquittal.

Pullens' specific intent to kill Matsolonia was a central issue in the case. The probative value of the evidence involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of the fact from the ultimate issue of the case.[100] Furthermore, in prosecuting specific intent crimes, prior acts evidence may often be the only method of proving this critical issue.[101] In addressing similar questions under the federal rules, the U.S. Supreme Court has stated that it is proper for trial courts to consider the availability of evidentiary alternatives in balancing unfair prejudice against probative value.[102] We find no reason why that was not a proper consideration by the trial court here. The fact that Pullens physically threatened to throw

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[100] *State v. Sanchez, supra* note 66.

[101] See *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994).

[102] See, *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). See, also, *U.S. v. Jenkins*, 593 F.3d 480 (6th Cir. 2010); *U.S. v. Davis*, 449 F.3d 842 (8th Cir. 2006); *U.S. v. Awadallah*, 436 F.3d 125 (2d Cir. 2006); *United States v. Layton*, 767 F.2d 549 (9th Cir. 1985).

Matsolonia off a balcony during their last visit and the effect that had on their relationship were the best evidence the State adduced of a specific intent to kill. Otherwise, the only means of ascertaining Pullens' mental state was by drawing inferences from the conduct itself.[103] That conduct was subject to more than one inference. The trial court did not abuse its discretion in determining that the probative value of the prior bad act to show intent was not substantially outweighed by the danger of unfair prejudice.

In sum, the trial court did not abuse its discretion in finding that the prior threat against Matsolonia was relevant to the proper purposes of identity, modus operandi, and intent. Further, it did not abuse its discretion in finding that such probative value was not substantially outweighed by the risk of unfair prejudice. The court further mitigated the risk of unfair prejudice by instructing the jurors that they were prohibited from considering this prior act as evidence of Pullens' character or as evidence that he acted in conformity with such character. We find no merit to Pullens' argument that the evidence that he had threatened Matsolonia was inadmissible. We turn now to Pullens' assignment of error challenging the authentication of the e-mails.

2. Authentication of E-Mails

Pullens next challenges the admission of the e-mail correspondence with Kanger. According to Pullens, under rule 901,[104] there was insufficient evidence to authenticate the e-mails as being written by him.

Rule 901 does not impose a high hurdle for authentication or identification.[105] The proponent is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[106] Instead, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, then the proponent has

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[103] See *Huddleston v. United States, supra* note 102.

[104] § 27-901.

[105] *State v. Draganescu, supra* note 1.

[106] See *id.*

satisfied the requirement of rule 901(1).[107] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated, and an appellate court reviews a trial court's ruling on authentication for an abuse of discretion.[108]

There are several ways that the authorship of an e-mail may be shown. E-mails may be authenticated by use of the e-mail address, which many times contains the name of the sender.[109] The signature or name of the sender or recipient in the body of the e-mail is also relevant to authentication.[110] Evidence that an e-mail is a timely response to an earlier message addressed to the purported sender is proper foundation analogous to the reply letter doctrine.[111] Finally, the contents of the e-mail and other circumstances may be utilized to show its authorship.[112] The possibility of an alteration or misuse by another of the e-mail address generally goes to weight, not admissibility.[113]

The first e-mail sent by Pullens is from the account "stephenpullens@yahoo.com" and is signed "Stephen Pullens." The next e-mail is from the account "pullens_stephen@yahoo.com" and is signed "Stephen Pullens." This e-mail also contains Pullens' Social Security and telephone numbers under the signature line. Four additional e-mails are sent from this account, most of which contain variations on the signature, "Stephen Pullens or friends thereof."

Three e-mails are from the account "grid_works@ureach.com," and two of these e-mails contain no signature. However, one e-mail from this account begins "This is Stephen" and is later signed by "Stepen [sic] Pullens." One e-mail is sent from "mr_san_man2u@yahoo.com." This e-mail contains two

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[107] See *id.*

[108] See *id.*

[109] R. Collin Mangrum, Mangrum on Nebraska Evidence 852 (2011).

[110] 2 McCormick on Evidence, *supra* note 40, § 227.

[111] *Id.* See, also, *Helwig v. Aulabaugh*, 83 Neb. 542, 120 N.W. 162 (1909).

[112] 2 McCormick on Evidence, *supra* note 40, § 227.

[113] Mangrum, *supra* note 109.

letters, the first of which is signed "[t]he above letter is not from Stephen" but the second of which is signed, "Stephen."

A Nebraska State Patrol investigator and computer forensics expert testified that he was able to determine what e-mail addresses were being used from the computer in Matsolonia's apartment during the time that Pullens was staying there immediately before her death. The investigator prepared a report for the police detailing the e-mail addresses found. He specifically recalled "stephenpullens@yahoo.com" and "grid_works@ureach.com" as e-mail addresses used at that computer at that time.

An Omaha police detective testified that he was assigned the tasks of compiling all the information concerning the e-mails and of verifying that each of the e-mails Kanger received was actually sent by Pullens. He testified that there were numerous references to personal facts in the e-mails and that he verified that each of these facts was accurate. He detailed these verifications at trial. They included descriptions of the layout and contents of Matsolonia's apartment, Pullens' previous travel, prior residences, prior employment, schooling, sports activities, and girlfriends. Based on our review of the record, we conclude that the trial court did not abuse its discretion in finding that the State had made a showing that the e-mails were what the State purported them to be—e-mails written by Pullens to Kanger.

3. Jury Instruction on Flight

Pullens next asserts that the trial court erred in giving the jury an instruction on flight. In reviewing a claim of prejudice from jury instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal.[114] Jury instruction No. 14 stated:

> You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with

[114] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> which the person so fleeing has been charged, is a circumstance, not sufficient of itself, to establish guilt, but a circumstance never the less which you may consider in connection with all other evidence in the case to aid you in determining the question of the guilt or innocence of such person.

Pullens does not dispute that instruction No. 14 is a correct statement of the law, but he argues that it was inapplicable to the facts of this case because he did not commit flight. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.[115]

[23] We have said that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.[116] Pullens testified that he departed merely in order to discuss the matter with a lawyer before speaking further with the police, and he argues that there was no evidence to the contrary.

A similar argument was presented by the defendant in *State v. Jacob*,[117] who asserted that there was no evidence that he made any deliberate attempt to conceal his whereabouts or identity and that he was unaware there was a warrant for his arrest. We explained that it was for the jury to decide whether a defendant's departure constituted flight.[118] We held that the State need not prove by clear and convincing evidence that the defendant had consciousness of guilt during his or her departure.[119] Instead, if the evidence is sufficient to support a jury's determination that the departure constituted flight, it is proper to submit such evidence.[120]

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[115] *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008).

[116] *State v. Lincoln*, 183 Neb. 770, 164 N.W.2d 470 (1969).

[117] *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[118] *Id.* See, also, *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

[119] *Id.*

[120] *Id.*

Pullens admitted that he deliberately left the motel before Kanger arrived and that he understood Kanger considered him a suspect. He then slept in a car, in locations unknown to the police, until leaving town. As soon as Pullens could obtain a passport, he went to Switzerland. In e-mails from Switzerland, Pullens describes how Kanger is unable to extradite him, and Pullens later admits to "running" from the police. It is not necessary for there to be a warrant for the defendant's arrest at the time of the departure in order to constitute flight.[121] We conclude that there was sufficient evidence from which the jury could infer flight and that the trial court did not err in instructing the jury on that issue.

4. Right to Counsel at Sentencing Hearing

(a) Denial of Right to Counsel

We turn now to Pullens' assignments of error pertaining to the sentencing hearing. His first argument is that he was denied the right to counsel at sentencing. The record shows that before trial, Pullens had requested that he be appointed counsel from the public defender's office. Pullens was subsequently able to procure private counsel, however, and he withdrew the request. There is no evidence in the record that Pullens was dissatisfied with his private counsel until after the verdict. Between the time of the verdict and the sentencing hearing, Pullens sent several letters to the trial judge asking that he be allowed to dismiss his privately retained attorneys and that a public defender be appointed in their stead.

The trial court held hearings on April 9 and 10, 2009, to address Pullens' requests. At the hearings, Pullens stated that he believed there were irregularities at trial and that he thought his attorneys should have gone to see him sooner to discuss pertinent issues. When the attorneys finally visited Pullens in prison, Pullens explained that he had determined that it was too late and had refused to see them.

The court denied Pullens' request to be appointed new counsel and explained that if, after sentencing, Pullens was able to

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[121] See *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997).

show indigency, he would appoint an attorney for purposes of his appeal. As for the sentencing hearing, the court advised Pullens that he had a right to represent himself or proceed with his current attorneys.

Pullens stated that he wished to represent himself, and he discussed with the court whether he would be able to file a motion based on what he considered newly discovered evidence and prosecutorial misconduct. The court responded that he was free to do so and that the court would require the attorneys to remain and provide assistance to Pullens as technical advisers. Pullens seemed agreeable to this as his best alternative, given the court's refusal to appoint him counsel before sentencing.

On May 26, 2009, the date of the sentencing hearing, Pullens indicated to the court that he had some sort of an arrangement with another private attorney and that he had the funds to hire this person. The trial court noted that the aforementioned attorney was not present. Pullens asked for a continuance in order to procure the attorney for the sentencing hearing. The court denied his request, explaining that sentencing had been scheduled since March 23. Pullens affirmed that, given the court's ruling, he still preferred to represent himself rather than be represented by his standby counsel.

[24,25] Once the right to counsel attaches, the accused is entitled to counsel at every critical stage of the proceeding.[122] But a defendant may not use his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice.[123] And the decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[124] Certainly, we find no abuse of discretion in the trial court's refusal to grant Pullens' last-minute request for a continuance on the day of the sentencing hearing.

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[122] See *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[123] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[124] See *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998).

[26] We also find no error in the trial court's refusal to appoint a public defender for the sentencing hearing. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters.[125] Fundamentally, because Pullens had shown himself capable of hiring counsel—who was still available to him—and because Pullens failed to give timely notice of any alleged indigency,[126] there was no entitlement to the provision of counsel at public expense.

Even if Pullens had demonstrated indigency and his trial counsel had been appointed, a defendant is not entitled to appointed counsel of his or her choice.[127] Mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel, and unless the defendant can show good cause to the court for the removal of counsel, his or her only alternative is to proceed pro se if competent to do so.[128]

Pullens also asserts that he was deprived of his right to counsel because "[n]owhere did the trial court establish on the record that Pullens[']s decision to go forward by himself was a knowing and intelligent waiver of his right to counsel at sentencing."[129] Pullens does not elaborate on this argument further, but it appears that he is challenging the trial court's failure to conduct a specified colloquy or make specific findings on the record.

[27] An effective waiver of an accused's Fifth Amendment right to counsel has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; second, the waiver must have been made with full awareness of both the nature of

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[125] *State v. Golden*, 8 Neb. App. 601, 599 N.W.2d 224 (1999).

[126] See *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

[127] 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).

[128] *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007); *State v. Dunster, supra* note 123.

[129] Brief for appellant at 35.

the right being abandoned and the consequences of the decision to abandon it.[130] But a formalistic litany is not required to show that such a waiver was knowingly and intelligently made.[131] Instead, a knowing and intelligent waiver of the right to counsel can be inferred from conduct.[132] The fact that a defendant has had the advice of counsel throughout his or her prosecution is an indication that the defendant's waiver of counsel and election to represent himself or herself was knowing and voluntary.[133] We find no merit to Pullens' assignment of error that he was deprived of his right to counsel at sentencing.

(b) Presentence Investigation Report

Pullens asserts that the trial court abused its discretion by not affording Pullens an opportunity to review his presentence investigation report (PSI) and by considering a letter written by someone not involved in the case. The PSI consisted of six volumes. At the hearing, the court stated that it "had occasion to review the [PSI] in this matter, and I will include all the letters that the defendant has written to me personally as well as a recent statement from a lady in Santa Monica, California." The woman's statement alleged that Pullens had once attempted to throw her out a window and that she urged the court to sentence Pullens to the maximum. Pullens made no objections during the sentencing hearing regarding the PSI or consideration of the letter. Nor is there any indication in the record that Pullens requested to review the PSI or whether he actually reviewed it.

The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of the sentence.[134]

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[130] *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[131] *State v. Figeroa, supra* note 8.

[132] *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[133] *State v. Gunther, supra* note 132.

[134] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

The sentencing court 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, and evidence may be presented as to any matter that the court deems relevant to the sentence.[135] We find no error in the trial court's inclusion of the letter, which, in any event, did not appear to play a particularly important role in the trial court's decision.

[28,29] As for the review of the PSI, we have previously held that a defendant waives his or her qualified right to review the PSI by not notifying the trial court that he or she has not personally reviewed the PSI and that he or she wishes to do so.[136] While Pullens argues that he did not know he had such a right, a defendant who elects to proceed pro se cannot thereafter complain of the quality of his or her own defense.[137] Thus, we conclude that Pullens' arguments that the trial court abused its discretion at sentencing are without merit.

5. Ineffective Assistance of Counsel

[30] Finally, Pullens raises several issues with regard to his claims of ineffectiveness of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[138] The determining factor is whether the record is sufficient to adequately review the question.[139] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[140]

Pullens argues that counsel was ineffective for failing to object to parts of the e-mail correspondence admitted into evidence on the ground that portions of the e-mails demonstrated prior bad acts. The record reflects that defense counsel did initially object to the e-mails on this basis. However, the State and defense counsel quickly reached an agreement not to

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[135] *Id.*

[136] See *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

[137] See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[138] *State v. Young, supra* note 114.

[139] *Id.*

[140] See *State v. Wabashaw, supra* note 128.

publish to the jury any portion of the objectionable prior bad acts. Witnesses at trial either summarized or read out loud specific portions of the e-mails to the jury, and, in that testimony, inadmissible prior bad acts were not mentioned.

Pullens is correct, however, that the exhibits themselves, as found in the record, show only one word blacked out. The e-mails contain several vague references to prior arrests and some other questionable behavior that may or may not be considered prior bad acts or otherwise be objectionable. The State believes that these exhibits were never given to the jury, and the record before us is unclear on this point. The resolution of this question would require an evidentiary hearing, and we thus determine that it is not appropriate for review on direct appeal.

Pullens' remaining arguments concerning ineffective assistance are likewise not appropriate for review without an evidentiary hearing. Pullens argues that his trial counsel failed to adequately cross-examine the pathologist. He claims that the pathologist had never before opined that Matsolonia's injuries were consistent only with manual strangulation, and he claims there would be expert testimony to rebut the pathologist's conclusion. But there is no evidence in the record to show this. Pullens asserts that trial counsel was ineffective for failing to make a motion for new trial based on the State's failure to disclose a report allegedly inconsistent with the theory that Matsolonia was thrown off the balcony. Likewise, this report is not in the record. Pullens is free to raise these issues of ineffective assistance of counsel in a motion for postconviction relief.

VI. CONCLUSION

We find the issues raised regarding ineffective assistance of counsel are premature, and we find no merit to Pullens' other assignments of error. We affirm the judgment of the trial court.

AFFIRMED.

CONNOLLY, J., dissenting.

I dissent. I disagree with the majority opinion's standard for admitting evidence of a defendant's extrinsic acts.

I also disagree with its conclusion that Pullens' assault on Matsolonia 4 years before her murder was admissible for proving Pullens' identity as the murderer, his modus operandi, or his intent to kill. The evidence was also inadmissible to show Pullens' absence of mistake in killing her. Moreover, the trial court erred in finding that the evidence was relevant to prove Pullens' identity, modus operandi, and intent because its relevancy depended upon an inference that he had acted in conformity with his previous bad conduct. So the admission of this evidence was not harmless error because the court improperly instructed the jury that it could consider the evidence for these purposes.

Before examining these issues, I pause to express my disagreement with the majority opinion's retreat from the specificity of purpose requirements that we set out in *State v. Sanchez*.[1] There, we held that upon objection, a proponent who offers evidence under rule 404(2)[2] must "state on the record the specific purpose or purposes for which the evidence is being offered"; the trial court must "similarly state the purpose or purposes for which such evidence is received."[3] We reasoned that "'the line between what is permitted and what is prohibited under Rule 404[(2)] is sometimes quite subtle. [It also] sometimes carries a substantial danger of unfair prejudice and thus raises serious questions under [rule] 403.'"[4] The *Sanchez* requirements are intended to ensure that rule 404(2) rulings "'are made with care'" and to "'assist the process of appellate review.'"[5]

So I disagree with the majority opinion's sweeping statement that a defendant's previous attacks against a victim are generally admissible to show intent, motive, and absence of mistake.

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[1] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

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

[3] *Sanchez, supra* note 1, 257 Neb. at 308, 597 N.W.2d at 374.

[4] *Id.* at 307, 597 N.W.2d at 374, quoting *U.S. v. Murray*, 103 F.3d 310 (3d Cir. 1997). See, also, Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[5] *Id.*

In *Sanchez*, we rejected this smorgasbord approach[6] to admitting extrinsic bad acts evidence or analyzing its admission on appeal. Under *Sanchez*, it is irrelevant that evidence may serve a permissible purpose under some circumstances. The question is whether the stated purpose for offering the evidence is a permissible purpose given the facts at hand.

Further, we have recognized that a proper limiting instruction in a jury trial is a crucial safeguard against the admission of unduly prejudicial extrinsic acts.[7] Thus, when a defendant claims on appeal that the trial court improperly admitted extrinsic acts evidence, it is necessary to consider whether the court both admitted the evidence for proper purposes *and* limited the jury's consideration of the evidence to those proper purposes.[8]

Evidence admitted under rule 404(2) is "one of the most frequently litigated issues on appeal, 'and the erroneous admission of such evidence is the largest cause of reversal.'"[9] And because Sanchez provides the analytical framework for analyzing rule 404(2) issues, I decline to join the majority's reliance on a pre-*Sanchez* decision[10] to again muddy the waters. A return to catchall statements regarding admissibility will only foster less clarity and more appeals.

Standard of Admissibility for Extrinsic Acts

Initially, I point out that a distinction exists between a defendant's previous verbal threats and physical assaults. I agree with the majority that a defendant's statements to the effect that he desires or intends to kill the victim can be admissible to prove

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[6] See, also, *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991) (Shanahan, J., dissenting), quoting 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5240 (1978).

[7] See *Sanchez, supra* note 1.

[8] See, e.g., *U.S. v. Bell*, 516 F.3d 432 (6th Cir. 2008).

[9] *State v. McManus*, 257 Neb. 1, 5, 594 N.W.2d 623, 627 (1999), quoting 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1:04 (rev. ed. 1999).

[10] See *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

intent. In *State v. Canbaz*,[11] we held that evidence of such statements "is not evidence of prior unrelated bad acts under [rule] 404(2)." But this type of evidence is distinguishable from the evidence admitted here. Here, the issue is whether the court properly admitted evidence that 4 years earlier, Pullens physically assaulted Matsolonia in a manner that threatened her life—an uncharged extrinsic act.

The majority opinion states that extrinsic acts evidence should be excluded if it invites the jury to focus its attention on the defendant's character instead of whether the defendant committed the crime. This standard conflicts with our previous policy statements explaining why such evidence is excluded and when it may be admitted. It is true that extrinsic acts evidence can invite the jury to focus its attention on the defendant's character instead of whether the defendant committed the charged crime. But that statement explains why admitting evidence on a theory of relevancy that depends on a propensity inference is prejudicial.[12] It is not the standard for admitting extrinsic acts evidence to avoid that prejudice. Except for a passing mention, the majority opinion fails to discuss or apply the admissibility standard that we have articulated several times: independent relevance that does not depend on a tendency to show propensity.[13]

As we have previously explained, evidence of the defendant's extrinsic bad acts is not excluded because it is irrelevant. It is excluded because its admission creates a risk that the trier of fact will decide guilt on an improper basis.[14] Its admission can tempt the fact finder to condemn the defendant for his or her extrinsic (and often unpunished) bad acts and create "a

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[11] See *State v. Canbaz*, 259 Neb. 583, 594, 611 N.W.2d 395, 404 (2000).

[12] See 1 Imwinkelried, *supra* note 9, § 2:19.

[13] See, *State v. Chavez, ante* p. 99, 793 N.W.2d 347 (2011); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *Sanchez, supra* note 1; *McManus, supra* note 9.

[14] See *Sanchez, supra* note 1.

danger that the trier of fact will overestimate [its] probative value."[15] "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[16] The exclusion of extrinsic acts when offered to show a defendant's propensity to act in conformity with them protects the presumption of innocence and is deeply rooted in our jurisprudence.[17]

I agree with the majority that under rule 404(2), the defendant's extrinsic acts must be relevant for a purpose other than to show his or her propensity.[18] But to be admitted for a proper purpose, a defendant's extrinsic acts must be relevant to the stated purpose *independent of* its tendency to show propensity.[19] We have refused to uphold the admission of extrinsic acts when its relevance involved classic propensity reasoning about the defendant's character.[20] So the test under rule 404(2) for admitting evidence of the defendant's extrinsic acts is this: Does the chain of reasoning necessary to find the evidence relevant to the fact sought to be proved depend on an inference that the defendant acted in conformity with a propensity reflected by the extrinsic acts?[21] And as the majority acknowledges, evidence of a defendant's extrinsic acts is not admissible

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[15] *McManus, supra* note 9, 257 Neb. at 7, 594 N.W.2d at 628.

[16] *Michelson v. United States*, 335 U.S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168 (1948).

[17] See *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[18] See *Sanchez, supra* note 1.

[19] See *id.*

[20] See, *Trotter, supra* note 17; *McManus, supra* note 9.

[21] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010); *U.S. v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *U.S. v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *Masters v. People*, 58 P.3d 979 (Colo. 2002); *State v. Clifford*, 328 Mont. 300, 121 P.3d 489 (2005); *State v. Cassavaugh*, 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006); 1 Imwinkelried, *supra* note 9, § 2:19; 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:28 (3d ed. 2007); 22 Wright & Graham, *supra* note 6, § 5239.

for the proponent's stated purpose unless that purpose was genuinely at issue.[22]

As applied here, rule 404(2) required the trial court to exclude evidence that Pullens had previously assaulted Matsolonia if its relevance to the stated purpose depended upon an inference that he had acted in conformity with a propensity to behave violently toward her. I do not believe that the admission of Pullens' 2000 assault on Matsolonia met that standard when offered to prove his identity, modus operandi, or intent. Nor do I believe that Pullens' identity as the perpetrator or his absence or mistake in committing the crime was at issue.

Proving Identity Was Not a Proper Purpose for Admitting the Evidence

The main issue was conduct, not identity.[23] That is, the issue was whether a murder was committed, not who committed the murder if proved. Pullens did not deny being the only person with Matsolonia at her death and did not claim that someone else must have killed her. If the jury believed his suicide defense, then Pullens was innocent because no murder occurred.[24] But a suicide defense should not be confused with a claim that another possible perpetrator committed the crime.[25] If the State proved that a murder was committed, then Pullens was the only possible perpetrator. We have previously held that if the jury believes the State's evidence that a crime was committed and the defendant is the only possible perpetrator, then evidence of the defendant's extrinsic bad acts is not admissible to prove the defendant's identity as the perpetrator.

We applied that principle in *Sanchez*.[26] There, the victim identified the defendant as the person who sexually assaulted her, and he denied the charge. The State introduced extrinsic acts evidence that he had previously sexually assaulted

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[22] See, *Trotter, supra* note 17; *Sanchez, supra* note 1.

[23] See 3 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 17:39 (7th ed. 1998).

[24] See *Sutter v. State*, 102 Neb. 321, 167 N.W. 66 (1918).

[25] Compare *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[26] *Sanchez, supra* note 1.

his two daughters. We distinguished earlier cases in which a defendant's extrinsic acts were admissible to prove identity because there were no eyewitnesses to the crime. We held in *Sanchez* that because identity was not at issue, the evidence was not admissible to prove the defendant's identity as the perpetrator:

> There is no evidence upon which the jury could have concluded that the assault occurred but that someone other than [the defendant] committed it. . . . If the jury believed the testimony of [the victim] that the acts which constitute first degree sexual assault occurred, it would have no basis for identifying anyone other than [the defendant] as the assailant and his prior conduct would prove nothing necessary for conviction. On the other hand, if the jury did not believe the testimony of [the victim] regarding the occurrence of the assault, it would be left with no evidence that a crime had been committed and thus no assailant to identify. [The defendant's] prior acts could not fill this evidentiary void.[27]

The Ohio Court of Appeals applied the same reasoning to a homicide case in which the defendant called the police to say that his girlfriend had just committed suicide. She had been shot in the chest. The trial court admitted extrinsic acts evidence that the defendant had injured her in the past to prove his identity as her murderer. The appellate court reversed, concluding that the defendant's identity was not genuinely at issue under the same reasoning we used in *Sanchez*:

> According to the theory of the state's case and the evidence it presented, if the alleged crime took place at all, no person other than [the defendant] could have committed it. Further, [the defendant] did not claim that another person had murdered [the victim]. Instead, he denied that she was murdered at all. The only genuine issue, therefore, was whether [the victim] was murdered or whether she committed suicide. Because the identity of the perpetrator of the state's murder alternative was not in issue,

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[27] *Id.* at 311, 597 N.W.2d at 376.

> evidence of [the defendant's] prior acts extrinsic to the operative facts of the crime alleged was not admissible . . . to prove *identity*.[28]

Sanchez and the Ohio case are connected by two common factors: (1) The defendant denied that a crime was committed; and (2) if the State proved that a crime was committed, the defendant's identity as the perpetrator was certain. "Where a defendant admits that he is the person the complainant or witness means to accuse, but asserts, in essence, that the alleged crime never occurred . . . the key issue is not *identity*, but *conduct*—what some commentators have refer to as the 'corpus delicti issue.'"[29]

"The corpus delicti is the body or substance of the crime—the fact that a crime has been committed, without regard to the identity of the person committing it."[30] "In the attempt to prove the corpus delicti by the use of other crimes it is very difficult to disguise the forbidden inference [of propensity] by casting it in some alternative form."[31]

The majority opinion's statement that the corpus delicti was not at issue is misguided. The State has the burden to prove beyond a reasonable doubt the corpus delicti of homicide in a murder prosecution, and that is certainly true when the defendant claims that no murder occurred.[32] The corpus delicti is composed of two elements: the fact or result forming the basis of a charge and the existence of a criminal agency as the cause thereof.[33] "In a homicide case, corpus delicti is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency *of another*."[34]

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[28] *State v. Hawn*, 138 Ohio App. 3d 449, 463, 741 N.E.2d 594, 604 (2000) (emphasis in original).

[29] 3 Fishman, *supra* note 23, § 17:47 at 443-44 (emphasis in original).

[30] *State v. Edwards*, 278 Neb. 55, 65, 767 N.W.2d 784, 795 (2009).

[31] See 22 Wright & Graham, *supra* note 6, § 5239 at 461.

[32] See *Edwards, supra* note 30.

[33] *Id.*

[34] *Id.* at 65-66, 278 N.W.2d at 796 (emphasis supplied).

The majority, relying on a different Court of Appeals' case from Ohio, *State v. Griffin*,[35] attempts to paint Matsolonia as the possible criminal agency. In that case, the Ohio court reasoned that in a murder-or-suicide case, both the defendant and the victim are suspects: "While it is true that only one of the suspects, the defendant, can be found guilty of murder, evidence of suicide creates a genuine issue concerning the identity of the person who pulled the trigger."[36] I do not believe that the *Griffin* court's veiled-in-mist reasoning is persuasive.

The concurrence in *Griffin* got it right. It concluded that this reasoning "confuses identity with culpability," and "a plea of not guilty with a genuine issue of identity."[37] In a murder prosecution, the victim cannot be "another" suspected of the criminal act. And a defendant's claim that the victim committed suicide is refuted if the State meets it burden to prove that the victim died "as a result of the criminal agency of another."[38] So to determine whether the defendant's identity as the perpetrator is genuinely at issue in a homicide case, the trial court need only ask this question: If the State meets its burden to prove that the victim died at the hands of another, is there any claim, or does the evidence leave open the possibility that the victim died at the hands "of another" who is not the defendant? Here, the answer is obviously no.

Pullens did not claim, and the evidence did not suggest, that anyone else could have killed Matsolonia. Here, Pullens' identity as the perpetrator was not genuinely at issue and the State was more interested in putting Pullens' propensity to attack Matsolonia before the jury. In some circumstances, I might agree with the majority's statement that "where the prior threat makes reference to a peculiar method of violence that in the end is carried out," it may be evidence of identity. But this reasoning does not apply here, which is obvious from examining the facts of the case that the majority relies on. In *Brenk v.*

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[35] *State v. Griffin*, 142 Ohio App. 3d 65, 753 N.E.2d 967 (2001).

[36] *Id.* at 74, 753 N.E.2d at 973-74.

[37] See *id.* at 87, 753 N.E.2d at 984 (Painter, J., concurring).

[38] *Edwards, supra* note 30, 278 Neb. at 65-66, 767 N.W.2d at 796.

State,[39] the victim's cut-up remains were found floating in an ice cooler on a lake. The murderer's identity was obviously at issue, so the court affirmed the admission of evidence that the defendant had previously threatened to kill his former wife and scatter her cut-up body.

In sum, I believe the majority has mistakenly concluded that Pullens' identity as the murderer was at issue. But even if identity had been at issue, the majority opinion fails to recognize that the logic needed to find this evidence relevant to proving identity depends upon a propensity inference. Courts must exercise caution in admitting evidence of extrinsic acts to prove identity. In general, using extrinsic acts evidence to prove identity has caused confusion because the "use of such evidence to prove 'identity' most directly raises the forbidden propensity inference."[40] The close relationship between proving identity and conduct requires courts to scrutinize identity evidence:

> Where other crimes evidence is offered to prove identity, it necessarily requires an inference to the conduct of the defendant; therefore, great care must be taken to [e]nsure that the theory of admissibility does not involve any inference as to the defendant's character. It is for this reason that courts are much stricter when assessing the admissibility of evidence offered to prove identity than they are when it is directed at some mental state that is in issue.[41]

One protection against the convergence of identity and conduct is the requirement that the defendant's extrinsic acts for proving identity have overwhelming similarities to the charged crime—"such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature."[42] The high degree of similarity is necessary to support a permissible inference that the "'same' person"

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[39] *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993).

[40] 3 Fishman, *supra* note 23, § 17:40 at 414.

[41] 22 Wright & Graham, *supra* note 6, § 5246 at 512-13.

[42] See *Epp, supra* note 25, 278 Neb. at 700, 773 N.W.2d at 373.

committed the acts, independent of a propensity inference about the defendant's character.[43]

But even when the extrinsic acts involve a unique criminal behavior, admitting evidence of the defendant's extrinsic acts against the same victim undercuts the rationale for requiring heightened similarity. It is primarily because the evidence shows the defendant has a propensity for domestic violence against the victim that it is highly persuasive in showing that the defendant must have committed the charged crime. Notably, some states have enacted exceptions to their rule 404 counterparts to admit past acts of domestic violence in prosecutions for domestic violence offenses.[44]

This case illustrates the problem. Here, the propensity inference was unavoidable when offered to prove Pullens' identity as the murderer. As explained, the State could refute Pullens' claim that Matsolonia committed suicide by proving that her death occurred as a result of the criminal agency of another. But it could not refute Pullens' suicide claim by showing that because he had behaved similarly in the past, his suicide claim was false. That proof is exactly what rule 404(2) prohibits. Reasoning that Pullens' previous assault on Matsolonia is relevant to show that he was her killer necessarily includes a propensity inference in the chain of reasoning. The conclusion cannot be separated from an inference that Pullens acted in conformity with his previous bad conduct or his propensity to behave violently toward Matsolonia. I would hold that the court erred in admitting evidence of the previous assault to prove Pullens' identity.

Proving Modus Operandi Was Not a Proper Purpose

Because proving Pullens' identity as the murderer was not a proper purpose for admitting the evidence, it follows that

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[43] See, 1 Imwinkelried, *supra* note 9, § 3:11 at 52. Accord 3 Fishman, *supra* note 23, § 17:41.

[44] See 1 McCormick on Evidence § 190 at 759 n.35 (Kenneth S. Broun et al. eds., 6th ed. 2006), citing Alaska R. Evid. 404(b)(4) and Cal. Evid. Code § 1109 (2005).

admitting the evidence to prove Pullens' modus operandi was also an improper purpose. Proving a defendant's modus operandi in committing an extrinsic crime that shares a unique characteristic with the charged crime supports an inference of identity: the same person committed each crime.[45] So using extrinsic acts evidence to prove the defendant's modus operandi is only relevant when the defendant's identity as the perpetrator is at issue.[46] As explained, identity was not at issue here, so proving Pullens' modus operandi was not a proper purpose for admitting the evidence.

Proving Absence of Mistake Was Not a Proper Purpose

Although the majority opinion has failed to discuss this issue, the trial court improperly instructed the jury that it could consider the evidence for proving Pullens' absence of mistake in killing Matsolonia. Absence of mistake was not at issue because Pullens did not claim to have unintentionally killed Matsolonia.[47] He claimed that he did not kill her. The absence of mistake exception is a "special form of the exception that permits the use of other crimes to prove intent."[48]

Normally, absence of mistake is not at issue unless the defendant claims that his or her conduct in committing the charged crime was an accident or mistake, or the defendant's act could be criminal or innocent depending on the defendant's state of mind.[49] Courts often admit evidence of a defendant's prior assaults against a victim to show absence of

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[45] See 3 Fishman, *supra* note 23, § 17:42.

[46] *U.S. v. Fraser*, 448 F.3d 833 (6th Cir. 2006); *Chavez v. City of Albuquerque*, 402 F.3d 1039 (10th Cir. 2005); *U.S. v. Williams*, 985 F.2d 634 (1st Cir. 1993).

[47] See *Trotter, supra* note 17.

[48] See 22 Wright & Graham, *supra* note 6, § 5247 at 517-18.

[49] See, *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007), citing *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973); *Trotter, supra* note 17. See, also, *Bell, supra* note 8; *Chavez, supra* note 46; *Hynes v. Coughlin*, 79 F.3d 285 (2d Cir. 1996); *U.S. v. Johnson*, 879 F.2d 331 (8th Cir. 1989); *United States v. Naranjo*, 710 F.2d 1465 (10th Cir. 1983).

mistake, or intent, in child abuse cases.[50] These cases often present a circumstance in which the defendant's act could be innocent depending upon his or her state of mind. But Pullens could not have accidentally or mistakenly strangled and then thrown Matsolonia off the balcony. It is true that he claimed to have briefly grabbed her neck to prevent her from falling from the balcony. But this was not an admission that he killed her but did so unintentionally. Absence of mistake was not at issue because it was not a plausible defense or inference under the facts presented.

Proving Intent Was Not a Proper Purpose

The State may not use extrinsic acts evidence to prove intent if the theory of relevance requires the trier of fact to infer "the defendant's state of mind on the charged occasion from the defendant's subjective, personal character, disposition, or propensity."[51]

It is true that courts have frequently admitted evidence of a defendant's extrinsic acts of domestic violence against a victim to show the relationship between the victim and the defendant and the defendant's feelings toward the victim. And it is true that many courts, including this court,[52] have frequently concluded that such evidence is relevant to prove the defendant's motive or intent. We have stated that any motive for the crime charged is relevant to intent.[53]

But logical relevance does not mean that the chain of reasoning to make the evidence relevant for the proponent's stated purpose is free of a propensity inference.[54] If the theory of relevance to prove motive depends upon an inference about

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[50] See, *Chavez, supra* note 13, quoting *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Kuehn, supra* note 49.

[51] *McManus, supra* note 9, 257 Neb. at 11, 594 N.W.2d at 630. Accord *Trotter, supra* note 17.

[52] See *Sharp v. State*, 115 Neb. 737, 214 N.W. 643 (1927).

[53] See, e.g., *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010), citing *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

[54] See *McManus, supra* note 9.

the defendant's character, then the same inference will necessarily be present if motive is used to show intent. General propositions are not a substitute for examining the proponent's chain of reasoning. The majority opinion fails to perform this examination.

Intent is the defendant's state of mind at the time of the criminal act.[55] In contrast, motive is "'the moving course, the impulse, the desire that induces criminal action on the part of the accused'"[56] or that which leads or tempts the mind to indulge in a criminal act.[57] Motive is normally used as an intermediate inference to prove identity: "The fact that the defendant had a motive for that particular crime increases the inference of the defendant's identity."[58] When "motive is particular to the defendant and is not shared with the general public, it is . . . circumstantial proof that the defendant, and not someone else, is the perpetrator."[59] But despite the commentators' argument that motive and intent are not synonymous,[60] courts have frequently treated them as though they were and indiscriminately upheld the use of evidence relevant to motive to show intent.[61]

Using an extrinsic act to show motive will not always depend on a propensity inference. "For example, an uncharged theft may supply the motive to murder an eyewitness to the theft."[62] In contrast, using a defendant's previous attacks on a victim to show that the defendant's hostility toward the victim motivated the defendant to commit the charged crime does require propensity reasoning. To reach the conclusion that the

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[55] See *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985).

[56] *State v. Bronson*, 242 Neb. 931, 940, 496 N.W.2d 882, 890 (1993), quoting Black's Law Dictionary (6th ed. 1990).

[57] *Id.* Accord *McBride, supra* note 53.

[58] 1 Imwinkelried, *supra* note 9, § 3:15 at 79. See, also, 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 4:45 (15th ed. 1997).

[59] *Schroeder, supra* note 53, 279 Neb. at 214, 777 N.W.2d at 806.

[60] See, e.g., 1 Bergman & Hollander, *supra* note 58.

[61] 22 Wright & Graham, *supra* note 6, § 5240.

[62] 1 Imwinkelried, *supra* note 9, § 3:16 at 82.

defendant had a motivating animus toward the victim based on prior attacks, the trier of fact must make an intermediate inference that the defendant had a propensity for attacking the victim. The fact finder infers the defendant's animosity toward the victim from this propensity evidence.[63]

Here, Pullens' hostile feelings toward Matsolonia were logically relevant to why he would have killed her, i.e., his motivation. Showing that the same motivation was present in both the extrinsic act and the charged act could not be free of propensity reasoning because the trier of fact must infer his hostile feelings from his assaults on Matsolonia. So when this motivation evidence was used to show intent, the propensity inference was also present: Pullens must have intended to kill Matsolonia because he hated her enough to have intentionally assaulted her previously.

Using a defendant's unlawful intent in a previous crime to show the defendant's unlawful intent in committing the charged crime will usually depend on propensity reasoning. "Evidence of unlawful intent in a prior offense is directly relevant to unlawful intent in the present offense only on the assumption that once a person has shown an ability to harbor an evil intent, that person is more likely to entertain the same evil intent on another occasion."[64] "A state of mind that continues over time and governs otherwise unconnected acts is generally called a person's character trait or propensity."[65]

In *State v. McManus*,[66] however, we stated that the "'only theory of logic under which evidence of other misconduct

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[63] See *id.*, § 3:18, citing Richard Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 226 (2d ed. 1982). See, also, *Varoudakis, supra* note 21.

[64] Eric D. Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1232 (1986).

[65] Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. Rev. 423, 430 (1983).

[66] See *McManus, supra* note 9, 257 Neb. at 10, 594 N.W.2d at 630, quoting Lansverk, *supra* note 64.

is directly relevant to prove intent . . . without relying on character inferences, is the doctrine of chances.'" Under this doctrine, the trier of fact is asked to infer that the defendant acted intentionally by making an intermediate inference about the objective improbability of an innocent act instead of an inference about the defendant's character.[67] This theory of relevance is used when the State seeks to prove the defendant's absence of mistake or accident. In *State v. Chavez*,[68] we implicitly adopted the doctrine to hold that evidence of a child's repeated, previous injuries is admissible when offered to show they are the product of child abuse and not accidents. In that circumstance, the evidence is relevant to someone's absence of mistake, and thus intent, without directly linking the acts to the defendant.

But in *McManus*, we did not adopt the doctrine of chances for directly proving intent through extrinsic acts that can only be attributed to the defendant. We recognized that critics had argued that the improbability of the defendant's acting innocently depends on his or her propensity to repeat the same crime, i.e., depends on an unchanging character.[69] We pointed out, however, that courts that have adopted the doctrine to directly prove *intent* will apply it "only when each of the other bad acts is similar to the charged offense and the defendant has been involved in such incidents more frequently than the typical person."[70]

We further stated that the number of similar events that are necessary to satisfy the doctrine of chances depends upon the complexity, degree of similarity, and relative frequency

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[67] See *McManus, supra* note 9.

[68] See *Chavez, supra* note 13. See, also, 1 Imwinkelried, *supra* note 9, § 5:06.

[69] See *McManus, supra* note 9, citing Andrew J. Morris, *Federal Rule of Evidence 404(B): The Fictitious Ban on Character Reasoning From Other Crime Evidence*, 17 Rev. Litig. 181 (1998), and Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259 (1995).

[70] *Id.* at 13, 594 N.W.2d at 632, citing *People v Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998).

of the event rather than on the total number of occurrences.[71] Generally, the doctrine of chances should not rest upon a single, previous uncharged act unless it is a complex act, like forgery requiring separate steps, as distinguished from "a spontaneous response to external stimuli,"[72] like spontaneous assaults.[73]

Here, the extrinsic act involved a spontaneous response to the victim, not a complex act like forgery. And it did not clearly show an intent to kill.[74] Neither did the evidence show several instances of domestic violence between the defendant and the victim continuing up to the occasion of the charged crime.[75] So even if we had adopted the doctrine of chances to directly prove intent, Pullens' single previous assault against Matsolonia could not be used to support an intermediate inference that an innocent act was improbable and that he therefore intended to kill her.

Of course, it was unnecessary to use this evidence to show the improbability of an innocent act because Pullens' act could not have been innocent. Even when the extrinsic acts are sufficiently similar and numerous to apply the doctrine of chances, showing the improbability of the defendant's innocent conduct is unnecessary when the defendant's conduct, if proved, could not have been done with an innocent intent. In that circumstance, no reason exists to ask the trier of fact to infer from extrinsic acts that the defendant's conduct in the charged crime was probably not innocent.

The absence of any need for the prejudicial evidence explains in part why many courts have held that when a defendant's conduct conclusively establishes intent, the defendant must actively contest the issue before extrinsic acts evidence is

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[71] *Id.*

[72] Lansverk, *supra* note 64, 61 Wash. L. Rev. at 1228. Accord 1 Imwinkelried, *supra* note 9, § 5:07.

[73] See 1 Imwinkelried, *supra* note 9, § 5:10.

[74] Compare *U.S. v. Hernandez*, 896 F.2d 513 (11th Cir. 1990).

[75] See, *Reizenstein v. State*, 165 Neb. 865, 87 N.W.2d 560 (1958); *Wever v. State*, 121 Neb. 816, 238 N.W. 736 (1931).

admissible.[76] Rule 403 explicitly gives a court discretion to exclude relevant evidence because it is a needless presentation of cumulative evidence.

The majority opinion attempts to circumvent the propensity reasoning necessary to find the extrinsic acts relevant and the cumulative nature of the evidence. The opinion posits in hindsight that Pullens' conduct was subject to more than one inference regarding his state of mind and that the State needed this evidence to rebut any inference that Pullens killed Matsolonia while acting under a provocation. But Pullens did not claim to have acted innocently in causing Matsolonia's death or claim to have killed her with a legal excuse, justification, or mitigation. He claimed that he did not kill Matsolonia.

Although the majority opinion states that the jury could have found that Pullens acted under a sudden provocation, its conclusion is inconsistent with Pullens' suicide defense and the evidence presented. It's a real stretch to affirm the admission of prejudicial character evidence based on an improbable defense that was not even presented.

More important, the State did not offer the evidence to refute any inference that Pullens had acted under a provocation or to consider whether an innocent act was improbable. Instead, the State offered the evidence to show that Pullens intended to kill Matsolonia because on one occasion 4 years earlier he had intentionally assaulted her in a similar manner after an argument. Offering the evidence to prove he intended to kill her required the jurors to use classic propensity reasoning that Pullens is the type of person "'who acts with violent intent when he is angry.'"[77]

I would conclude that the extrinsic acts evidence was inadmissible for any purposes for which the court instructed the jury to consider it. But even if the evidence had been

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[76] *U.S. v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992); *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975); 3 Fishman, *supra* note 23, § 17:63 (citing cases).

[77] See *State v. Sutton*, 16 Neb. App. 185, 194, 741 N.W.2d 713, 721 (2007), quoting *McManus, supra* note 9.

admissible to prove intent, I do not believe that the trial court properly performed its weighing function under rule 403.

Prejudicial Effect Outweighed Probative Value When State Had Other Substantial Evidence of Intent

As the majority states, the second requirement for admitting evidence of the defendant's extrinsic acts is weighing the evidence's probative value against the danger of unfair prejudice under rule 403.[78] Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[79]

As explained, extrinsic acts evidence creates a risk that the trier of fact will find guilt based on the defendant's character or disposition and overestimate the value of that evidence.[80] Balancing unfair prejudice against the probative value of extrinsic acts evidence under rule 403 is a critical safeguard. It ensures that the court does not admit unduly prejudicial evidence under rule 404.[81] Unfair prejudice in a criminal case refers to evidence that has a tendency to suggest a decision on an improper basis,[82] such as by relying on propensity reasoning.[83]

The majority correctly states that the U.S. Supreme Court has held that federal trial courts may consider the availability of evidentiary alternatives in balancing unfair prejudice against probative value under the federal counterpart to our rule 403.[84]

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[78] See *McManus, supra* note 9.

[79] § 27-403.

[80] See *McManus, supra* note 9.

[81] See *Sanchez, supra* note 1, citing *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

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

[83] See *Sanchez, supra* note 1.

[84] See *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

But it appears that the Court intended to clarify that under rule 403, a trial court has discretion to *exclude* the prosecution's proffered evidence of prior bad acts to avoid the risk of a verdict tainted by improper considerations if evidentiary alternatives are available.

Specifically, the Court held that the trial court abused its discretion when it rejected the defendant's offer to admit to a previous conviction and instead it admitted the full record of the previous judgment.[85] The Court explained that the advisory committee's notes showed that considerations under rule 403 should include "'waste of time and undue prejudice.'"[86] It concluded that when the proffered evidence has

> the dual nature of legitimate evidence of an element and illegitimate evidence of character[,] . . . . Rule 403 confers discretion by providing that evidence "may" be excluded, [and] the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.[87]

So I am puzzled by the majority's use of the Court's statement to support the admission of character evidence *despite* less prejudicial and equally persuasive evidentiary alternatives.

Moreover, intent is an element of almost every crime. And courts have recognized that in criminal cases, admitting extrinsic acts evidence to show intent has the potential of eviscerating rule 404.[88] Thus, many courts have held that when a defendant's conduct conclusively establishes intent, the defendant must actively contest the issue before extrinsic acts evidence is admissible for that purpose.[89] And a defendant does not actively contest intent by claiming that he did not commit the

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[85] See *id.*

[86] *Id.*, 519 U.S. at 184.

[87] *Id.* (citations omitted).

[88] *U.S. v. Johnson*, 27 F.3d 1186 (6th Cir. 1994); *United States v. Miller*, 508 F.2d 444 (7th Cir. 1974). See, also, 22 Wright & Graham, *supra* note 6, § 5242.

[89] See sources cited *supra* note 76.

charged crime.[90] Other courts have held that the availability of alternative proofs is a factor to be considered in balancing unfair prejudice against probative value.[91]

However, by claiming suicide, Pullens did not contest intent. And his conduct, if proved, conclusively established that he intended to kill her. We have stated that independent evidence of specific intent is not required. Instead, 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.[92]

The State introduced evidence that Matsolonia had struggled against her attacker before she died and that she had injuries consistent with strangulation. Her purse was dumped. Her glasses were found on the floor by the balcony door. The coffee table was partially off its base. Her necklace pieces were found on the couch and on her person. More important, this court has held that the length of time that it takes to kill a person by strangulation is significant evidence of the defendant's intent to kill.[93] If the jury found from the State's evidence that Pullens had killed Matsolonia, there was ample evidence for it to also find that Pullens intended to kill her. In closing argument, the prosecutor specifically argued that if the jury found Pullens had strangled Matsolonia and thrown her over the balcony, then as

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[90] See, *U.S. v. Sumner*, 119 F.3d 658 (8th Cir. 1997); *U.S. v. Ortiz*, 857 F.2d 900 (2d Cir. 1988).

[91] See, *U.S. v. Jenkins*, 593 F.3d 480 (6th Cir. 2010); *U.S. v. Awadallah*, 436 F.3d 125 (2d Cir 2006); *U.S. v. Lynn*, 856 F.2d 430 (1st Cir. 1988); *United States v. Layton*, 767 F.2d 549 (9th Cir. 1985); *Ex parte Vaughn*, 869 So. 2d 1090 (Ala. 2002); *State v. Gibson*, 202 Ariz. 321, 44 P.3d 1001 (2002); *Masters, supra* note 21; *State v. Bunker*, 89 Conn. App. 605, 874 A.2d 301 (2005); *People v. Walker*, 211 Ill. 2d 317, 812 N.E.2d 339, 285 Ill. Dec. 519 (2004); *State v. Henderson*, 696 N.W.2d 5 (Iowa 2005); *Norris v. Com.*, 89 S.W.3d 411 (Ky. 2002); *State v. Long*, 173 N.J. 138, 801 A.2d 221 (2002); *Hayden v. State*, 155 S.W.3d 640 (Tex. App. 2005); *State v. Ortega*, 134 Wash. App. 617, 142 P.3d 175 (2006).

[92] E.g., *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008); *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[93] See, *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989); *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

a matter of common sense, the evidence showed beyond a reasonable doubt that he intended to kill her.

Like other courts, we have also recognized that trial courts should consider the availability of other evidence in balancing probative value against the potential for prejudice. In *State v. Williams*,[94] we concluded that the prejudicial effect of admitting the defendant's extrinsic acts was outweighed by its probative value. In commenting on balancing probative value versus prejudice, we stated:

> Recent cases recognize that the problem cannot generally be solved by virtue of a mechanical rule of relevancy but, instead, is one of balance. McCormick on Evidence (2d Ed.), § 190, p. 447, at p. 453 states: "(T)he problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues *and the other evidence available to the prosecution*, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility."[95]

So even if extrinsic acts evidence is admissible under rule 404(2), a trial court has discretion under rule 403 to exclude it to prevent unfair prejudice, confusion of the issues, or misleading the jury, and to avoid needless presentation of cumulative evidence.

Here, even if the court had properly admitted extrinsic evidence to show Pullens' intent, its probative value was weak. Generally, the more isolated and remote the extrinsic act is without any intervening incidents, the less probative it is of the defendant's intent to commit the charged crime independent of a propensity inference.[96] Further, even if it

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[94] *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

[95] *Id.* at 64-65, 287 N.W.2d at 24 (emphasis supplied).

[96] See, *Bell, supra* note 8; *Brown v. State*, 109 Ga. App. 212, 135 S.E.2d 480 (1964); *Barnes v. Com.*, 794 S.W.2d 165 (Ky. 1990). Compare *Commonwealth v. Gil*, 393 Mass. 204, 471 N.E.2d 30 (1984).

had been admissible to show the improbability of an innocent act, it would have been cumulative for that purpose. Finally, the exclusion of the extrinsic acts in Pullens' case would not have hindered the prosecutor's ability to present a picture of what happened.

Here, the extrinsic evidence was weak, and stronger evidentiary alternatives were available to the State that conclusively established Pullens' intent. The State did not need to introduce evidence of Pullens' previous assault on Matsolonia. So even if the evidence's relevancy had not depended upon a propensity inference, I would conclude that the court erred in admitting highly prejudicial evidence to show Pullens' intent to kill. I believe that the probative value of the evidence was substantially outweighed by its prejudicial effect.

Admission of Extrinsic Acts Evidence Was Not Harmless

I do not believe that the court's admission of this evidence is harmless. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[97] Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.[98]

We have explained that a proper limiting instruction is another critical safeguard in protecting the defendant against the admission of unduly prejudicial extrinsic acts evidence.[99] But here, the court instructed the jury that it could consider evidence of the defendant's extrinsic acts for four improper purposes. Three of these purposes—proving identity, modus operandi, and intent—required the jurors to use propensity reasoning to find the evidence relevant.

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[97] *Sanchez, supra* note 1.

[98] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[99] See, *Sanchez, supra* note 1, citing *Huddleston, supra* note 81; *McManus, supra* note 9.

In *State v. McManus*,[100] we concluded that the State had cast grave doubt on the defendant's credibility by presenting evidence that he was the kind of person prone to use his pistol and make threats. Because the defendant was the only witness to the crime to testify and the State's evidence was circumstantial, his credibility was crucial. So the error was not harmless: "Faced with such evidence, the jury could be tempted to infer bad character and action taken in conformity with that character and could thus reach a verdict on an improper basis."[101]

> "When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person . . . and that if he 'did it before he probably did it again.'"[102]

Other courts have reached similar conclusions.[103]

We must presume the jury followed the court's instructions and considered evidence for the stated purposes as instructed. Those purposes permitted the jury to confuse proof of Pullens' identity and intent with his propensity to attack Matsolonia. And as in *McManus*, Pullens' credibility was a critical factor. After the jury heard evidence of Pullens' propensity to attack Matsolonia, he had a dead cat hanging around his neck, and the lingering odor would have permeated the jury room.

Because Pullens' credibility was crucial to his defense, permitting the State to attack his character with unnecessary extrinsic acts should not be considered harmless error. As the majority states, much of the trial focused on the relationship between Pullens and Matsolonia. We cannot say the jury did not rely on the extrinsic acts evidence to discredit Pullens' version

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[100] *McManus, supra* note 9.

[101] *Id.* at 15, 594 N.W.2d at 633.

[102] *Id.* at 9, 594 N.W.2d at 629, quoting *Crawford, supra* note 70.

[103] See, e.g., *Bell, supra* note 8; *U.S. v. Morley*, 199 F.3d 129 (3d Cir. 1999); *U.S. v. Heidebur*, 122 F.3d 577 (8th Cir. 1997); *U.S. v. Mothershed*, 859 F.2d 585 (8th Cir. 1988); *Hardin v. State*, 611 N.E.2d 123 (Ind. 1993); *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173 (2004).

of events and conclude that he killed Matsolonia because he hated her enough to have attacked her before. I would reverse the judgment and remand the cause for a new trial.

In closing, a trial court can avoid a retrial by requiring the proponent of extrinsic acts evidence to show that its theory of relevance does not depend on a propensity inference. A trial court should not be hypnotized by the prosecutor's sweeping incantations of identity, intent, modus operandi, motive, and absence of mistake. A trial court should adhere to rules we set out in *Sanchez* and not assume that the evidence is relevant to a catchall list of purposes. When the relevance is not clear, the court should insist that the proponent explain why the evidence will be necessary and set forth its chain of reasoning.

STATE OF NEBRASKA, APPELLEE, V.
DAVID M. KASS, APPELLANT.
799 N.W.2d 680

Filed July 15, 2011. No. S-10-315.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which an appellate court resolves without regard to how the issue was decided below.
2. **Jury Instructions.** Whether jury instructions are correct presents a question of law.
3. **Constitutional Law: Criminal Law.** The First Amendment limits a state's ability to prosecute certain criminal offenses.
4. **Constitutional Law: Presumptions.** Except for a few well-recognized categories of unprotected speech, a content-based restriction on speech is presumptively invalid and subject to strict scrutiny.
5. **Constitutional Law: Statutes: Proof.** When a party does not claim that a challenged law has no valid application, a facial challenge must establish that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep.
6. **Constitutional Law: Statutes.** If a statute is substantially overbroad, it invalidates all enforcement of the law.
7. **Constitutional Law: Statutes: Standing.** A party has standing to challenge a statute as overbroad, even if unaffected by the part that punishes protected speech, when the party claims that the statute will significantly compromise the free speech rights of others not before the court.
8. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct

which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.

9. ____: ____. A court may invalidate a statute on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
10. ____: ____. In considering a facial challenge to a law regulating speech, a court will narrow its application when the language is readily susceptible to such construction.
11. **Statutes: Legislature: Intent.** A statute is susceptible to a narrowing construction when the text or another source of legislative intent identifies a clear line that a court can draw.
12. **Jury Instructions: Appeal and Error.** When a party assigns as error the failure to give an unrequested jury instruction, an appellate court will review only for plain error.
13. **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.
14. **Jury Instructions.** When instructing the jury, it is proper for the court to describe the offense in the language of the statute.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Criminal Law: Entrapment: Words and Phrases.** In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.
17. **Entrapment: Evidence: Proof.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
18. **Entrapment: Evidence.** A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.
19. **Entrapment: Evidence: Words and Phrases.** Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.

20. **Entrapment: Words and Phrases.** Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.
21. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
22. **Judges.** An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
23. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
24. ____. In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors.
25. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

CONNOLLY, J.

A jury found David M. Kass guilty of one count of enticement by an electronic communication device under Neb. Rev. Stat. § 28-833 (Reissue 2008). The district court sentenced Kass to 1 year in prison and ordered him to register as a sex offender. He argues that § 28-833 violates the First Amendment because it is facially overbroad, that the court erred in its jury instructions, and that his sentence is excessive. We affirm.

I. BACKGROUND

On July 13, 2009, Kass, an Omaha police officer, logged onto his "Yahoo!" chat account using his personal computer.

He used the screen name "chs1665." A La Vista police officer also logged onto the chat service that day. This officer, who was conducting an undercover investigation, signed in with a screen name that represented that he was a female. He adopted the screen name "mickigirl14." Because the "romance chat rooms" on the Yahoo! chat services require a person to be at least age 18 to enter, the officer entered a date of birth to indicate that the fictitious female was 19 years old.

The La Vista officer logged onto a chat room designated "Nebraska romance" and waited. He did not initiate contact with any of the other members present in the chat room. Eventually, a participant contacted the officer. The participant was Kass. The two began a conversation that spanned 1½ hours.

In our summary of the conversation that follows, we correct grammar, spelling, or punctuation only when the meaning would otherwise be unclear. We do not add "sic" at any point because it would be necessary far too often and would clutter the opinion.

About 5 minutes into the conversation, Kass asked the officer, or decoy, "asl [age, sex, location]?" To which the decoy responded, "14[, female,] omaha." Kass then said that he was 25, a male, and in Omaha. Kass asked if this was "too old?" The decoy asked, "4 whut?" Kass responded, "anything."

Kass directed the conversation. Shortly after asking the decoy's age, Kass asked the decoy what she was going to do that day. The decoy responded that she would be swimming at a pool at her grandmother's apartment complex. Kass asked whether her bathing suit was "one piece or two piece." When the decoy answered, "two," Kass responded, "nice." Kass also asked her if her suit was small. He asked her what apartment complex she would be swimming at. After the decoy asked why Kass would want to know, Kass backed off that line of questioning.

A short time later, Kass asked what the decoy was wearing. The decoy responded, "just some shorts and a tank, why[?]" Kass then said, "very cute just making convo." He then asked if she was home alone. The decoy responded that her grandmother would still be home for "a little while."

The conversation then turned to more personal matters. Kass asked if the decoy had a boyfriend. She responded, "not anymore." Kass then said, "awesome what all did you do with him?" The decoy responded that she would go to the movies or just hang out with her boyfriend. Kass asked, "did you kiss him?" The decoy responded, "hey now," as if to indicate that such a question was inappropriate. She stated further, "personal qwestion and i dont even no u." Later, after the decoy indicated that she went to a shopping mall often, Kass asked if she shopped at a certain lingerie store and if she had anything from the store. When the decoy indicated that she had underwear and a pajama shirt from the store, Kass asked "what style panties?" After Kass pressed for details on the underwear, the decoy said, "u sure like 2 ask qwestions bout whut i wear," which could again be seen as an indication by the decoy that the line of questioning was inappropriate. Kass responded, "sorry just being dumb lol."

The conversation continued down a sexual path, all seemingly at the direction of Kass and over the, albeit subtle, protestations of the decoy. Kass asked what size bra the decoy wore. The time logs on the chat indicate that the decoy did not respond for 2 minutes, at which time Kass asked, "cat got ur tongue?" The decoy responded, "just not sure if i shuld say." Kass said, "ok dont say if you dont want to." The decoy went on, "its just I dont no u very well . . . and im kinda embarrassed cuz i think im kinda small." Kass then coaxed her into saying that she wore a "32 a," to which Kass responded, "very nice." Kass then said, "i like tiny girls and being properly portioned to ur body is the key."

A short time later, Kass asked, "whats the most you have done with a boy?" The decoy asked if Kass was joking. Kass indicated that he might have been both asking seriously and joking at the same time. The decoy responded that she had not had sex but had done "some stuf." Kass asked if it was "oral fun or just hands?" The decoy then said, "ur not gonna think bad of me if i tell u are u[?]" After Kass said no, the decoy indicated it was oral sex. Kass then pressed for further details, including whether the decoy masturbated. After the decoy said that she had never "finished," Kass asked her,

"you wanna finish?" The decoy also stated that she had "never had one," presumably referring to an orgasm. Kass asked, "want one?" To which the decoy responded, "with u?" Kass answered, "suer . . . or with anyone." Kass pressed the decoy, later asking, "wanna get off?" and encouraged the decoy to try masturbating.

The conversation then turned to graphic detail regarding oral sex. Kass asked if the decoy would like to try it. The decoy then asked Kass if he would be interested in her, considering her age. Kass responded, "kinda." Kass continued to ask numerous detailed questions regarding the decoy's experience with oral sex.

Kass then asked about intercourse. He asked the decoy, "what about sex?" The decoy asked in return, "what bout it." Kass responded, "wanna?" The decoy responded, "alot of girls are doin it but im so scared of gettin pregnent." Kass answered, "condoms . . . lol." The decoy expressed her fear of getting pregnant, stating, "im 2 yung 2 have a baby." A short time later, Kass ended the conversation.

Two days after this conversation, officers served a search warrant on Kass' home. The State later charged Kass with one count of enticement by an electronic communication device in violation of § 28-833.

Before trial, Kass moved to quash or, in the alternative, demur to the information. Kass cited nine bases for his motion, including that the statute violated the First Amendment and was vague and overbroad because of its inclusion of a peace officer as a victim. The court denied this motion.

After the presentation of evidence, the court instructed the jury on two subsections of § 28-833, namely subsections (1)(a) and (c). The court did not instruct the jury on the meaning of "indecent, lewd, lascivious, or obscene." The record, however, does not indicate that Kass ever requested such an instruction. Although Kass had requested an instruction on the defense of entrapment, the court refused to give it. The court found that the record failed to show entrapment and stated that the defense seemed inconsistent with Kass' other defense that he thought the decoy was over the age of 16.

The jury found Kass guilty of enticement. The court then sentenced Kass to 1 year in prison and ordered him to register as a sex offender.

II. ASSIGNMENTS OF ERROR

Kass raises four assignments of error, which we restate as follows:

(1) The court erred in concluding that § 28-833 is not overbroad, in violation of the First Amendment.

(2) The court committed plain error in failing to instruct the jury on the definition of "indecent, lewd, lascivious, or obscene."

(3) The court erred in failing to instruct the jury on an entrapment defense.

(4) The court erred in imposing an excessive sentence.

III. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional presents a question of law, which we resolve without regard to how the issue was decided below.[1] Whether jury instructions are correct also presents a question of law.[2]

IV. ANALYSIS

1. Overbreadth of § 28-833

[3] Kass' first argument is that § 28-833 is overbroad and thus violates the First Amendment. The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech"[3] and is made applicable to the states by the Due Process Clause of the 14th Amendment.[4] The First Amendment limits a state's ability to prosecute certain criminal offenses.[5]

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[1] See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[2] See *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[3] U.S. Const. amend. I.

[4] *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

[5] *State v. Drahota*, 280 Neb. 627, 788 N.W.2d 796 (2010).

At oral argument, Kass stressed that he was challenging only subsection (1)(a) as being overbroad. Accordingly, we will analyze only that section. Section 28-833(1) provides:

> A person commits the offense of enticement by electronic communication device if he or she is nineteen years of age or over and knowingly and intentionally utilizes an electronic communication device to contact a child under sixteen years of age or a peace officer who is believed by such person to be a child under sixteen years of age and in so doing:
>
> (a) Uses or transmits any indecent, lewd, lascivious, or obscene language, writing, or sound;
>
> (b) Transmits or otherwise disseminates any visual depiction of sexually explicit conduct as defined in section 28-1463.02 [defining terms under Child Pornography Prevention Act]; or
>
> (c) Offers or solicits any indecent, lewd, or lascivious act.

We recently considered an equal protection challenge to Neb. Rev. Stat. § 28-320.02 (Reissue 2008), which criminalizes enticement of a child by an electronic communication device to engage in sexual conduct if the sexual conduct would violate specified criminal statutes.[6] We rejected the defendant's argument that the statute was subject to strict scrutiny because it jeopardized the exercise of the fundamental rights to free speech and sexual privacy. We held that the First Amendment does not protect speech used to entice a minor to engage in illegal sexual conduct. We also held that the fundamental right to sexual privacy does not apply to statutes regulating sexual conduct with a minor.[7] Under the same reasoning, we have held that strict scrutiny did not apply to a statute regulating child pornography.[8] Child pornography is not protected speech when adequately defined.[9]

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[6] See *Rung, supra* note 1.

[7] See *id.*

[8] See *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[9] See, *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993).

But § 28-833(1) is not limited to the transmission of child pornography or speech to entice a child to engage in illegal sexual conduct. Subsection (1)(a) prohibits a person over the age of 19 from using an electronic communication device to transmit to a child age 16 or younger any speech that is "indecent, lewd, lascivious, or obscene." Because this prohibition is not tied to promoting illegal activity,[10] we must consider whether it violates the First Amendment's protection of speech.

[4-6] Except for a few well-recognized categories of unprotected speech,[11] a content-based restriction on speech is presumptively invalid and subject to strict scrutiny.[12] The state bears the burden to rebut that presumption.[13] But when a party does not claim that the challenged law has no valid application, a facial challenge must establish that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep.[14] If shown, this substantial overbreadth invalidates all enforcement of the law.[15] Conversely, the attack fails if the challenger fails to meet this burden.[16]

[7] As noted, the court instructed the jury that it could convict Kass if it found that the State had proved a violation of § 28-833(1)(a) or (c). We do not know under which subsection the jury convicted Kass. Even in that circumstance, however, Kass does not argue that he was engaged in constitutional speech or that subsection (1)(a) is unconstitutional as applied to him. Nonetheless, a party has standing to challenge a statute as overbroad, even if unaffected by the part that punishes protected speech, when the party claims that the statute will significantly compromise the free speech rights of others not

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[10] See *Rung, supra* note 1.

[11] See *Drahota, supra* note 5.

[12] See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L Ed. 2d 865 (2000).

[13] *Playboy Entertainment Group, Inc., supra* note 12.

[14] See, e.g., *U.S. v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

[15] *Virginia v. Hicks*, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

[16] *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

before the court.[17] This exception to traditional standing rules exists out of "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[18]

[8,9] A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.[19] A court may invalidate a statute on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.[20] A realistic danger must exist that the statute will significantly compromise recognized First Amendment protections of parties not before the court.[21]

Here, Kass cannot meet that burden. He argues that because the statute does not define "indecent, lewd, lascivious, or obscene," the statute is overbroad in its application. We recognize that the U.S. Supreme Court in *Reno v. American Civil Liberties Union*[22] struck down a similar statute, in part, over its concern that Congress failed to define the terms "'indecent'" and "'patently offensive'" in a manner that ensured they would not be applied to protected speech.[23] But here, the Legislature has used a phrase to define the prohibited conduct that we previously construed in *State v. Kipf*.[24] The Legislature obviously intended to restrict the range of this statute to our earlier construction.

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[17] See, *Hicks, supra* note 15; *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Hookstra, supra* note 16.

[18] See *Hicks, supra* note 15, 539 U.S. at 119.

[19] *Rung, supra* note 1.

[20] See *id.*

[21] See *id.*

[22] See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[23] *Id.*, 521 U.S. at 865.

[24] *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

[10,11] In *New York v. Ferber*,[25] the U.S. Supreme Court held that child pornography, though separate from obscenity, is not protected by the First Amendment if the conduct to be prohibited is "adequately defined by the applicable state law, as written or authoritatively construed." The Court has further stated that in considering a facial challenge to a law regulating speech, it will narrow its application when the language is readily susceptible to such construction.[26] We have recognized a similar standard for overbreadth challenges.[27] A statute is susceptible to a narrowing construction when the text or another source of legislative intent identifies a clear line that a court can draw.[28]

Here, the Legislature's use of the phrase "indecent, lewd, lascivious, or obscene," which is the same phrase that we construed in *Kipf*, identifies a clear line that we can apply to narrow the statute's reach. In *Kipf*, we considered a challenge to Neb. Rev. Stat. § 28-1310 (Reissue 1985), which criminalizes intimidation by telephone call if, with intent to terrify, intimidate, threaten, harass, annoy, or offend, a person telephones another and "uses indecent, lewd, lascivious, or obscene language or suggests any indecent, lewd, or lascivious act." We held that the phrase "indecent, lewd, lascivious, or obscene" refers to language that "conjures up repugnant sexual images."[29]

Further, we emphasize that to violate § 28-833, a person must "knowingly and intentionally . . . contact" the minor or decoy. We construe this language to mean that the statute only applies when a person uses the prohibited speech in a private conversation with a minor or a decoy. In other words, the statute only applies when the defendant is speaking exclusively to a minor or decoy. Such a construction eliminates any possibility of chilling constitutionally protected speech among adults, which was a major concern of the Court in *Reno*.

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[25] See *Ferber, supra* note 9, 458 U.S. at 764.

[26] See *Reno, supra* note 22.

[27] See, e.g., *Hookstra, supra* note 16.

[28] See *Reno, supra* note 22.

[29] *Kipf, supra* note 24, 234 Neb. at 235, 450 N.W.2d at 405.

When these limiting constructions are applied to § 28-833, the statute proscribes a person age 19 or older from knowingly and intentionally using an electronic communication device to contact a child under age 16, or peace officer whom the person believes to be a child under age 16, and using language that conjures up repugnant sexual images. This restriction does not include within its ambit the concerns raised in *Reno*.[30] That is, it does not, for example, restrict an adult from having a serious conversation with a child under age 16 about birth control practices, homosexuality, or prison rape.[31] Similarly, the narrowed construction of the statute is sufficient to restrict its application to speech that lacks serious literary, artistic, political, or scientific value.[32] Thus, we conclude that Kass' overbreadth challenge fails.

2. Jury Instructions

Kass also argues that the court erred in failing to instruct the jury in two respects.

(a) Instruction on Meaning of Terms "Indecent, Lewd, Lascivious, or Obscene"

Kass argues that the court erred in not instructing the jury on the meaning of the terms "indecent, lewd, lascivious, or obscene." Kass argues that the court erred in not providing definitions of the terms. The record, however, indicates that Kass never requested such an instruction.

[12,13] Because Kass did not request this instruction, we review the court's failure to give it only for plain error.[33] 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.[34]

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[30] *Reno, supra* note 22.

[31] See *id.*

[32] See *Kipf, supra* note 24.

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

[34] *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[14] The failure to define the terms in the statute does not rise to the level of plain error. The jury instructions described the offense in the language of the statute. And we have previously held that it is proper for the court to describe the offense in the language of the statute.[35] There was no plain error in the court's instruction on the elements of the crime.

(b) Entrapment

Kass argues that the court erred in denying his request for a jury instruction on the defense of entrapment. We find that on the record before us, the evidence does not warrant an entrapment instruction.

[15] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[36]

[16-18] When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment.[37] In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.[38] The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. The court makes this determination as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial

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

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

[37] *Id.*

[38] *Id.*

burden.[39] A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.[40]

[19,20] Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than a government agent or informant suggested the crime and provided the occasion for it.[41] Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.[42] To show inducement, "a defendant must establish that '[it was] the prosecution [that] set the accused in motion . . . .'"[43]

Kass claims two facts show inducement—that given the decoy's profile and Yahoo!'s chat room policies, Kass thought the decoy was over 18, and that the decoy was the first to use the word "sex" or "oral." Neither of these facts suffices to show inducement.

The record shows that Kass was informed of the decoy's supposed age well before he said anything that even approached the speech covered by the statute. When the decoy told Kass her age, Kass asked if he was too old, which indicates that he read and understood the decoy's message. And other statements made by Kass and the decoy lead us to believe that Kass knew he was talking to a minor. At this point, Kass could have left the conversation without violating any law. The decoy did not encourage him to stay. Nor did the decoy urge him to discuss anything sexual. In fact, the chat logs indicate

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[39] See *id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *U.S. v. Brand*, 467 F.3d 179, 190 (2d Cir. 2006), quoting *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952).

that the decoy protested when Kass' questions and comments turned sexual. Even over these protests, Kass continued to push the conversation toward the topic of sex. The only times the decoy mentioned sex were in response to Kass' questions. The record fails to show that the State induced Kass to act. Accordingly, it was not error for the trial court to refuse the requested instruction.

3. Excessive Sentence

Finally, Kass argues that his sentence is excessive. The court sentenced Kass to 1 year in prison with credit for 2 days served and ordered Kass to register as a sex offender.

Kass was convicted under § 28-833, which is a Class IV felony. Under Neb. Rev. Stat. § 28-105 (Reissue 2008), a person convicted of a Class IV felony can be sentenced to 0 to 5 years in prison, a $10,000 fine, or both. The court sentenced Kass to 1 year in prison, which is well within the statutory limits.

[21-25] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[44] An abuse of discretion occurs when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[45] 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.[46] In imposing a sentence, the sentencing judge is not limited to any mathematically applied set of factors.[47] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's

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[44] *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

[45] See *Rung, supra* note 1.

[46] *Id.*

[47] *Id.*

demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[48]

Given Kass' age, his education, the offense, and the fact that he was a police officer, we conclude that the court did not abuse its discretion in sentencing Kass to 1 year in prison.

V. CONCLUSION

We conclude that none of Kass' assignments of error have merit. We affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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[48] *Id.*

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

799 N.W.2d 673

Filed July 15, 2011. No. S-10-643.

1. **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.
2. **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.
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. ____: ____: ____. Absent any provision affirmatively stating otherwise, it is within the juvenile court's discretion to issue whatever combination of statutorily authorized dispositions as the court deems necessary to protect the juvenile's best interests.
5. **Juvenile Courts: Jurisdiction: Statutes: Child Custody.** It is within the juvenile court's statutory power to issue a dispositional order for juveniles adjudicated under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008), which includes both legal custody with the Department of Health and Human Services and supervision by a probation officer.

Appeal from the County Court for Lincoln County: KENT D. TURNBULL, Judge. Affirmed.

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

Jennifer Wellan, Deputy Lincoln County Attorney, for appellee State of Nebraska.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Department of Health and Human Services (DHHS) and the Lincoln County Attorney dispute whether a juvenile court has the statutory authority to order a juvenile adjudicated under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008) to be placed in the legal custody of DHHS while simultaneously placing the juvenile on probation. We hold that in the case of a juvenile adjudicated under § 43-247(3)(b), the juvenile court has authority to issue a dispositional order of concurrent custody with DHHS and supervision by a probation officer. We accordingly affirm the juvenile court's order in this case.

BACKGROUND

In November 2009, Katrina R., who was 15 years old at that time, sent two nude photographs of herself to her boyfriend's cellular telephone. When, in February 2010, these pictures, and pictures of other girls, were found on the hard drive of a school computer checked out to the boyfriend, Katrina was adjudicated under § 43-247(3)(b) as a child who deports herself so as to injure or endanger seriously the morals or health of herself or others. Katrina was active in school, was an honor roll student, and had no history of prior incidents with law enforcement or juvenile court. Katrina is not a party to this appeal and does not contest her adjudication or the court's subsequent dispositional order.

DHHS appeals the order, contesting whether the juvenile court acted within its statutory powers in the manner in which it crafted the order to address various concerns over Katrina's welfare. At the dispositional hearing, the juvenile court spent

considerable time discussing with Katrina emotional issues pertaining to Katrina's relationship with her father. Katrina had accused her father of emotional abuse. He had brain cancer and was in the process of obtaining a divorce from her mother. The court stressed that Katrina needed to resolve these issues. The court also questioned whether certain psychotropic medications prescribed to Katrina were necessary.

DHHS, in its case plan, had recommended that it be dismissed from the case, that Katrina be placed on probation, and that her care, custody, and control be returned to her mother. But the guardian ad litem thought Katrina should not be placed "just" on probation. The guardian ad litem believed that Katrina would benefit from counseling available through DHHS. On the other hand, the guardian ad litem did not think Katrina should be placed solely with DHHS, because it was more limited "on what they can and can't do," given the "reason that she came into care." Thus, the guardian ad litem believed a combination of custody with DHHS and supervision by a probation officer was in Katrina's best interests. The guardian ad litem agreed that Katrina should stay in the physical custody of her mother.

The juvenile court followed the guardian ad litem's recommendations. On May 27, 2010, the court ordered that Katrina serve 6 months' probation; that she be placed in the legal custody of DHHS, with physical custody with her mother; and that she participate in counseling and community service. The court explained that the Office of Probation Administration (Office of Probation) would be the "primary caretaker," but that DHHS would "make sure [the] counseling component is in place." The court noted that DHHS would be the secondary insurance provider for counseling services and could operate generally as a "safety net." Otherwise, DHHS was "to take a back seat . . . so that probation can do what they want." The court adopted DHHS' case plan as so modified, and DHHS appealed.

ASSIGNMENT OF ERROR

DHHS assigns that the juvenile court erred in simultaneously committing Katrina to DHHS and placing her on probation in the same juvenile court case.

STANDARD OF REVIEW

[1] 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.[1]

ANALYSIS

In *In re Interest of Jeremy T.*,[2] we held that the Nebraska Juvenile Code (the Code)[3] does not authorize placement of a juvenile in the "custody" of two separate agencies simultaneously. We were also careful to distinguish "custody" from the "supervision" or "care" of the juvenile. We have not directly addressed whether the Code permits juvenile courts to simultaneously order the "custody" of the juvenile with DHHS, while ordering "supervision" by the Office of Probation.

DHHS argues such an order is outside the court's statutory authority. DHHS is responsible for the costs of placing and caring for juveniles within its "custody,"[4] and does not want to pay for whatever services its "'back seat'"[5] custody entails in this case. It also does not want to share control over a juvenile with the Office of Probation. DHHS believes that an order of concurrent DHHS custody and supervision by probation involves the inequitable expenditure of public money,[6] involves a "duplication of . . . services,"[7] and interferes with DHHS' ability to carry out its statutorily mandated responsibilities. DHHS does not contest that the order of concurrent DHHS custody and probation supervision was in Katrina's best interests.

The Lincoln County Attorney asserts that the order was both within the juvenile court's statutory power and in Katrina's best interests. The Lincoln County Attorney points out that there are

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[1] *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

[2] *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[3] See Neb. Rev. Stat. §§ 43-246 through 43-2,129 (Reissue 2008 & Cum. Supp. 2010).

[4] *In re Interest of Jeremy T., supra* note 2.

[5] Brief for appellant at 8.

[6] See § 43-290.

[7] Brief for appellant at 10.

no DHHS supervisory services available where Katrina lives and that taking her out of the home would be neither beneficial nor cost effective. It argues that DHHS' support for counseling was necessary because Katrina's family could not afford it and the Office of Probation does not provide this service.

The Code provides that the juvenile court has jurisdiction over any juvenile adjudged to be within the provisions of § 43-247. Juveniles commonly referred to as "status offenders" are described in § 43-247(3).[8] Section 43-247(3) is divided into subsections (3)(a), (3)(b), and (3)(c). Subsection (3)(a) concerns a juvenile who is homeless, destitute, without proper support and care, abandoned, or neglected. Subsection (3)(b) concerns a juvenile who is wayward and uncontrolled; deports himself or herself so as to injure or endanger the morals or health of himself, herself, or others; or is habitually truant from home or school. Subsection (3)(c) concerns a juvenile who is mentally ill and dangerous.

Juveniles referred to as "law violators"[9] are described in § 43-247(1), (2), and (4). Subsection (1) describes a juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state or a violation of a city or village ordinance. Subsection (2) concerns any juvenile who has committed an act which would constitute a felony. Subsection (4) concerns a juvenile who has committed a traffic offense.

Section 43-284 describes dispositions for juveniles adjudicated under subsections (3), (4), or (9). Subsection (9) concerns a ward whose guardianship has been disrupted or terminated. Section 43-284 states that the court

> may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to (1) the care of some suitable institution, (2) inpatient or outpatient treatment at a mental health facility or mental health program, (3) the care of some reputable citizen of good moral character, (4) the

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[8] See *In re Interest of C.G. and G.G.T.*, 221 Neb. 409, 377 N.W.2d 529 (1985).

[9] See *In re Interest of J.M.N.*, 237 Neb. 116, 464 N.W.2d 811 (1991).

> care of some association willing to receive the juvenile embracing in its objects the purpose of caring for or obtaining homes for such juveniles, which association shall have been accredited as provided in section 43-296, (5) the care of a suitable family, or (6) the care and custody of [DHHS].

Section 43-286(1) lists dispositions for any juvenile adjudicated under subsections (1), (2), or (4):

> (a) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged or an order requiring the juvenile to participate in community service programs, if such order is in the interest of the juvenile's reformation or rehabilitation, and, subject to the further order of the court, may:
>
> (i) Place the juvenile on probation subject to the supervision of a probation officer;
>
> (ii) Permit the juvenile to remain in his or her own home or be placed in a suitable family home, subject to the supervision of the probation officer; or
>
> (iii) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of [DHHS], the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents.

Subsection (1)(b) of § 43-286 states that the court may commit such juveniles to the Office of Juvenile Services, but shall not place a juvenile under the age of 12 years in the Youth Rehabilitation and Treatment Centers in Geneva or Kearney unless the juvenile has committed murder or manslaughter, violated the terms of probation, or committed an additional offense.

Subsection (2) of § 43-286 states that for any juvenile adjudicated under § 43-247(3)(b), "the court may enter such order as it is empowered to enter under subdivision (1)(a) of this section or enter an order committing or placing the juvenile to the care and custody of [DHHS]."

Thus, § 43-284, which lists care and custody with DHHS as a possible disposition, but does not list probation as a possible disposition, is for status offenders, traffic offenders, and wards of the state whose guardianship has been disrupted. Section 43-286(1), which lists probation as a possible element of the dispositional order, but does not list placement in the care and custody of DHHS, generally covers law violators.

Traffic offenders and juveniles adjudicated under § 43-247(3)(b) are covered by §§ 43-284 and 43-286. For traffic offenders, the juvenile court has all the options listed under § 43-286(1), as well as all the options listed under § 43-284. But for status offenders under § 43-247(3)(b), the juvenile court does not have all the options listed under § 43-286(1). It only has the options listed in § 43-286(1)(a). For a juvenile adjudicated under subsection (3)(b), the juvenile court also has all the options listed in § 43-284.

Other than serving the purpose of excluding the option under § 43-286(1)(b) of commitment to a rehabilitation center, and emphasizing the option of DHHS care and custody, we do not find any special significance to the fact that § 43-286(2) states that for juveniles adjudicated under § 43-247(3)(b), the court may enter such order as empowered to enter under § 43-286(1)(a) "or" place the juvenile to the care and custody of DHHS. DHHS admits that under § 43-284, juvenile courts have the power to concurrently order care with one entity, including placement in the family home, and order custody with DHHS for juveniles adjudicated under § 43-247(3)(b). There have been several cases before this court and the Nebraska Court of Appeals of juveniles adjudicated under § 43-247(3)(b) wherein custody was with DHHS while placement and supervision was with another person or entity.[10] In *In re Interest of Amber G. et al.*,[11] we said that the liberal use of the word "may" in § 43-284 authorizes the juvenile court to exercise broad discretion in its disposition.

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[10] See, *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007); *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996); *In re Interest of Emily C.*, 15 Neb. App. 847, 738 N.W.2d 858 (2007).

[11] *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

DHHS argues simply that probation is different. It asserts that as soon as the juvenile court orders probation, DHHS must be discharged from all further responsibility for the juvenile. But by placing juveniles adjudicated under § 43-247(3)(b) under both §§ 43-284 and 43-286, the Legislature clearly meant to expand the dispositional options available so as to include probation—not to limit the juvenile court's ability to provide for the juvenile's best interests by forcing it to make a choice between probation or DHHS involvement. Such a dilemma would be contrary to the foremost purpose and objective of the Code, which is to promote and protect a juvenile's best interests.[12]

Indeed, § 43-286(1)(a)(iii) affirmatively recognizes the possibility of concurrent DHHS custody and supervision by a probation officer. Section 43-286(1)(a)(iii) sets forth the dispositional option of causing the juvenile to be "placed in a suitable family home or institution, subject to the supervision of the probation officer." It further states, "If the court has committed the juvenile to the care and custody of [DHHS], the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents."

DHHS argues that this reference to concurrent DHHS custody and probation supervision is meant to be only for the law violators for which § 43-286(1) is principally concerned, and not for juveniles adjudicated under § 43-247(3)(b), for which § 43-286(1)(a) is incorporated by reference. Again, DHHS places special emphasis on the "or" statement of § 43-286(2)—that the court may enter such order as it is empowered to enter under subsection (1)(a) "or" enter an order committing or placing the juvenile to the care and custody of DHHS.

[2] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[13] To read § 43-286(2) in the limiting manner DHHS suggests not only runs contrary to the objectives of the Code, but would ignore the myriad of other

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[12] *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000).

[13] *In re Interest of Gabriela H., supra* note 1.

options listed in § 43-284. Those options, insofar as they include numerous placements without probation, are different from the options listed in § 43-286(1)(a). They are also more expansive than simply "the care and custody of [DHHS]," which DHHS argues is the only alternative, once probation is imposed, to the options listed in § 43-286(1)(a). We fail to see how DHHS' suggested narrow interpretation of § 43-286(2) could operate only to exclude shared DHHS custody and probation supervision, but not exclude the options listed in § 43-284. And the dispositional options listed in § 43-284 plainly apply to "any juvenile . . . adjudged to be under subdivision (3)." DHHS' narrow reading of § 43-286(2) thus fails to maintain a sensible scheme which gives effect to every provision of the Code.

[3-5] DHHS is correct 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.[14] However, for juveniles adjudicated under § 43-247(3)(b), the statutes confer upon the juvenile court the power to commit the juvenile to DHHS' custody, and they also confer the power to order supervision by the Office of Probation. Absent any provision affirmatively stating otherwise, it is within the juvenile court's discretion to issue whatever combination of statutorily authorized dispositions as the court deems necessary to protect the juvenile's best interests. We do not find any statutory provision which states that the juvenile court cannot concurrently order DHHS custody and supervision by a probation officer for a juvenile adjudicated under § 43-247(3)(b). Therefore, we hold that it is within the juvenile court's statutory power to issue a dispositional order for juveniles adjudicated under § 43-247(3)(b), which includes both legal custody with DHHS and supervision by a probation officer.

Not only are the juvenile's best interests protected by such range of discretion, but the ability to concurrently order DHHS custody and supervision by the Office of Probation allows for the most equitable use and availability of public money.[15] We

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[14] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[15] See *In re Interest of Jeremy T., supra* note 2.

are unconvinced by DHHS' assertion that concurrent DHHS custody and probation supervision wastes funds in a duplication of services. Both entities provide unique services. Furthermore, it is only through the crafting of a dispositional order that provides for both DHHS custody and probation supervision that certain juveniles, such as Katrina, are able to stay in the family home. It would be much more costly to remove a juvenile from the family home and place that juvenile in foster care or an institution in order to obtain the support and supervision that the juvenile requires.

We note that in a recent decision, *In re Interest of Emily R.*,[16] the Court of Appeals held that for a juvenile adjudicated under § 43-247(1), the aforementioned "if" statement in § 43-286(1)(a)(iii) signifies that a juvenile court is without statutory authority to order concurrent DHHS legal custody and probation supervision when the juvenile is allowed to stay in the family home, but that a juvenile court does have authority to order concurrent custody and supervision when placement is outside the family home. We do not read the "if" statement of § 43-286(1)(a) as affirmatively addressing what combinations of DHHS custody and care or supervision are prohibited or allowed. It is simply a recognition of a possibility that is allowed by other provisions of the Code. In this case, DHHS care and custody for juveniles adjudicated under § 43-247(3)(b) is authorized by §§ 43-284 and 43-286(2)—not the "if" statement of § 43-286(1)(a)(iii). To the extent that *In re Interest of Emily R.* is inconsistent with this opinion, it is overruled.

CONCLUSION

A juvenile adjudicated under § 43-247(3)(b) ordered to be in the "care" of one entity while under the "supervision" of the Office of Probation may not necessarily require the support that DHHS legal custody entails. But that does not mean that under specific instances where it would be in the juvenile's best interests, the court is statutorily prohibited to give "custody" to DHHS while "care" and "supervision" are placed elsewhere.

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[16] *In re Interest of Emily R.*, 18 Neb. App. 845, 793 N.W.2d 762 (2011).

No one contests that, in this case, the juvenile court crafted its dispositional order so as to serve Katrina's best interests. We therefore affirm.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF D.I., ALLEGED TO BE A DANGEROUS SEX OFFENDER. D.I., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

799 N.W.2d 664

Filed July 15, 2011. No. S-10-717.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Statutes.** The interpretation of a statute is a question of law.
3. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
4. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
5. **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.
6. **Mental Health: Convicted Sex Offender.** The Sex Offender Commitment Act provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the Nebraska Mental Health Commitment Act.
7. **Mental Health: Convicted Sex Offender: Appeal and Error.** While the Sex Offender Commitment Act and the Nebraska Mental Health Commitment Act have similar procedures for commitment and appeals, they represent two separate acts.
8. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed.
9. **Actions: Statutes.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.

10. **Actions: Statutes: Words and Phrases.** 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. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.
11. **Actions: Statutes.** Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."
12. **Mental Health: Evidence: Proof.** Under the Nebraska Mental Health Commitment Act, the State bears the burden to show by clear and convincing evidence that an individual remains mentally ill and dangerous.
13. **Convicted Sex Offender: Proof: Rebuttal Evidence.** Once the subject of a petition seeking to have him or her adjudged to be a dangerous sex offender has exercised his or her right to a review hearing, the State is required to present clear and convincing evidence that a less restrictive treatment option is inappropriate. At that point, the subject may rebut the State's evidence.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Travis L. Wampler for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

D.I. appeals the decision of the Douglas County District Court affirming the order of the Mental Health Board of the Fourth Judicial District. The board found that D.I. remains a dangerous sex offender and that secure inpatient treatment remains the least restrictive treatment alternative. We affirm the judgment of the district court.

II. BACKGROUND

D.I. was convicted of sexual assault of a child in 2004 and was adjudged to be a dangerous sex offender. He was committed to secure inpatient treatment in 2006. According to a classification study, D.I. was alleged to have sexually

assaulted seven male children between the ages of 8 and 14 with whom he had had contact through his positions as counselor and director of a church-sponsored Bible camp. D.I. was diagnosed as having two mental illnesses: "pedophilia, sexually attracted to males, nonexclusive type," and "narcissistic personality disorder." We note that the record in this case contains very little information regarding the factual basis for D.I.'s original conviction. However, we take judicial notice of an unpublished memorandum opinion from the Nebraska Court of Appeals, in case No. A-04-711, filed February 11, 2005, which indicates that D.I. had been convicted after he administered bare-bottom spankings and back and buttocks massages to a child.

Pursuant to Neb. Rev. Stat. § 71-1219 (Reissue 2009), D.I. filed a motion for reconsideration before the mental health board on June 12, 2009, alleging that cause no longer existed to keep him in secure inpatient treatment. A hearing was held during which the State's psychiatrist and clinical director of the Norfolk Regional Center, Dr. Stephen J. O'Neill, testified. O'Neill has been D.I.'s psychiatrist since his commitment in 2006. O'Neill testified that the inpatient treatment program consists of three phases, with three levels per phase, and that D.I. had not yet completed the first level of the first phase. When asked why D.I. had not progressed, O'Neill stated that D.I. refused to admit that he had done anything wrong. D.I. also insisted that he would repeat problematic behavior such as bare-bottom spankings for children.

O'Neill stated that it was his medical opinion that D.I. had not successfully been treated and still remained a danger to the public. O'Neill also stated that there was not a less restrictive treatment option that would meet D.I.'s needs. D.I. scored in the medium- to high-risk category on the "Static-99," a test which measures the likelihood that someone will reoffend. O'Neill also stated that D.I. denied any wrongdoing, but that the treatment program generally required an admission of guilt in order for treatment to be considered successful.

At the hearing, D.I. argued that because he maintains he did nothing wrong, he cannot advance in the treatment program and should be released to an outpatient program. D.I. also

argues that inpatient treatment is solely punitive at this point. D.I. claimed there was not sufficient evidence of pedophilia, because there was no evidence that he engaged in these behaviors for purposes of sexual gratification. However, one of the board members pointed out that the basis for D.I.'s conviction had been sexual contact with a child under 14 years of age over the period of a year.

The mental health board denied D.I.'s motion for reconsideration, and he filed a petition in error with the Douglas County District Court. The district court denied D.I.'s petition in error and affirmed the order of the mental health board. D.I. has appealed from that order.

III. ASSIGNMENTS OF ERROR

D.I. assigns that the board erred in finding that (1) he is a dangerous sex offender as defined by Neb. Rev. Stat. § 83-174.01 (Reissue 2009) and (2) there was not a viable, less restrictive treatment other than secure inpatient treatment.

IV. STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[1]

[2] The interpretation of a statute is a question of law.[2]

[3,4] The district court reviews the determination of a mental health board de novo on the record.[3] In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.[4]

V. ANALYSIS

1. Jurisdiction Over D.I.'s Appeal

[5] The State claims we do not have jurisdiction to hear D.I.'s appeal because the Sex Offender Commitment Act (SOCA)

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[1] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[3] *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[4] *Id.*

does not give D.I. the right to appeal from a denial of a motion for reconsideration. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5]

D.I. sought a review hearing under § 71-1219, which provides:

> (1) Upon the filing of a periodic report under section 71-1216, the subject, the subject's counsel, or the subject's legal guardian or conservator, if any, may request and shall be entitled to a review hearing by the mental health board and to seek from the board an order of discharge from commitment or a change in treatment ordered by the board. . . .
>
> (2) The board shall immediately discharge the subject or enter a new treatment order with respect to the subject whenever it is shown by any person or it appears upon the record of the periodic reports filed under section 71-1216 to the satisfaction of the board that (a) the subject's mental illness or personality disorder has been successfully treated or managed to the extent that the subject no longer poses a threat to the public or (b) a less restrictive treatment alternative exists for the subject which does not increase the risk that the subject will commit another sex offense. When discharge or a change in disposition is in issue, due process protections afforded under [SOCA] shall attach to the subject.

Neb. Rev. Stat. § 71-1209 (Reissue 2009) sets out the burden of proof required for a treatment order as well as the procedure for commitment, but makes no mention of an appeals process. Neb. Rev. Stat. § 71-1214 (Reissue 2009) provides that the subject of a petition has the right to appeal a treatment order of a mental health board.

[6,7] D.I. filed his petition in error before the district court pursuant to Neb. Rev. Stat. § 71-930 (Reissue 2009), which is part of the Nebraska Mental Health Commitment Act (MHCA). In his current appeal, however, D.I. alleged that we have jurisdiction over this appeal under § 71-1214 and Neb. Rev. Stat.

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[5] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

§§ 25-1901 and 25-1902 (Reissue 2008). However, we note that the language of § 71-930 mirrors that of § 71-1214, and we address D.I.'s argument under § 71-1214. "SOCA provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the [MHCA]."[6] And while SOCA and the MHCA have similar procedures for commitment and appeals, they represent two separate acts.

We agree with the State that SOCA does not explicitly provide for an appeal from § 71-1219. Section 71-1214 provides that a subject committed under SOCA may appeal to the district court from a treatment order entered under § 71-1209. Therefore, the question is whether the decision of the mental health board denying D.I.'s motion for reconsideration was a final, appealable order under §§ 25-1901 and 25-1902.

[8] Under § 25-1902,

> [a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

In *In re Interest of Michael U.*,[7] we previously addressed whether an order adjudicating someone as dangerous and mentally ill under the MHCA is a final, appealable order. We found that an order of commitment under the MHCA is a final, appealable order within the meaning of § 25-1902.

(a) Special Proceeding

[9-11] We first address whether this order was made in a special proceeding. Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.[8] An action is any

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[6] *In re Interest of J.R.*, 277 Neb. 362, 369, 762 N.W.2d 305, 314 (2009).

[7] *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

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

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. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.[9] Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."[10]

Under § 71-1219(1), the subject of a commitment order may request, and shall be entitled to, a review hearing upon the filing of a periodic report. The hearing must be held no later than 14 calendar days after receipt of the request. At that time, the board must determine whether the subject's mental illness or personality disorder has been successfully treated or managed and whether a less restrictive treatment alternative exists. If the board determines that treatment has been successful or that a less restrictive treatment alternative exists, the subject is to be immediately discharged. Therefore, a hearing under § 71-1219(1) is a special proceeding within the ordinary meaning of the term.

(b) Substantial Right

Having determined that a hearing under § 71-1219(1) is a special proceeding, we next turn to the question of whether it affects a substantial right as understood under § 25-1902. We recognized in *In re Interest of Michael U.* that an order which deprived a subject of liberty for an indeterminate amount of time was an order affecting a substantial right.[11] And we also recognized that if a committed subject wanted to question the sufficiency of the board's findings in issuing an order, he had to appeal that order.[12]

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[9] *Id.*

[10] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

[11] *In re Interest of Michael U., supra* note 7.

[12] *Id.*

The order in this case may have continued a previous treatment order which was entered under § 71-1209, but it also deprived D.I. of his liberty for an indeterminate period of time. Section 71-1219(2) requires that the mental health board make a determination as to whether the subject has been successfully treated or whether a less restrictive treatment alternative existed. Such a determination will result in either the subject's continued commitment or his or her release. We therefore find that denial of a motion for reconsideration under § 71-1219(1) is a final, appealable order and that this court has jurisdiction to address D.I.'s claims.

2. Mental Health Board Did Not Err When It Found D.I. Was Still Dangerous Sex Offender

Turning now to D.I.'s assignments of error, D.I. first argues that the board erred in determining that he was a dangerous sex offender. We have not yet made a determination regarding what standard of review is to be used for a motion for reconsideration under § 71-1219. Nor are there any cases addressing the burden of proof and who bears the burden to show that treatment has been successful or whether a less restrictive treatment alternative ought to be pursued.

[12] We previously stated in *In re Interest of Dickson*[13] that the State bears the burden to prove by clear and convincing evidence that the individual remains mentally ill and dangerous under the MHCA. Although that decision was made under the old MHCA, the same language is used in Neb. Rev. Stat. § 71-935 (Reissue 2009). And we note that § 71-1219 mirrors the language in § 71-935 of the MHCA. We stated in that case:

> When the State petitions to have an individual declared mentally ill and dangerous . . . it must prove by clear and convincing evidence that the individual poses a substantial risk of harm to others or to himself. It follows that upon review of the commitment . . . the State must also prove by clear and convincing evidence that the individual

[13] See *In re Interest of Dickson*, 238 Neb. 148, 469 N.W.2d 357 (1991).

> remains mentally ill and dangerous. We interpret the "any person" language [in the MHCA] to require the State to show cause why the subject of the petition should remain incarcerated under the act.[14]

Therefore, we agree that the State bears the burden to show by clear and convincing evidence that the subject remains mentally ill and dangerous. Although D.I. argues that the State had the burden to establish that he was *currently* dangerous and that a prior commitment has no bearing on a present diagnosis, we disagree. Section 71-1219(2) states:

> The board shall immediately discharge the subject or enter a new treatment order with respect to the subject whenever it is shown by any person or it appears upon the record of the periodic reports filed under section 71-1216 to the satisfaction of the board that (a) the subject's mental illness or personality disorder has been *successfully treated or managed* to the extent that the subject no longer poses a threat to the public or (b) a less restrictive treatment alternative exists for the subject which does not increase the risk that the subject will commit another sex offense.

(Emphasis supplied.)

Under the plain language of the statute, the board must determine whether the subject's mental illness or personality disorder has been "successfully treated or managed," which necessarily requires the board to review and rely upon the original reason for commitment.

The evidence at the hearing established that in 3 years, D.I. had made little progress in the treatment program. O'Neill testified that D.I. was still in the first level of the first phase of a three-phase program. While in treatment, D.I. maintained that if he were released, he would continue to engage in problematic behaviors, such as bare-bottom spankings for children, even after being challenged as to the appropriateness of that kind of discipline. D.I. also continued to claim he had done nothing wrong.

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[14] *Id.* at 150, 469 N.W.2d at 359.

O'Neill stated that it was his medical opinion that D.I. had not successfully been treated and that D.I. still remained a danger to the public. D.I. scored in the medium- to high-risk category on the Static-99 test. O'Neill also stated that D.I. denied any wrongdoing, but that the treatment program generally required an admission of guilt in order for treatment to be considered successful. And when D.I. claimed there was no longer any evidence to support a diagnosis of pedophilia, a board member responded that pedophilia "doesn't come and go." Clearly, the mental health board did not accept that D.I.'s condition had been successfully treated or managed, and we find no error in that conclusion.

The mental health board did not err when it determined that D.I.'s mental illness and personality disorder had not been successfully treated or managed.

3. Mental Health Board Did Not Err When It Determined There Was No Less Restrictive Treatment Alternative

[13] D.I.'s second assignment of error is that the board did not consider less restrictive treatment alternatives. As we have already noted, § 71-1219(2) requires that the subject, or another person, establish to the satisfaction of the board that a less restrictive treatment alternative exists. In keeping with our prior case law and the language of § 71-1219(2), we find that once the subject of a petition has exercised his or her right to a review hearing, and asserted that there are less restrictive treatment alternatives available, the State is required to present clear and convincing evidence that a less restrictive treatment alternative is inappropriate.[15] At that point, the subject may further rebut the State's evidence.

D.I. relies heavily on *In re Interest of O.S.*[16] in his contention that the State did not present sufficient evidence that secure inpatient treatment remains the least restrictive alternative. In that case, we determined that the State had not presented *any* evidence of alternative treatment options and noted that the

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[15] See *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009).

[16] *Id.*

testifying psychiatrist had not been asked to give an opinion as to what other treatment options might be available.[17]

But in this case, O'Neill stated that "it [sic] would be hard pressed to find an outpatient provider wanting to work with [D.I.] when he's not in a stage of change." O'Neill also stated that to be considered as a candidate for outpatient treatment, D.I. would need to be "farther [sic] into the . . . change mode." He also stated that there was not a less restrictive treatment option that would meet D.I.'s needs. The mental health board found that secure inpatient treatment was the least restrictive alternative, although the board also invited D.I. and the Norfolk Regional Center to consider and present other treatment options. We therefore find that the State presented clear and convincing evidence that secure inpatient treatment remains the least restrictive treatment alternative and that D.I. presented no evidence beyond mere assertions to rebut the State's expert witness.

VI. CONCLUSION

Because the denial of a motion for reconsideration is a final, appealable order under § 25-1902, we have jurisdiction to hear D.I.'s appeal. We find, however, that the State presented clear and convincing evidence that D.I. remains a dangerous sex offender and that secure inpatient treatment remains the least restrictive treatment alternative.

AFFIRMED.

WRIGHT, J., not participating.

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[17] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
THUNDER COLLINS, APPELLANT.
799 N.W.2d 693

Filed July 22, 2011. No. S-09-1151.

1. **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.

2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Indictments and Informations.** A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
4. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
5. **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.
6. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat § 27-404(2) (Reissue 2008), provides that 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, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
7. ____: ____. 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. 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).
8. **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.
9. **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.
10. **Rules of Evidence: Other Acts.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall, upon

objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.

11. **Evidence: Other Acts: Jury Instructions.** Any limiting instruction given upon receipt of other crimes evidence should identify only those specific purposes for which the evidence was received.
12. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.
13. **Motions for Continuance: Evidence.** When a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.
14. **Motions for New Trial: Evidence.** Neb. Rev. Stat. § 29-2101(5) (Reissue 2008) provides that a new trial may be granted for newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial.
15. **Criminal Law: Juries.** Neb. Rev. Stat. § 29-2022 (Reissue 2008) provides that when a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court.
16. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
17. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
18. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Remanded for further proceedings.

Steve Lefler, of Lefler & Kuehl Law, 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.

PER CURIAM.

INTRODUCTION

Thunder Collins was convicted of first degree murder, attempted second degree murder, first degree assault, and two counts of use of a weapon to commit a felony. He was

sentenced to a combined sentence of life plus at least 90 years' imprisonment. Collins appeals to this court pursuant to our statutory obligation to hear all appeals in which the sentence of life imprisonment is imposed.[1] We remand for further proceedings.

FACTUAL BACKGROUND

Early Summer 2008: Initial Visits to Nebraska to Deliver, Manufacture, and Distribute Crack Cocaine.

Collins met one of the victims in this case, Marshall "Flower" Turner, through Collins' brother. Turner was a drug dealer based in Los Angeles (LA), California, and on two occasions while in LA, Collins attempted to purchase marijuana from Turner. After meeting Collins, Turner and his cousin, Timothy "Twin" Thomas, became interested in the possibility of selling crack cocaine in Omaha, Nebraska. Turner contacted Collins, who, in turn, did some "research" into the market for crack cocaine in Omaha. At the time Turner contacted Collins, Turner could sell an ounce of crack cocaine for $400 in LA; Collins determined that the same ounce could sell for upward of $700 to $800 in Omaha. At this point, it was agreed that Turner and Thomas would come to Omaha with cocaine and have Collins sell it for them.

Thereafter, on two separate occasions in July 2008, Turner, Thomas, and their "worker," Darryl Reed, traveled to Omaha from LA in vehicles purchased at automobile auctions. Those vehicles were registered in California using fake identification in the name of an alias belonging to Reed. This identification was also used to check into Omaha motels for the duration of their stays. The record is in dispute over Reed's compensation for his work. Turner indicated that Reed was paid a few hundred dollars and allowed all the crack cocaine he could smoke, while Reed indicated that he was paid anywhere from $1,000 to $3,000 per trip and that he was not a drug user. What is not in dispute is the fact that Reed was unaware of the location of the drugs within the vehicle and was not privy to any details regarding the trips to Omaha.

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

On their first trip, Turner, Thomas, and Reed arrived in Omaha on July 13, 2008. The three met Collins in the parking lot of a gas station located on 72d Street in Omaha. Collins had already procured a room for the three at a nearby motel. There is some dispute in the record as to why, but in any event, the three switched motels the next day and stayed at another motel for the remainder of their trip. Turner and Thomas needed a private place to remove the two packages of cocaine—weighing ½ kilogram and 4½ ounces respectively—they had brought from LA, and Collins found such a location for them. On this trip, the cocaine packages were hidden in the outside rear wheel area of the passenger side of their sport utility vehicle.

The three men went to a local Wal-Mart to buy supplies for cooking the cocaine into crack cocaine. Over the course of the next week or so, Collins would stop by the motel at least once a day and Turner and Thomas would "front" him crack cocaine to sell. After selling the crack cocaine, Collins would return with Turner's and Thomas' share of the payment. On approximately July 20, 2008, Turner, Thomas, and Reed returned to LA, having made about $33,000 while in Omaha.

Upon reaching LA, the three procured another vehicle and more cocaine and again left for Omaha, this time arriving on July 25, 2008, in a minivan. The three checked into the former Baymont Inn on 72d Street. The drugs secreted in the vehicle were more accessible on this trip, and Turner and Thomas were able to retrieve the drugs while in the parking lot of the motel. This time, Turner and Thomas brought one package of cocaine weighing 27 ounces and another package weighing 4½ ounces. Again supplies were purchased at a local Wal-Mart, allowing the men to process the cocaine into crack cocaine.

Similar to the previous trip, Collins stopped by the motel a few times a day and was fronted crack cocaine to sell. Motel records and testimony indicate that Turner, Thomas, and Reed checked out of the Baymont Inn on July 28, 2008, and returned to LA. On this trip, Turner and Thomas made between $38,000 and $40,000.

Events of Late Summer/Early Fall 2008.

Subsequent to the July visits, Collins again went to LA, where he again met with Turner. Collins told Turner there was

a "drought" in Omaha, so Turner and Thomas agreed to return to Omaha with more cocaine. Thereafter, on September 22, 2008, Turner, Thomas, and Reed returned to Omaha in a white 2002 Ford Expedition. They brought along two packages of powder cocaine weighing 1 kilogram and 4½ ounces, respectively, and one 8-ounce package of crack cocaine. This time, the three men were accompanied by Turner's girlfriend.

The four checked into the Baymont Inn, using Reed's fake identification, and rented two rooms. Afterward, the group went to Wal-Mart to purchase supplies for processing the crack cocaine. Turner had been in contact with Collins and asked Collins to procure some marijuana for the group. Collins did so and met the group at Wal-Mart to deliver the marijuana. Collins arranged to meet with the group the next morning so that Turner and Thomas could retrieve the cocaine from its hiding place in the Expedition.

September 23, 2008: Collins Allegedly Obtains Gun.

The next morning, September 23, 2008, Collins went to a house located on North 70th Circle in Omaha (referred to as the "blue house"). Collins' friend, Ahmad Johnson, resided at this address, and Johnson's father was in the process of purchasing the residence so that a home daycare facility could be opened there. Upon arrival, Collins awoke Johnson and informed him that his "guys from Cali" were in town and that he, Collins, wanted to "get 'em." Collins also informed Johnson that the "guys from Cali" had a "bird," which Johnson understood to be drug related. According to Johnson's testimony, he tried to ignore Collins, but ultimately agreed to help Collins find a place for Turner and Thomas to retrieve the cocaine from the Expedition.

Collins and Johnson first went to the mechanic shop where Johnson's friend Karl "Psycho" Patterson worked. Patterson declined to let Collins use the shop, but did take the pair back to his home. While at his home, Patterson gave Collins a weapon, described by Johnson as a black .40-caliber gun. In his testimony, Johnson indicated that Patterson worked near 42d Street and Bedford Avenue in Omaha and lived near 30th and Hamilton Streets in Omaha. Patterson testified at trial that

he had never met Collins or Johnson and had not given a gun to Collins. He did testify, however, that he worked at a mechanic shop at 41st Street and Bedford Avenue and that he owned a home at 28th and Charles Streets. Charles Street is located one block north of Hamilton Street in Omaha.

After leaving Patterson's shop, Collins placed the gun in the center console of his vehicle. At that point, Collins and Johnson attempted to contact another friend, Karnell Burton. After driving to Burton's house and seeing his car parked outside, they tried to call Burton a number of times and knocked on his door but did not reach him. Collins and Johnson then left Burton's home and drove around for a while, stopping at a few locations. Collins and Johnson eventually went to the Baymont Inn so that they could meet with Turner and Thomas. Collins told Turner and Thomas to follow him, then asked Johnson whether Turner and Thomas could use the blue house to retrieve the drugs. Johnson testified that he was reluctant to allow the use of the blue house because his children were coming there soon, but that he agreed. On their way back to the blue house, Burton called Johnson. Collins told Johnson to tell Burton to "bring that thing" to the blue house. Burton responded that he had it and was on his way.

The Shooting at the Blue House.

After arriving at the blue house at approximately 11 a.m., Johnson removed the gun from the center console and placed it on the stove in the house. Turner and Thomas arrived shortly after Collins and Johnson. Because Johnson's father was home on his lunch break, Turner and Thomas had to wait to retrieve the cocaine. At some point, at Collins' direction, Johnson pulled two vehicles out of the garage. Burton arrived about this same time. Turner testified that Burton was wearing a white shirt and black jeans and had his hair in braids, while Collins was wearing a blue shirt, blue shorts or pants, and a pair of black shoes.

About 15 minutes after arriving, Turner backed the Expedition into the garage so that Thomas could extricate the drugs. The garage had two stalls, each with its own door. The door in front of the Expedition was down, and the other door was partially

down. There were two other doors in the garage: a side door that was padlocked, and a back door. At this point, Thomas began to work at retrieving the cocaine, which was hidden in the back passenger wheel well. Turner and Collins were in the garage with Thomas while he worked.

While Turner, Thomas, and Collins were in the garage, Johnson and Burton went into the house. Collins joined them, noting that he "didn't know they had that there . . . right by the seat belt." He then stated that he wanted to "get these guys." Collins asked Burton for his gun, and Burton handed Collins a small chrome gun. Collins then left the house. Johnson testified that he told Burton to "watch [Collins'] back" and make sure nothing happened. Johnson then testified that he went out to his vehicle and turned up his music "[p]retty loud." According to Johnson, the .40-caliber gun was still on the stove when he left the house.

Upon Collins' reentry into the garage, Turner and Thomas asked Collins whether they could open the garage door further in order to obtain more light. Collins said no, because of the neighbors. According to Turner, Collins then walked around to the side door of the garage and wiggled the door handle, then walked out of the back door of the garage. Turner and Thomas continued to work at retrieving the cocaine.

Turner testified that he was shot in the neck as he and Thomas were working. Turner indicated that he had not seen anyone enter the garage, but that he heard a loud "boom" and was hit by a bullet. Turner fell to the ground and crawled underneath the Expedition, making his way to the driver's side. He testified that he saw a flash while under the vehicle, but did not see who fired the shot. Turner indicated that he could tell that Thomas was running around the garage because he saw Thomas' shoes.

Turner testified that he got out from underneath the Expedition and saw that Collins held Thomas by the hair at gunpoint, standing in the corner of the garage by the locked side door. Turner also testified that Burton was standing on the back bumper of the Expedition with a black gun pointed at Turner. Turner indicated that Collins' gun was silver or chrome.

Collins told Thomas to get into the Expedition, while Turner attempted to get in between Thomas and Collins. Turner testified that he and Thomas both told Collins he could just have the cocaine. Collins then told Burton to get Turner off him, so Burton shot Turner in the buttocks. About the same time, Collins, who was still struggling with Thomas, stated, "Fuck this nigger, 'cuz," and shot Thomas. Thomas went limp, and Turner believed that Thomas was dead.

After Thomas was shot, Collins began dragging Thomas' body from the front of the Expedition to the passenger side and requested that Burton help him. At that point, Turner grabbed his cellular telephone and the Expedition's keys and tried to ease into the Expedition. After Collins and Burton were finished dragging Thomas' body, Burton said that they should "make sure this nigger [is] dead." Turner testified he lay down and played dead. Collins told Burton to hurry up. Burton then shot Turner, grazing the right side of his head. Turner heard footsteps walk away and heard Collins and Burton discussing how they needed plastic to wrap the bodies.

Turner's Escape From the Blue House.

Turner heard the pair leave the garage, at which point he jumped up, got into the Expedition, and drove it through the closed garage door. Turner testified that when exiting the garage, he saw Johnson standing in the front yard but did not see Collins or Burton. The Expedition slid as it left the garage and collided with Burton's vehicle. Turner kept going and eventually ended up back at the Baymont Inn.

Johnson testified that after the Expedition drove through the garage door, he turned around and saw Collins and Burton standing behind him. Though Johnson questioned Collins, Collins did not reply. Collins then ran into the house through the front door. Burton also did not reply to Johnson's questions. One of Johnson's neighbors came over to ask Johnson whether he had heard gunshots. Johnson said that he had, and agreed that the neighbor should call the police. At that point, Collins came out of the garage and asked Johnson why he had told the neighbor to call the police. Johnson testified that he

ignored Collins' question, then again asked what had happened. Collins got into his vehicle and drove away.

After Collins drove off, Johnson attempted to reach him by cellular telephone. After Johnson finally contacted him, Collins "[t]ried to play dumb and act like he wasn't even at the house." According to Johnson, Collins then disconnected the call and did not answer when Johnson tried to call him again.

Investigation.

Upon law enforcement's arrival, Thomas' body was found in the garage with a blue T-shirt wrapped around his legs. An autopsy was performed on Thomas. Two entrance wounds were found, one on his upper forehead just to the left of the midline and another on the top of his right shoulder. The cause of death was a gunshot wound to the head with hemorrhage and disruption of the brain tissue. The bullet perforated Thomas' brain and skull, exiting through the back right side of his head, causing marked disruption and laceration of the brain as well as multiple skull fractures. There was no "soot" or "stippling" on the forehead wound, so it appears the gun was fired at a distance of more than 2 feet. However, the pathologist who conducted the autopsy allowed that Thomas' hair might have interfered with the deposit of soot. The bullet that caused the shoulder wound was removed from Thomas at the time of the autopsy and was later revealed to be a .40-caliber bullet. Thomas also had scrape-like abrasions over parts of the right side of his body.

At some point after leaving the blue house, Turner arrived at the Baymont Inn. Due to the shooting, Thomas had not removed the drugs from the vehicle. Because of the presence of the drugs, Turner told Reed to move the vehicle, but Reed was unable to do so because the tire was punctured and rubbed against the damaged bumper. Emergency personnel were notified, and Turner was transported to the University of Nebraska Medical Center.

Upon arrival at the medical center, it was determined that Turner had three entry wounds: one on the left side of his neck, one on his left buttock, and one on his left ear. Turner also had abrasions on the right side of his body. The shot to Turner's

ear was a "through and through," but the bullet that entered Turner's neck was lodged in his shoulder and fractured his right scapula and humerus. That bullet was not removed and was still in Turner's shoulder at the time of trial.

Turner had surgery to repair a hole in his rectum caused by the bullet that entered his left buttock. As part of that surgery, Turner was required to wear a colostomy bag for about 5 months. Turner also suffered a fracture to his pelvis, an injury to his urethra that required use of a catheter, a large hematoma, and multiple areas of active bleeding. The bullet that entered Turner's left buttock was found in his right thigh and removed during surgery. The bullet was later determined to be a .40-caliber bullet.

In addition to Thomas' body, a tarp was found in the back of the garage. That tarp had on it a substance that appeared to be blood. Also found in the garage were two .25-caliber shell casings and two .25-caliber bullets. Testing revealed that these two bullets were fired from the same weapon, and the two shell casings were also fired by the same weapon. In addition, two .40-caliber shell casings were found in the garage. These casings were determined to have been fired from the same weapon. A .40-caliber bullet was recovered from Thomas' right shoulder, while another was recovered from Turner's right thigh. These two bullets were later also determined to have been fired from the same weapon.

Physical evidence tied Collins to the Expedition and to the garage. Collins' prints were found on the Expedition—in particular, his left thumbprint was found on the exterior of the front passenger door and his right palmprint was found on the front driver's-side quarter panel and front hood. And Collins' DNA was found on the blue T-shirt found wrapped around Thomas' legs, with testing unable to exclude Collins as a major contributor of the DNA on the inside of the T-shirt. A pair of black sneakers was also found in the kitchen of the blue house. The shoes were identified by Johnson as the shoes worn by Collins. DNA testing could not exclude Thomas as the source of blood found on the shoes or exclude Collins as the source of DNA from inside the shoes.

Both Johnson and Turner admitted to lying to authorities immediately after these events. Turner lied about the circumstances surrounding his injuries, though he gave an accurate description of Collins' vehicle when speaking to law enforcement after the incident. Turner explained that he had no interest in going to jail, given the large quantities of cocaine hidden in the Expedition. Eventually, Johnson and Turner, as well as Reed, entered into agreements with the State for a reduction in charges and sentencing recommendation in return for truthful testimony.

Also presented at trial was evidence of a telephone call from Collins to the home of Johnson's parents. This call was made from the Douglas County Correctional Center on November 10, 2008. In the call, Collins, speaking to Johnson's girlfriend and later to Johnson's father, indicated that Collins had cleared Johnson from being in the garage at the time of the shooting, but that Johnson needed to stop telling people that a robbery was in progress. Collins then explained the felony murder rule and suggested that Johnson's father speak to Johnson about Johnson's changing his story. Johnson testified that in addition to this telephone call, a message from Collins was relayed to him via the barber at the correctional center and that Johnson was told to keep his mouth shut.

Procedural Background.

Collins was arrested. On November 10, 2008, Collins was charged with first degree murder, attempted second degree murder, and two counts of use of a weapon to commit a felony. An amended information was filed on April 13, 2009, alleging the same charges. On July 13, the State filed a motion for leave to file a second amended information to add the charges of first degree assault and use of a weapon to commit a felony, related to injuries sustained by Turner. Following a hearing, that motion was granted on July 28.

On July 27, 2009, the State filed a notice of its intent to adduce evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), in particular, evidence that Collins had organized and actively participated with Turner and Thomas in drug deals in the Omaha area. The State contended

that such evidence was relevant and material as proof of motive, opportunity, intent, preparation, plan, knowledge, and identity. Following a hearing, the district court concluded that the State had sufficiently proved those prior incidents and granted the State's motion with respect to proof of motive, opportunity, intent, preparation, plan, knowledge, and identity.

Trial was held from August 10 to August 24, 2009. On August 28, Collins was convicted of all charges except for the third count of use of a weapon to commit a felony. Following trial, Collins filed a motion for new trial because of newly discovered evidence and because the jury was allowed to separate before reaching a verdict. That motion was denied. Collins was sentenced to life imprisonment for first degree murder, 30 to 50 years' imprisonment for attempted second degree murder, 20 to 20 years' imprisonment for first degree assault, and 20 to 20 years' imprisonment on each count of use of a weapon to commit a felony. He appeals.

ASSIGNMENTS OF ERROR

On appeal, Collins assigns that the district court erred in (1) denying his motion for a directed verdict; (2) admitting evidence of a prior relationship between Collins and the victims, in violation of rule 404; (3) allowing the State to file a second amended information just 20 days prior to trial; (4) overruling Collins' motion for new trial based on newly discovered evidence; (5) overruling Collins' motion for new trial due to the district court's action in allowing the jury to separate during deliberations; and (6) submitting the felony murder charge to the jury.

STANDARD OF REVIEW

[1] 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.[2]

[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[3]

[3] A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.[4]

[4] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[5]

ANALYSIS

Directed Verdict/Felony Murder Submission.

In his first assignment of error, Collins assigns that the district court erred by not granting his motion for a directed verdict. Collins argues that there was insufficient evidence to support his convictions for first degree murder, attempted second degree murder, and first degree assault. And in a related argument, in his sixth assignment of error, Collins argues that the State did not meet its burden, i.e., there was insufficient evidence to submit the felony murder charge to the jury. These assignments of error will be addressed together.

Collins' arguments are largely based on his contention that Turner's testimony is simply not to be believed. But, of course, in reviewing criminal convictions, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. The question of Turner's credibility was for the jury, and the jury obviously believed that Collins was responsible for Thomas' death.

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[2] *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010).

[3] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[4] *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[5] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[5] Collins also suggests that the State did not present any direct evidence that he had the intent to kill Thomas or to rob Turner and Thomas. But 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.[6] Thus, the State was not required to present any such direct evidence.

Collins also notes the record shows that he had a .25-caliber weapon in his possession during the purported attempted robbery, while Burton was in possession of a .40-caliber weapon. Collins argues that no .25-caliber bullets were found at the scene or were recovered from Turner or Thomas. Collins acknowledges that the shot that killed Thomas was not recovered and that a bullet remains lodged in Turner's shoulder, but insists that those wounds were more characteristic of a .40-caliber weapon. However, Collins simply makes this assertion and does not direct us to any evidence in the record supporting that conclusion.

In sum, viewed in a light most favorable to the State, the evidence shows that Collins was aware of the cocaine secreted in the vehicle and knew the amount of money sale of the cocaine would bring and how much money he would have to pay Turner and Thomas. Johnson testified that Collins told him that he wanted to "get" Turner and Thomas. Collins had Patterson and Burton provide him with two weapons, then lured Turner and Thomas into a closed garage with just one exit. In addition, Turner testified that Collins shot Thomas. Finally, physical evidence presented at trial showed Collins shot Turner and killed Thomas.

Collins' first and sixth assignments of error are without merit.

Rule 404(2) Evidence.

[6-9] In his second assignment of error, Collins assigns that evidence of the prior relationship between Collins and Turner

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[6] *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010).

and Thomas was inadmissible under rule 404(2), which governs the admissibility of "other crimes" evidence. 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.[7] 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).[8] 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.[9] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[10]

[10,11] The proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.[11] And any limiting instruction given upon receipt of

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[7] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

such evidence should likewise identify only those specific purposes for which the evidence was received.[12]

Prior to trial, the State filed a notice of intent to adduce rule 404(2) evidence, specifically Collins' participation in prior drug deals with Turner and Thomas. The State alleged that these prior deals were "relevant and material as to proof of motive, opportunity, intent, preparation, plan, knowledge, and identity."

A hearing on the State's notice was held. At that hearing, the State again argued that Collins' motive for murdering Thomas and attempting to murder Turner was robbery and that evidence regarding the prior relationship between Collins and Turner and Thomas was relevant to showing Collins' motive, opportunity, intent, preparation, plan, knowledge, and identity.

Following the hearing, the district court found that the State had met its burden of showing by clear and convincing evidence that these prior acts were committed by Collins. The district court entered an order allowing the State to adduce such evidence, finding that it was relevant and material for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, and identity. The jury was instructed as to all seven of these reasons for independent relevancy.

We conclude that the evidence of the prior relationship between Collins and Turner and Thomas was independently relevant as to Collins' motive, intent, and knowledge, but not so with respect to opportunity, preparation, plan, and identity.

Understanding this prior relationship between Collins and Turner and Thomas shows Collins' motive and intent for shooting Turner and Thomas on September 23, 2008. Motive is defined as that which leads or tempts the mind to indulge in a criminal act.[13] Motive, even when not an element of the charged crime, is nevertheless relevant to the State's proof of the intent element.[14] Collins wanted the cocaine for himself. He had been selling the drugs and returning most of the money to Turner

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[12] *Id.*

[13] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[14] *Id.*

and Thomas, and he was aware of how much profit was to be made if he did not have to share it with Turner and Thomas. This profit was Collins' motive to rob Turner and Thomas, and showed his intent to do so. And this robbery is, of course, key to the State's felony murder theory—that Collins was guilty of first degree murder because Thomas was killed during the commission of the robbery.

This prior relationship also shows Collins' knowledge. Collins was in contact with Turner, was aware that Turner and Thomas were in possession of significant quantities of cocaine, and knew that Turner and Thomas were in Omaha with that cocaine. Because of the prior relationship between himself and Turner and Thomas, Collins was in a position to know the details surrounding the plan to remove the cocaine from the Expedition.

While the challenged evidence was independently relevant with respect to Collins' motive, intent, and knowledge, we find that it was not admissible to show opportunity, preparation, plan, or identity.

We first address opportunity. We have recognized that evidence is relevant to commit a crime if it shows the defendant had the capacity to commit the crime, including access to a weapon necessary to commit the crime.[15] But in this case, the prior relationship is not independently relevant to show Collins' opportunity; rather, it is relevant only to show Collins' knowledge of the pertinent fact: Collins' knowledge does not equate to the capacity, or opportunity, to act on that knowledge.

In addition, we find that evidence of this prior relationship did not show either Collins' preparation or plan to commit the murder; rather, these instances again showed only Collins' knowledge of the facts. In order to be admissible to show a plan, however, both the extrinsic acts and the charged crime must be part of a common scheme or plan.[16] But here, the drug dealing was not committed in furtherance of the murder, and

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[15] See *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994).

[16] See, 3 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 17.44 (7th ed. 1998); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5244 (1978).

the murder was not committed to cover up the drug dealing. Nor is there any evidence that Collins participated in the drug dealing so that he would be in a position to kill Turner and Thomas and steal their money.

Finally, we find that this extrinsic acts evidence was not independently relevant to Collins' identity as the perpetrator of the crime. Identity was at issue because of testimony admitted at trial of an unidentified black male observed near the scene of the crime, suggesting that this person, and not Collins, committed the crime. But whether the jury believed that Collins or this unidentified male was the perpetrator was simply a question of which witnesses the jury believed, the State's witnesses or Collins' witnesses. Indeed, at most, this evidence would show Collins' identity as the perpetrator under the reasoning that he had the propensity to commit crimes and had therefore committed this crime. But this type of reasoning, of course, is precisely what rule 404(2) is designed to prevent.

We realize that the admission of other acts evidence is usually prejudicial to the defendant. But in this case, we find that it was not, and instead find that the error in admitting the evidence of this prior relationship was harmless. Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.[17]

We have examined the trial record. Collins' defense against these charges was largely limited to an argument that the State failed to prove his guilt. But the evidence presented at trial shows otherwise. The record includes both scientific evidence and eyewitness testimony showing that Collins was, in fact, the perpetrator of the charges against him. In particular, Collins' fingerprints and palmprints were found on the Expedition and his DNA was found on a T-shirt wrapped around Thomas' legs. Also, DNA that could not be excluded as belonging to Collins and Thomas was found on shoes identified as Collins' shoes and found in the kitchen of the blue house.

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[17] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

In addition, Turner testified that it was Collins who shot him. Johnson testified that Collins told him he wanted to "get" Turner and Thomas and that Collins left the kitchen of the blue house with a weapon. And shortly thereafter, the shooting, and Turner's subsequent escape, occurred.

As such, while we find merit to Collins' second assignment of error, namely that the district court erred in admitting evidence of Collins' prior relationship with Turner and Thomas, we conclude that the admission of this evidence was not prejudicial to Collins and thus is not reversible error.

Motion to Amend.

In his third assignment of error, Collins contends that the district court erred in allowing the State to amend the information to add a charge of first degree assault just 20 days before trial.

[12] The State argues that Collins waived any argument he has with respect to the amendment of the information. We noted in *State v. Walker*[18] that "[o]bjections to the form or content of an information should be raised by a motion to quash." Collins filed no motion to quash, and thus has waived any argument he might have that the district court erred in allowing the State to amend the information against him.

[13] And in any case, it cannot be said that the district court abused its discretion in allowing the State to file an amended information. There was sufficient evidence to charge Collins with first degree assault. And Collins has not shown how he was prejudiced by this charge. In particular, this court has noted that when a continuance will cure the prejudice caused by belated disclosure of evidence, a continuance should be requested by counsel and granted by the trial court.[19] But Collins did not request a continuance. Nor did he request severance of the joined offenses as he is permitted to do under Neb. Rev. Stat. § 29-2002(3) (Reissue 2008).

Collins' third assignment of error is without merit.

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[18] *State v. Walker*, 272 Neb. 725, 735, 724 N.W.2d 552, 562 (2006).

[19] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

Motion for New Trial.

In his fourth assignment of error, Collins argues that the district court erred in denying his motion for new trial on the basis of newly discovered evidence. At the hearing on the motion for new trial, Collins introduced the testimony of Renae Heeley. Heeley resided in an apartment complex on North 70th Circle. According to Heeley's testimony, on the day of the shooting, she heard gunshots, squealing tires, and a crash. Upon looking out of her window, Heeley observed a damaged white sport utility vehicle driving down the street. Heeley indicated that at some point later that day, she left her apartment and observed a black woman in her twenties exit the garage of the blue house and walk up to a neighbor's house. Heeley testified that she overheard the woman, who was crying, tell the neighbor that one of the "Johnson boys" shot somebody in the garage. Heeley testified that the woman entered the neighbor's home and that later, the woman was removed from the home and placed in a police cruiser.

On cross-examination, Heeley admitted that she could not actually see from where the woman in question came and did not actually see the woman exit the garage. Heeley indicated that she did not tell law enforcement what the woman said, because she did not think of it at the time.

Collins heard about Heeley's alleged observation through Collins' counsel's law partner, Joseph Kuehl. Kuehl represented the father of Heeley's child in juvenile proceedings. Kuehl testified that he had a conversation with Heeley shortly after his partner was appointed as Collins' counsel, but that Heeley did not mention the identification of the "Johnson boys" at that time; Heeley mentioned only that she heard and observed the gunshots and the getaway of the sport utility vehicle.

Law enforcement officers who responded to the scene indicated that no one besides Johnson and Burton was transported from the scene. In addition, no officers were aware of a young black woman being placed in a police cruiser. Law enforcement officers also indicated that Heeley was interviewed after the incident and that she was even listed on the State's witness list, but that she never informed anyone of what she allegedly overheard.

The district court did not find Heeley to be credible and denied Collins' motion for new trial. It cannot be said that the district court abused its discretion in reaching this conclusion.

As an initial matter, Heeley's testimony was contradicted by other witnesses. She indicated that she saw a young black woman being placed in a police cruiser, though law enforcement indicated that this did not occur. And Heeley testified that she saw the woman walk from the garage at the blue house, but later admitted that she did not see the woman actually exit the garage. Moreover, Heeley was interviewed by law enforcement on two occasions after the events of that day, but did not tell anyone about what she overheard. Nor did she tell that to Kuehl initially.

[14] This evidence is not newly discovered within the meaning of Neb. Rev. Stat. § 29-2101(5) (Reissue 2008), which provides in part that a new trial may be granted for "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." But this evidence could have been discovered and produced at trial, because both the State and the defense were aware that Heeley was a witness and had potential information.

And even if the evidence was "newly discovered," it is still not relevant. Nor is it exculpatory of Collins; because one of the "Johnson boys" was allegedly involved does not mean that someone else, i.e. Collins, was not also involved.

Collins' fourth assignment of error is without merit.

Jury Separation.

In his fifth assignment of error, Collins argues that the district court erred in overruling his motion for new trial on the basis that the court allowed the jury to separate during deliberations. Collins' case was submitted to the jury on Friday, August 21, 2009. The jury did not reach a verdict on that day and was permitted to separate and return to deliberate on Monday, August 24, at which point it returned with its verdicts.

On appeal, Collins argues that he was not asked whether it was acceptable for the jury to separate during deliberations. Collins contends that in the absence of his express agreement,

the district court erred by allowing the jury to separate and a rebuttable presumption of prejudice exists, which was not rebutted by the State.

[15] Neb. Rev. Stat. § 29-2022 (Reissue 2008) provides in part that "[w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court."

At issue is the requirement of this statute and several decades of our case law on the subject. That case law begins with our discussion of jury separation in *Polin v. State*.[20] In *Polin*, we noted that the jury was told to stay together, but that "two or three of the jurors in the court room separated a little from their fellows and engaged in a brief conversation with bystanders."[21] The *Polin* court then held that such

> was known by the [defendant's] counsel, and probably by the [defendant] himself at the time it occurred, yet no complaint was made to the judge, but the trial was permitted to proceed without objection until after verdict.
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> . . . The objection first appeared in the motion for a new trial, and came too late. If the separation were thought to be at all prejudicial to the [defendant], it ought to have been brought to the notice of the judge at once, upon discovery, so that an investigation could have been made, to the end that without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged, and a new one impaneled to try the case.
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> Parties' litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to withhold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion, and then take advantage of them. Generally all objections not jurisdictional as to the subject of the litigation must be made at the first opportunity, or they are deemed to

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[20] *Polin v. State*, 14 Neb. 540, 16 N.W. 898 (1883).

[21] *Id.* at 549, 16 N.W. at 901.

> be waived. The rule in such cases is, that a party shall not be permitted without objection to take the chances of a favorable result, and then, if disappointed, for the first time complain.[22]

We considered *Polin* in *Sedlacek v. State*.[23] In *Sedlacek*, the trial court informed the jury, in the presence of the defendant, that the attorneys had agreed that the jury could separate and return the next day for further deliberations. Citing *Polin*, we concluded that despite the literally mandated language of the statute, the right granted under § 29-2022 was

> within the classification of those rights that can be waived, and that the defendant by the consent of his counsel, which he knew was given, by his silence and acquiescence, and by his failure to raise the question when the court reconvened, waived the right to have the jury kept together.[24]

But we went beyond *Polin* and *Sedlacek* in *State v. Robbins*.[25] We indicated in *Robbins* that our holding in *Sedlacek* was "sound but require[d] clarification."[26] We then went on to hold that

> [t]he trial court may properly permit the separation of the jury in a criminal case after submission of the case to the jury only if the statutory right to nonseparation is waived by the express agreement or consent of counsel for the defendant and counsel for the State. A separation of the jury after final submission without the consent or agreement of counsel for the State may not be charged as error by a defendant who has consented or agreed to such separation.[27]

We acknowledged in *Robbins* that "[m]any cases treat the defendant's right to have the jury sequestered during deliberations

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[22] *Id.* at 549-50, 16 N.W. at 901-02.

[23] *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946).

[24] *Id*. at 850-51, 25 N.W.2d at 545.

[25] *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980).

[26] *Id.* at 231, 287 N.W.2d at 58.

[27] *Id.* at 231-32, 287 N.W.2d at 58.

as procedural only and take the position that the failure of a defendant to make timely objection to jury separation during deliberations results in a loss of the right."[28] But we nonetheless read § 29-2022 as providing a defendant with a fair trial, and therefore "in a category beyond that of a mere procedural right which may be lost by a failure to object."[29] So, we reasoned, even though the defendant in *Robbins* had not objected to the separation of the jury, he was permitted to raise the issue on appeal.

[16-18] But that conclusion was unwarranted by *Polin, Sedlacek*, or the language of § 29-2022, and inconsistent with extremely well-established principles of law. We have often said that failure to make a timely objection waives the right to assert prejudicial error on appeal.[30] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[31] One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[32] For that reason, an issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[33]

And we have applied those principles to find waiver of statutory and even constitutional rights when a defendant fails to raise them. For example, the failure of defendants to raise the unconstitutionality of the charging statute has been held to be waived by the failure to object.[34] This court has also held that alleged violations of procedural due process[35] and

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[28] *Id.* at 230, 287 N.W.2d at 57.

[29] *Id.* at 230-31, 287 N.W.2d at 57.

[30] *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[31] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

[32] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[33] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

[34] See, e.g., *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990).

[35] *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991).

confrontation[36] were waived by the defendants' failure to object. A district court's consideration of lesser-included offenses even after a first degree murder charge was dismissed was waived when the defendant failed to object.[37] We have concluded that a defendant's failure to object to the form or content of an information waived any complaint the defendant might have.[38] We found that a defendant waived his right to notice of the information 24 hours prior to arraignment by failing to object when the case proceeded under the amended information,[39] while in another instance, we concluded that a defendant waived venue of his trial by his failure to object at trial.[40] This court has held that a defendant waived his objection to the voir dire procedure utilized by the trial court by his failure to object to it,[41] and also that defendants who failed to object or use peremptory challenges regarding the selection of their juries have waived their complaints regarding jury selection.[42] The failure of defendants to object to the giving of particular jury instructions has consistently been found by this court to constitute waiver.[43] Defendants have been found, by their failure to object, to have waived any argument regarding the trial court's procedure for handling juror questions after submission[44] and regarding the trial court's trial management.[45] And this court has found that the failure to object waived any right a defendant might have

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

[37] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[38] See, e.g., *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999); *State v. Wostoupal*, 208 Neb. 555, 304 N.W.2d 393 (1981).

[39] *State v. High*, 225 Neb. 695, 407 N.W.2d 772 (1987).

[40] *State v. Meers, supra* note 38.

[41] *State v. Anderson*, 269 Neb. 365, 693 N.W.2d 267 (2005).

[42] *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988).

[43] See, e.g., *State v. Williams*, 269 Neb. 917, 697 N.W.2d 273 (2005); *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002); *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[44] *State v. Gutierrez, supra* note 19.

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

to argue that he or she was not granted a preliminary hearing before an independent decisionmaker.[46] Other examples include waiver upon failure to object to the State's violation of a discovery order[47] and to the State's demonstration of the crime at trial.[48]

We also note that in reaching its decision in *Robbins*, this court cited somewhat extensively to an annotation in the American Law Reports entitled "Separation of Jury in Criminal Case After Submission of Cause—Modern Cases."[49] While the *Robbins* court correctly identified certain points made in this annotation, that court failed to relate this annotation noted that most courts have found that the failure of a defendant to object waives the right.[50] The annotation also stated that a majority of jurisdictions have concluded that where the record is silent on the question of jury separation, it is generally assumed that consent was obtained.[51]

This court's decision in *Robbins* articulated no basis for concluding that the statutory right established by § 29-2022 was distinguishable from all of the other circumstances in which a defendant waives his or her rights by not making a timely objection. That decision was, therefore, inconsistent with judicial efficiency, sound policy, and basic, well-established legal principles. We therefore overrule our decision in *Robbins* to the extent that it concludes that express agreement or consent is required by a defendant in order to waive his or her rights under § 29-2022. In doing so, we do not retreat from the principle that the language of § 29-2022 is mandatory and places the duty of sequestration directly upon the trial court. Our opinion should not be read as tacitly approving the notion that trial courts may disregard this mandatory duty—whether

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[46] *State v. Moreno*, 193 Neb. 351, 227 N.W.2d 398 (1975).

[47] See, e.g., *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

[48] *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973).

[49] Annot., 72 A.L.R.3d 248 (1976).

[50] *Id.*, § 2[a].

[51] *Id.*, § 2[b].

accidentally or intentionally. Indeed, the better practice would be for the district court to note any explicit consent, or lack thereof, on the record.

But our overruling of *Robbins* is prospective only, and we decline to apply our newly announced rule in this case. At the time of trial, the applicable rule was set forth in *Robbins*:

> In the absence of express agreement or consent by the defendant, a failure to comply with section 29-2022 . . . by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.[52]

Because the district court failed to obtain express agreement or consent for the jury's separation, Collins is entitled to a presumption that he was prejudiced by that separation. The State has a right to rebut that presumption. We therefore remand the cause to the district court for a hearing at which the State has the burden of showing that no injury resulted from the jury's separation.

CONCLUSION

The cause is remanded for further proceedings consistent with this opinion.

REMANDED FOR FURTHER PROCEEDINGS.

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[52] *State v. Robbins, supra* note 25, 205 Neb. at 232, 287 N.W.2d at 58.

HEAVICAN, C.J., concurring.

I concur with the decision of the court affirming Collins' sentence and remanding the cause for hearing on the jury separation issue. I write separately because I disagree with the majority's conclusion that the evidence of Collins' prior relationship with Turner and Thomas was inadmissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

As noted by the majority's opinion, rule 404(2) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may,

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But this court has previously noted some limits to the applicability of rule 404(2): those "[b]ad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under rule 404(2)."[1] We reasoned that

> "'"'[w]here evidence of other crimes is "so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by Rule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. . . . The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . .'"'"'"[2]

In this case, the prior relationship at issue was part of a larger drug conspiracy involving the same four persons: Collins, Turner, Thomas, and Reed. Many of the details of the trips that largely defined this relationship were similar: The motels where Turner, Thomas, and Reed stayed were often the same; supplies were purchased at the same Omaha-area Wal-Mart location during each visit; Reed's false identification was

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[1] *State v. Robinson*, 271 Neb. 698, 713, 715 N.W.2d 531, 548 (2006).

[2] *Id.* at 714, 715 N.W.2d at 549.

used in each instance; and each visit involved the secreting of progressively increasing quantities of powder cocaine, and eventually also crack cocaine, in the body of a vehicle purchased at an automobile auction.

During each visit, Turner and Thomas would manufacture the crack cocaine from powder cocaine in their motel room using supplies purchased at an area Wal-Mart. At various times during this process, Turner and Thomas would "front" the drugs to Collins, who would pick up the crack cocaine from the motel and sell it in the Omaha area. Then, on Collins' next visit to the motel to pick up more drugs, he would give Turner and Thomas the proceeds and get his share of the profit. And after the drugs were all manufactured and sold, it was Reed's job to clean up the motel room and dispose of all supplies used to manufacture the crack cocaine.

In addition, this prior relationship unfolded over a relatively short period of time. Turner, Thomas, and Reed first visited Omaha on July 13, 2008, and the shooting occurred on September 23, just over 2 months later. And this relationship was ongoing; the record shows that Collins met with Turner in LA between the second and third trips to Omaha.

Understanding the nature of the prior relationship between Collins, Turner, and Thomas is necessary to paint a coherent picture of the facts surrounding the crimes with which Collins was charged. The State introduced evidence of this prior relationship in order to explain why Turner and Thomas were in Omaha and why Collins was with them on September 23, 2008. This evidence explains how Collins came to know that cocaine was hidden in the white Expedition and why Collins might want to rob or murder Turner and Thomas. In examining the record, I find it difficult to determine at what point these alleged "prior bad acts" ended and the events forming the basis for the charges against Collins began.

As such, I would conclude that this prior relationship is "'"'"so blended or connected[] with the one[] on trial . . . that proof of one incidentally involves the other[]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the

immediate context of the crime charged. . . .'"'"'[3] Because this evidence is relevant, and is not governed by rule 404(2), I would find it admissible.

CASSEL, Judge, joins in this concurrence.

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[3] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. EDWARD L. WINTROUB, RESPONDENT.

800 N.W.2d 269

Filed July 22, 2011. No. S-10-187.

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, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. ____. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
6. ____. 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.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of public reprimand.

John W. Steele, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

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

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Edward L. Wintroub. In the charges, the Counsel for Discipline alleged that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska[1] and Neb. Ct. R. of Prof. Cond. §§ 3-501.8 and 3-508.4, in relation to a personal loan by a client to respondent. After a hearing, the referee found that although the loan was repaid, the absence of respondent's signature on the note or any collateral for the loan, combined with inadequate advisement concerning the risks of the loan and the desirability of consulting with outside counsel, constituted violations of respondent's oath of office and §§ 3-501.8 and 3-508.4. The Counsel for Discipline and respondent filed a joint motion for judgment on the pleadings, urging this court to enter a judgment of public reprimand as recommended by the referee. This court granted judgment on the pleadings as to the facts in the formal charges and set the matter of discipline for oral argument.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 28, 1965. At all times relevant to this case, respondent was engaged in the private practice of law with an office located in Douglas County, Nebraska.

On or about November 17, 2005, respondent was retained by Leah Crabb, pursuant to a written fee agreement to represent Crabb regarding a motor vehicle accident. In 2006, her claims were settled. At Crabb's request, some of the resulting funds were held by respondent in a trust account to be disbursed at Crabb's direction. Respondent did not charge Crabb for this service.

In 2007, respondent was suffering financially and unable to obtain credit due to a recent bankruptcy. Respondent asked Crabb for a loan from the trust account in the amount of $29,000, to be paid back within a year, with 10-percent

[1] Neb. Rev. Stat. § 7-104 (Reissue 2007).

interest. Respondent prepared and had Crabb sign the following agreement:

> I Leah Crabb this date loan to Edward Wintroub for One Year to April 17, 2008 the sum of $ 29,000.00 at 10% interest due April 17, 2008. I understand and have been advised by Mr. Wintroub that [I] have the right to speak to and have this explained to me by an attorney if [I] wish and [I] explicitly choose not to do so. [F]urther [I] am not a client of Mr. Wintroub. Mr. Wintroub may repay monies early without penalty if needed by myself.

Respondent did not sign the agreement, nor did he sign any other agreement relating to the loan. Respondent did not give security for the loan. He did not advise Crabb in writing of the desirability of seeking independent legal advice or of the risks of such an unsecured loan. The loan document was signed the same day that respondent proposed it to Crabb.

At the end of a year, respondent had paid Crabb back, including interest due. Respondent did not commingle his moneys with Crabb's. While the original grievance was that respondent had not accounted for all the funds borrowed and later repaid, it was found that respondent did not misappropriate any of the funds loaned to him.

The Counsel for Discipline charged that respondent violated the oath of office and §§ 3-501.8 (conflict of interest) and 3-508.4(a) (misconduct through violation of rules). The Counsel for Discipline noted that in 2008, respondent was given a public reprimand by the Iowa Supreme Court in relation to a loan given respondent by a client for which respondent later obtained a discharge in bankruptcy.[2] The Iowa Supreme Court found that respondent had failed to urge his client to seek outside counsel and had failed to disclose to the client the risks of the unstructured loan transaction. There was no reciprocal action taken in Nebraska on that case.

At a hearing before the referee, respondent testified that he was aware of the Iowa Supreme Court's view of his previous dealings with another client and had attempted, this time, to properly inform his client of the desirability of seeking outside

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[2] *Iowa S.Ct. Attorney Disc. Bd. v. Wintroub*, 745 N.W.2d 469 (Iowa 2008).

counsel before agreeing to lend him money. He observed that, in retrospect, it was "a very clumsy document."

Respondent admitted that Crabb was his client at the time of the transaction and explained that the declaration in the loan document to the contrary was meant to clarify that there was no litigation pending such that she might feel coerced. Respondent submitted several letters from attorneys attesting to his character and fitness as an attorney and to the fact that he has, in the past, provided legal services on a pro bono basis.

In his report, the referee concluded that respondent violated his oath of office and §§ 3-501.8 and 3-508.4(a). The referee, citing *In re Timpone*,[3] stated that because respondent failed to sign a promissory note or give collateral for the loan, the terms of the transaction were not "fair and reasonable" as required by § 3-501.8(a)(1).

The referee also found that respondent failed to fully disclose the terms of the transaction, as required by § 3-501.8(a)(1). The referee noted that the Iowa Supreme Court had explained to respondent that "[f]ull disclosure means the use of active diligence on the part of the attorney to 'fully disclose every relevant fact and circumstance which the client should know to make an intelligent decision concerning the wisdom of entering the agreement.'"[4]

The referee determined, further, that respondent failed to comply with § 3-501.8(a)(2), which requires that the attorney advise the client, in writing, of the desirability of seeking the advice of independent legal counsel and requires that the client be given a reasonable opportunity to seek the advice of independent legal counsel on the transaction.

Finally, the referee found that respondent had violated § 3-501.8(a)(3), because respondent failed to communicate to Crabb the material risks in making a loan without a promissory note and without obtaining some form of collateral to secure repayment of the loan.

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[3] *In re Timpone*, 208 Ill. 2d 371, 804 N.E.2d 560, 281 Ill. Dec. 595 (2004).

[4] *Iowa S.Ct. Attorney Disc. Bd. v. Wintroub, supra* note 2, 745 N.W.2d at 474.

The referee explained that respondent's alleged good faith attempt to comply with the Nebraska Rules of Professional Conduct was not a defense to the violations, but could be considered in determining the severity of the sanction. In any event, the referee did not believe respondent had made a good faith effort to comply with the rules.

The referee found that the prior disciplinary action by the Iowa Supreme Court for a similar violation was an aggravating factor, as well as the fact that respondent has been previously disciplined by our court.[5] The referee considered as mitigating factors that respondent cooperated throughout the course of the disciplinary proceedings and expressed genuine remorse. The referee also considered it mitigating that the client in this case suffered no actual harm and that respondent was generally considered a competent attorney who has provided legal services on a pro bono basis.

The referee recommended that respondent be given a public reprimand and that he be 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). No exceptions have been filed to the report.

ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[6] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.[7] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[8]

[4] As noted, neither party filed a written exception to the referee's report, and the facts that make up the basis for the report were stipulated to prior to the hearing. We granted the parties' joint motion for judgment on the pleadings as to the referee's

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[5] See *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[6] *State ex rel. Counsel for Dis. v. Nich*, 279 Neb. 533, 780 N.W.2d 638 (2010).

[7] *Id.*

[8] *Id.*

findings of fact. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.[9] Based upon the undisputed findings of fact in the referee's report, we conclude that respondent has violated his oath of office as an attorney and the following provisions of the Nebraska Rules of Professional Conduct: §§ 3-501.8 and 3-508.4(a).

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[10] Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

[5-7] We have stated that each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[11] 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.[12] 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

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

factors.[13] We have considered prior reprimands as aggravators.[14] Further, cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[15]

The evidence in the present case establishes, among other facts, that respondent engaged in a business transaction with a client without fully complying with the requirements set forth in § 3-501.8. As the referee noted, the loan transaction was not secured by a promissory note issued by respondent and no collateral was provided for the loan. This made the loan risky for Crabb and was not a fair and reasonable transaction. Respondent also failed to advise Crabb in writing of the value of seeking outside legal counsel as required in § 3-501.8(a)(2) and did not obtain the consent of his client pursuant to § 3-501.8(a)(3).

As to mitigating factors, respondent cooperated with the Counsel for Discipline during the disciplinary proceedings and was remorseful for his actions. Further, it is significant that Crabb did not suffer an economic injury due to respondent's conduct, because she was reimbursed in full with interest prior to the filing of these proceedings. Numerous letters of support attested to respondent's good character. There was evidence that respondent engaged in pro bono work.

However, there are aggravating factors in this case. Respondent has been disciplined for similar conduct by the Iowa Supreme Court and has previously been disciplined by this court. This indicates cumulative acts of misconduct and suggests a more severe sanction.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Based upon our consideration of the record in this case, we adopt the recommendation of the referee and find that respondent should be and hereby is publicly reprimanded for his misconduct.

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[13] *Id.*

[14] *Id.*

[15] *Id.*

However, we take this opportunity to note that we are cognizant that respondent has received prior discipline by this court and the Iowa Supreme Court. Given this history, we caution that more severe sanctions will be considered in connection with any further disciplinary actions.

CONCLUSION

It is the judgment of this court that respondent should be and hereby is publicly reprimanded. 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 PUBLIC REPRIMAND.

HEAVICAN, C.J., not participating.

IN RE INTEREST OF JAMYIA M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JAMISON M., APPELLEE AND CROSS-APPELLANT, AND SHINAI S., APPELLANT.

800 N.W.2d 259

Filed July 22, 2011. No. S-10-208.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
3. **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.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
5. **Final Orders: Appeal and Error.** There are three types of final orders that may be reviewed on appeal: (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 upon summary application in an action after a judgment is rendered.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.

7. **Jurisdiction: Final Orders: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.
8. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
9. **Judges: Recusal: Presumptions.** A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.
10. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH CRNKOVICH, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jeremy R. Shirk for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee State of Nebraska.

Thomas C. Riley, Douglas County Public Defender, and Christine D. Kellogg for appellee Jamison M.

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

GERRARD, J.

The State of Nebraska seeks further review of a Nebraska Court of Appeals' decision which reversed the order of the juvenile court for Douglas County terminating the parental rights of Jamyia M.'s natural parents, Shinai S. and Jamison M. Jamyia, a minor child of Navajo descent, was removed from her parents' home after doctors discovered that she suffered injuries consistent with shaken baby syndrome. Shinai and Jamison appealed, and the Court of Appeals reversed.[1] The State petitioned for further review. For the following reasons, we reverse the decision of the Court of Appeals and

[1] *In re Interest of Jamyia M.*, 18 Neb. App. 679, 791 N.W.2d 343 (2010).

remand the cause with directions to affirm the order of the juvenile court.

I. BACKGROUND

On September 30, 2008, 2-month-old Jamyia was hospitalized with a posterior occipital subdural hemorrhage and either a subarachnoid hemorrhage or cerebral contusion. Doctors concluded that Jamyia's injuries were consistent with shaken baby syndrome and that her injuries were intentionally inflicted. Shinai and Jamison claimed that they did not cause Jamyia's injuries.

The State filed an adjudication petition alleging that the juvenile court had obtained jurisdiction in these proceedings based upon the natural parents' placing Jamyia in a situation which was dangerous to her life or limb or injurious to her health or morals within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The State then filed an amended petition, alleging that Shinai's and Jamison's parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(2), (8), (9), and (10)(d) (Reissue 2008).

The State also alleged that pursuant to Neb. Rev. Stat. § 43-1505(4) (Reissue 2008) of the Nebraska Indian Child Welfare Act (NICWA), "active efforts" had been made to prevent the breakup of the Indian family, but that those efforts had been unsuccessful; so NICWA's requirement of providing active efforts before foster care placement or termination of Shinai's and Jamison's parental rights was satisfied. The State argued, in the alternative, that active efforts to prevent the breakup of the Indian family were not required because Jamyia's parents subjected her to aggravated circumstances. Shinai and Jamison argued that NICWA contained no aggravated circumstances exception and that active efforts had not been made. Adjudication hearings were held from February 19 to November 12, 2009. A summary of the salient testimony adduced during the adjudication hearings follows.

Dr. Katherine Penny, Jamyia's pediatrician, testified that Jamyia had been brought in to her office for care on September 29, 2008, because she had been screaming and fussy, had cold symptoms, and refused to eat. Penny testified that she fed

Jamyia 2 ounces of Pedialyte and that at that time, Jamyia was able to suck and swallow and exhibited no unusual breathing, no unusual eye movement, or any appearance of being abnormally limp. Shinai testified that she and Jamison had taken Jamyia to Penny because Jamyia had a fever, had saliva running from her mouth, and had diarrhea, and because her eyes were "fluttering." Shinai stated that Jamyia was diagnosed with "hand, mouth, [and] foot virus." Shinai said that after seeing Penny, the family returned to Jamison's mother's home, where they had been staying.

Jamison testified that Jamyia was often sick and was a colicky baby. Jamison stated that Jamyia had been taken to Penny because she had difficulty breathing, was crying, and had a cough and diaper rash. He also stated that her tongue and eyes fluttered. Jamison stated that after returning from Penny's office, Jamyia cried all night, as if in pain.

Shinai and Jamison said that on September 30, 2008, Shinai went to the store with Jamison's mother to pick up a prescription and left Jamyia in Jamison's care. Jamison claimed that he fed Jamyia two or three times. Jamison said that after his mother and Shinai returned from the store, he and Shinai attempted to wake Jamyia but that the baby was unresponsive. Shinai said that she called the 911 emergency dispatch service.

Dr. Jeffrey DeMare, a pediatric specialist and the former medical director of a team which evaluates and coordinates care for abused children, was the attending physician the night Jamyia was admitted to the hospital. DeMare testified that he commonly reviews cases to determine whether a child's injury is consistent with child abuse. DeMare noted that upon admission, Jamyia was actively seizing, hypoxic, and in need of mechanical ventilation. Magnetic resonance imaging of Jamyia's brain indicated subdural blood within the posterior occipital space and in the high parietal area, which injuries were recent in nature. Due to the severity of the hemorrhaging, DeMare determined that Jamyia's brain injuries were intentionally inflicted.

Dr. Sebastian J. Troia, a pediatric ophthalmologist, also examined Jamyia's injuries and testified that bilateral retinal hemorrhages established that Jamyia's injuries were the result

of trauma. Troia said that Jamyia's retinal hemorrhaging was consistent with shaken baby syndrome, and he ruled out other possible causes of Jamyia's retinal hemorrhaging.

Tammy Burk, a protection and safety worker from the Department of Health and Human Services (DHHS), testified that she had conducted an assessment soon after Jamyia's admission to the hospital. Burk recounted that Jamyia was unable to eat orally because she could not suck or swallow, required a feeding tube, and was on a ventilator. Burk interviewed Shinai and Jamison, who claimed that Jamyia's injuries were the result of a misdiagnosis by Penny. Burk stated that Shinai and Jamison disputed the doctors' conclusions that Jamyia had been shaken, but were unable to provide any reasonable explanation for Jamyia's injuries.

The evidence adduced during the adjudicative hearings established that Jamyia has cognitive motor delays, language delays, visual impairment due to retinal hemorrhages to both eyes, seizures, and neurological problems. Jamyia has difficulty swallowing and requires a feeding tube to supplement her daily oral feeding. Jamyia's hands and feet are curled when they are not in splints, and though she is placed in a "stander" twice daily to strengthen her legs, she was unable to walk or talk at 17 months of age.

The State's expert witness, Evelyn Labode, cited the grave nature of Jamyia's injuries, coupled with a review of the medical and investigative agency reports, as evidence that returning Jamyia to her natural parents would result in further emotional or physical damage to the child. Labode said it was her opinion that it was in Jamyia's best interests for Shinai's and Jamison's parental rights to be terminated. Burk concurred, explaining that because there was no reasonable explanation for how Jamyia had suffered such extensive injuries, there were no assurances that Jamyia would not suffer additional injuries if returned to her natural parents. Burk stated that DHHS supported the termination of Shinai's and Jamison's parental rights.

An expert for Shinai and Jamison, Dr. Steven Gabaeff, testified that Jamyia's injuries were not the result of being shaken, but were due to infection, recurrent seizures, or choking and

respiratory arrest. Gabaeff noted that Jamyia's medical records did not indicate that viral meningitis had been ruled out, which he claimed could account for an increase in cranial pressure which could cause Jamyia's retinal hemorrhages. Shinai acknowledged that physicians had testified that Jamyia's injuries were not accidental, but Shinai maintained that she had not abused Jamyia and claimed that Jamison would never harm Jamyia.

On December 2, 2009, at the conclusion of the adjudication phase, the juvenile court entered an order determining that conditions existed for termination of Shinai's and Jamison's parental rights pursuant to § 43-292(2), (8), and (9). The court also found that active efforts to prevent the breakup of the Indian family had been made but that those efforts were unsuccessful, so the State had satisfied § 43-1505(4). The court took under advisement whether continuing custody with Shinai and Jamison would likely result in further harm to Jamyia and whether reasonable efforts to preserve and reunify the family were required under Neb. Rev. Stat. § 43-283.01 (Reissue 2008).

The State alleged that reasonable efforts to preserve and reunify the family, as provided for by § 43-283.01, were not required because Shinai and Jamison had subjected Jamyia to "aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse" under § 43-283.01(4)(a). After a dispositional hearing on January 11, 2010, the juvenile court entered its dispositional order on February 12. The juvenile court determined that it was in Jamyia's best interests to terminate Shinai's and Jamison's parental rights and that reasonable efforts to prevent the breakup of Jamyia's family were not required pursuant to § 43-283.01 as to both parents, because Jamyia was subjected to aggravated circumstances. On February 26, Shinai filed a notice of appeal from the juvenile court's February 12 dispositional order. On March 2, Jamison filed a notice of appeal, purporting to appeal from the December 2, 2009, adjudication order, as well as from the February 12, 2010, dispositional order.

On appeal to the Court of Appeals, Shinai and Jamison argued, among other things, that the juvenile court erred in

finding that the State had made active efforts, as required under § 43-1505(4), to prevent the breakup of their Indian family and that those efforts were unsuccessful. The Court of Appeals determined that the services DHHS provided to Shinai and Jamison had been successful and that Shinai and Jamison had attempted to remain involved in Jamyia's life, so the State had not proved that it made active efforts pursuant to § 43-1505(4) to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had been unsuccessful.[2]

The Court of Appeals then examined whether the exception to providing reasonable efforts when aggravated circumstances exist, as contained in § 43-283.01(4)(a), relieved the State of its burden to provide active efforts under NICWA's § 43-1505. The Court of Appeals determined that the statutes were separate and distinct, that they did not conflict, that NICWA did not have an aggravated circumstances exception, and that even if they did conflict, NICWA's § 43-1505 was more specific than § 43-283.01, and therefore was controlling. The Court of Appeals determined that the State had failed to prove that active efforts to prevent the breakup of Jamyia's family were provided but unsuccessful, and it reversed the juvenile court's termination of Shinai's and Jamison's parental rights.[3] The State sought further review of the Court of Appeals' decision, which we granted.

II. ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred when it determined that the State was required to provide active efforts to Shinai and Jamison to prevent the breakup of the family within the meaning of § 43-1505(4) when aggravated circumstances were present.

III. STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of

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[2] *Id.*

[3] *Id.*

law.[4] On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.[5]

[3] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[6]

IV. ANALYSIS

1. Active Efforts

Before the Court of Appeals, Shinai and Jamison argued that the State had not proved that it had made active efforts, pursuant to § 43-1505(4), to prevent the breakup of the Indian family and that those efforts were unsuccessful, and the court ultimately agreed. Though the State argued that active efforts were not required because the aggravated circumstances exception contained in § 43-283.01(4)(a) applied to NICWA, the Court of Appeals determined that the aggravated circumstances exception was not part of NICWA's statutory scheme, so the State was not excused from proving the active efforts requirement before terminating Shinai's and Jamison's parental rights.

[4] The State seeks further review, again arguing that the presence of aggravated circumstances excused the State from providing active efforts within the meaning of § 43-1505(4). The issue is one we need not decide, because we lack jurisdiction to review the merits of the order in which the juvenile court determined that active efforts had been made but were unsuccessful. Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.[7]

[5-7] There are three types of final orders that may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment,

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[4] *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[5] *Travelers Indem. Co. v. Gridiron Mgmt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

[6] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[7] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., ante* p. 93, 798 N.W.2d 823 (2011).

(2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered.[8] We have previously determined that a proceeding before a juvenile court is a special proceeding for appellate purposes and that a judicial determination in an adjudication order that the State satisfied the active efforts requirement contained in § 43-1505(4) affects the substantial right of parents to raise their children, and is therefore a final, appealable order.[9] In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.[10]

In the juvenile court's December 2, 2009, adjudication order, it determined that the State had satisfied § 43-1505(4)'s active efforts requirement. That finding was properly part of the adjudication, because § 43-1505(4) requires it for a foster care placement or termination of parental rights. The adjudication order was a final, appealable order when entered on December 2. Shinai did not appeal from the adjudication order. And though Jamison attempted on March 2, 2010, to appeal from the adjudication and disposition orders, his appeal was not timely with respect to the adjudication order.[11]

Because neither Shinai nor Jamison perfected an appeal from the juvenile court's adjudication order determining that the State had made active efforts pursuant to § 43-1505(4), there exists no appellate jurisdiction to review Shinai's and Jamison's argument that the active efforts requirement contained in § 43-1505(4) was not proved. Therefore, the Court of Appeals did not have jurisdiction to reach the active efforts issue, and it erred when it reversed the juvenile court's determination that the State had satisfied § 43-1505(4) before terminating Shinai's and Jamison's parental rights. We reverse the Court of Appeals' judgment in that regard.

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[8] See Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[9] See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[10] See, *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

[11] See § 25-1912(1) and Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2008).

[8] The Court of Appeals, finding that the active efforts issue was dispositive, did not address Shinai's and Jamison's other arguments on appeal. Upon reversing a decision of the Nebraska Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[12] Because there is no appellate jurisdiction on the active efforts issue, we now address Shinai's and Jamison's remaining arguments.

2. Jamison's Appeal

Jamison's remaining assignments of error, summarized and restated, are that the juvenile court erred when it (1) found that continuing custody of Jamyia with Jamison would likely result in serious emotional or physical damage to the child and terminated Jamison's parental rights; (2) found that there was sufficient evidence to establish grounds for termination under §§ 43-292(2), (8), and (9); and (3) failed to conduct the proceedings in a fair and impartial manner.

(a) Termination of Parental Rights

Jamison argues that the juvenile court erred when it terminated his parental rights after determining that continued custody of Jamyia with Jamison would likely result in serious emotional or physical damage to the child. Before terminating an Indian child's parental rights, the State must establish, beyond a reasonable doubt, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child under NICWA, § 43-1505(6), in addition to proving that the State provided active efforts under § 43-1505(4). Here, the juvenile court determined in its disposition order that continued custody of Jamyia with Jamison would likely result in serious emotional or physical damage to Jamyia within the meaning of § 43-1505(6). Jamison argues that the evidence was insufficient to support a determination beyond a reasonable doubt that continued custody would likely result in serious emotional or physical

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[12] *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010).

damage to Jamyia. Our review of the record does not coincide with Jamison's position.

In its December 2, 2009, order, the juvenile court determined, among other things, that Jamyia's injuries were the result of nonaccidental trauma, that Jamison had inflicted serious bodily injury upon Jamyia, and that Jamyia was at risk of further harm. Those findings and the record as a whole support a determination beyond a reasonable doubt that continued custody of Jamyia with Jamison would likely result in serious emotional or physical damage to the child.

The attending pediatric specialist, DeMare, testified that he commonly reviewed cases to determine whether a child's injury was consistent with child abuse and that in this case, he ultimately determined that Jamyia's severe injuries were intentionally inflicted. This determination was consistent with the observations of the ophthalmologist, who testified that Jamyia's retinal hemorrhaging was consistent with shaken baby syndrome and that there were no other possible causes for Jamyia's injuries. And Shinai's and Jamison's testimony established that Jamyia was in the exclusive care of Jamison before the discovery of Jamyia's injuries. Furthermore, Labode opined that Jamyia's grave injuries, coupled with a review of the medical and investigative agency reports, evidenced that returning Jamyia to her parents would result in further emotional or physical damage to the child. Though Jamison contends that Labode's testimony was based on incomplete information, the record reflects that Labode candidly cited the documents on which she relied in forming her opinion and that Jamison was given a full opportunity to cross-examine her. And nothing in the record suggests that the court relied solely on Labode's testimony in making its determination.

Shinai's and Jamison's expert, Gabaeff, testified that Jamyia's injuries could have been caused by cranial pressure from viral meningitis. However, there is no evidence in the record that Jamyia actually contracted viral meningitis, and we find the testimony of the State's medical witnesses to be far more persuasive. After considering Jamison's contentions and reviewing the record, we conclude that the State has proved

beyond a reasonable doubt that continued custody of Jamyia with Jamison is likely to result in serious emotional or physical damage to the child.

(b) Juvenile Court's Adjudication Order

Jamison argues that the juvenile court erred when it found in the adjudication phase that there was sufficient evidence to establish grounds for termination under § 43-292(2), (8), and (9). We note that the court's findings were made in the adjudication order and that as discussed above, Jamison failed to perfect an appeal from the adjudication order. This raises a potential question as to whether we have jurisdiction to review those findings. We conclude, however, that the court's determination that there was sufficient evidence to establish grounds for termination, though entered at the same time as the adjudication order, was not actually part of the adjudication. This is because the juvenile court's jurisdiction over and placement of Jamyia did not rest on those findings. Nor did the court's determination affect any substantial right of Jamison, because his parental rights were not actually affected until they were terminated. Jamison therefore did not waive his right to appeal the § 43-292 determination when he failed to perfect an appeal from the adjudication order. Therefore, we will address Jamison's argument that the evidence was insufficient to establish grounds for termination under § 43-292(2), (8), and (9).

The evidence, as summarized above, amply supports the court's finding of statutory grounds for termination of Jamison's parental rights. Section 43-292(2) permits termination when a parent has "neglected and refused" to give the juvenile "necessary parental care and protection." Section 43-292(8) permits termination if "[t]he parent has inflicted upon the juvenile, by other than accidental means, serious bodily injury." And § 43-292(9) permits termination when the parent has subjected the juvenile to "aggravated circumstances," including but not limited to "abandonment, torture, chronic abuse, or sexual abuse." As we found above, the record supports the finding that Jamison subjected Jamyia to severe, intentional physical abuse. That evidence is sufficient to establish each of

the statutory grounds found by the juvenile court. Therefore, we find no merit to Jamison's complaint that the evidence was insufficient.

(c) Judicial Impropriety

Jamison argues that the juvenile court violated Jamison's due process rights because the court failed to conduct the proceedings in a fair and impartial manner. Jamison argues that the juvenile court gave the appearance of impropriety when the court took a motion for visitation during the proceedings under advisement for a year, interrupted the testimony of Jamison's expert witness, indicated the court's opinion of the medical expert, and sought additional information during the dispositional phase.

But the record reflects that the juvenile court was unaware of the visitation motion until the hearings began. The juvenile court did comment that Jamison's expert witness was "slick," but the record reflects that the juvenile court's comment was part of an effort to instruct the witness to answer only the questions presented rather than elaborating beyond the scope of the question. And though Jamison argues that the court gave the appearance of impropriety when it sought additional information during the dispositional phase, our review of the record does not reflect that the court was at all partial during the presentation of that evidence. Ultimately, because the juvenile court was the trier of fact, it was not only proper but entirely necessary for the court to inquire into the facts and make findings regarding the persuasiveness of the witnesses and the weight of the evidence.

[9] There exists a presumption of judicial impartiality, and a party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming that presumption.[13] After considering Jamison's arguments and reviewing the record, we conclude that there is no evidence that the court was biased or prejudiced, so Jamison has failed to overcome the presumption of judicial impartiality.

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[13] See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

3. Shinai's Appeal

[10] Shinai's replacement brief on appeal does not contain a separate "assignments of error" section stating the assigned errors apart from the arguments in her brief. Neb. Ct. R. App. P. § 2-109(D)(1)(d), (e), and (f) (rev. 2008) requires a separate section for assignments of error, designated as such by a heading, and also requires that the section be located after a statement of the case and before a list of controlling propositions of law. Assignments of error consisting of headings or subparts of argument do not comply with the mandate of § 2-109(D)(1)(e).[14] Accordingly, we may proceed as though Shinai failed to file a brief or, alternatively, may examine the proceedings for plain error.[15] We will consider whether the juvenile court committed plain error, but only in regard to the dispositional order, because Shinai did not appeal from the adjudication order. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[16] After reviewing the relevant parts of the record, we find no plain error pertaining to the dispositional proceedings.

V. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to affirm the juvenile court's order terminating Shinai's and Jamison's parental rights.

Reversed and remanded with directions.

Wright, J., not participating.

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[14] See *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d 129 (2008).

[15] See *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

[16] *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

STOREVISIONS, INC., APPELLEE, V. OMAHA TRIBE OF NEBRASKA, ALSO KNOWN AS OMAHA NATION, APPELLANT.

802 N.W.2d 420

Filed July 22, 2011. No. S-10-280.

SUPPLEMENTAL OPINION

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Ben Thompson and Amanda J. Karr, of Thompson Law Office, P.C., L.L.O., for appellant.

Michael J. Whaley and Elizabeth M. Skinner, of Gross & Welch, P.C., L.L.O., for appellee.

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

PER CURIAM.

Case No. S-10-280 is before this court on the motion for rehearing filed by the appellant regarding our opinion reported at *StoreVisions v. Omaha Tribe of Neb., ante* p. 238, 795 N.W.2d 271 (2011). We overrule the motion, but modify the opinion as follows:

In the section of the opinion designated "*Waiver of Sovereign Immunity*," we withdraw the 12th and 13th paragraphs, *id.* at 248, 796 N.W.2d at 280, and substitute the following:

> The situation presented by this appeal is virtually identical to the one presented in *Rush Creek Solutions*. One difference is that, in this appeal, the Tribe and StoreVisions entered into a separate waiver prior to entering into the underlying contracts. As noted, this separate waiver was signed in the presence of five of the seven members of the tribal council and lends even more weight to an appearance that the signatories to the document—the chairman and vice chairman—were vested with the authority to waive the Tribe's sovereign immunity. Indeed, the presence of

five of the seven members of the tribal council in the tribal meeting room at the Tribe's headquarters, along with the tribal council's vote on resolution No. 08-74, strongly suggest that the action of the chairman and the vice chairman, both members of the tribal council, were, on these facts, essentially the action of the tribal council itself. Unlike those cases wherein the agent was a party removed from the principal by time, place, and/or organizational structure, the agent and the principal in this case, if not actually one and the same, are very nearly one and the same.

We conclude that based upon these undisputed facts, the chairman and vice chairman had the requisite authority to waive the Tribe's sovereign immunity. The Tribe's first assignment of error is without merit.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

CESAR C., APPELLANT AND CROSS-APPELLEE, V. ALICIA L., APPELLEE AND CROSS-APPELLANT.

800 N.W.2d 249

Filed July 22, 2011. No. S-10-924.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **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.
3. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

4. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Paternity: Words and Phrases.** The provision in Neb. Rev. Stat. § 43-1409 (Reissue 2008) that the acknowledgment of paternity is a "legal finding" means that it legally establishes paternity in the person named in the acknowledgment as the father.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Jeffrey M. Wightman and Jesus A. Tena, Jr., of Wightman & Wightman, for appellant.

Bradley D. Holbrook and David H. Kalisek, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The district court for Dawson County awarded Alicia L. custody of Jaime C. based on its application of the parental preference doctrine. Cesar C. appeals and assigns various errors, and Alicia cross-appeals. We conclude that the district court erred when it failed to give proper legal effect to a notarized acknowledgment of paternity signed by Cesar and Alicia at the time of Jaime's birth. In the absence of a successful challenge directed at the acknowledgment, the acknowledgment had the effect of establishing that Cesar was the legal father of Jaime and matters of custody and child support should have been considered within this legal framework. We therefore reverse the decision of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

Cesar and Alicia lived together and had an intimate relationship between 2004 and 2006. During that time, Alicia became pregnant. Cesar and Alicia are not married.

Alicia gave birth to Jaime in 2006, and Cesar was present at the birth. On the day after Jaime's birth, Cesar and Alicia both signed a form provided by the Nebraska Department of Health and Human Services titled "Acknowledgement of Paternity," in which both Cesar and Alicia acknowledged that Cesar was Jaime's biological father. Their signatures were notarized. Cesar was named as the father on the birth certificate.

When Alicia and Jaime left the hospital, they returned to a home Cesar and Alicia had rented in Lexington, Nebraska. Shortly thereafter, Alicia learned that there was an outstanding federal warrant for her arrest for conspiracy to deliver methamphetamine. Without notifying Cesar, Alicia fled Lexington and left Jaime with Cesar. Alicia was arrested in Colorado on October 5, 2006, and was later convicted and sentenced to imprisonment in a federal facility in Texas. She was in federal custody until August 2008, when she was released to a halfway house in Omaha, Nebraska, where she lived until she moved into a house in February 2009. After arriving in Omaha, Alicia resumed contact with Cesar and Jaime, who for the last 2 years had been living together in Lexington. The relationship between Cesar and Alicia did not resume.

On June 8, 2009, Cesar filed a complaint in the district court for Dawson County to establish paternity, custody, and child support with respect to Jaime. Cesar asserted that at all times, Jaime had been in his physical care, custody, and control and that they had lived in Lexington Jaime's entire life. Cesar sought an order declaring him to be Jaime's father, granting him custody of Jaime, and ordering Alicia to pay child support. Cesar also filed a motion for temporary custody; in an affidavit in support of the motion, he asserted that on June 7, Alicia had taken Jaime to Omaha without Cesar's knowledge or consent. The court granted Cesar's motion for temporary custody of Jaime.

Although on June 9, 2009, Alicia filed a separate action in the district court for Douglas County in which she asserted that Cesar was Jaime's father, she answered Cesar's complaint in this case with a countercomplaint for custody and child support in which she asserted that Cesar was "potentially" Jaime's

father. In a separate motion, Alicia asserted that it was possible that Cesar was not Jaime's biological father and she requested that the court order Cesar to submit to genetic testing to determine paternity. The court granted the request. After the genetic testing excluded Cesar as being Jaime's biological father, Alicia filed a motion for summary judgment and motions to, inter alia, grant her temporary custody of Jaime and vacate the order directing her to pay child support.

Cesar filed a motion for leave to file an amended complaint which alleged that immediately after Jaime's birth, he asked Alicia whether he was Jaime's father; that Alicia told Cesar that he was Jaime's father; and that at no time since, until the present action, had Alicia indicated to Cesar that he was not Jaime's father. Cesar also alleged that Alicia was unfit to have custody of Jaime for various reasons including, inter alia, her involvement with drugs, her conviction "for one or more federal felonies," and her abandonment of Jaime. Cesar further alleged that he was an "'equitable parent'" to Jaime, that Alicia should be equitably estopped from denying his paternity, and that he had acted in loco parentis to Jaime.

The district court granted Cesar leave to file the amended complaint. The court overruled Alicia's motion for summary judgment and other motions after it determined that there were genuine issues of material fact relating to the claims raised by Cesar in his amended complaint and that there was legal authority to support Cesar's claims that he had the rights of a parent. Alicia answered Cesar's amended complaint by alleging, inter alia, that Cesar was unfit to have custody of Jaime.

At a final hearing on all pending matters in this case, Cesar offered into evidence the notarized acknowledgment of paternity signed by Cesar and Alicia at Jaime's birth. Without objection by Alicia, the court received the acknowledgment into evidence. Following the hearing, the court entered an order on August 19, 2010, ruling on both parties' various claims. The court first determined that Cesar had proved by clear and convincing evidence each of the elements of equitable estoppel. In making such determination, the court found as an incidental matter that the acknowledgment of paternity had been signed;

however, the court did not consider the legal effect of the acknowledgment. The court concluded that Cesar could use the doctrine of equitable estoppel to prevent Alicia from terminating the relationship between Cesar and Jaime.

In its order, the court noted that genetic testing excluded Cesar as being Jaime's biological father. The court therefore applied the parental preference doctrine and concluded that Alicia, as the biological parent of Jaime, had the superior right to custody unless such custody would be detrimental to Jaime's welfare. The court found that Cesar failed to establish that Alicia was unfit to parent Jaime or that she had forfeited her parental rights by substantial, continuous, and repeated neglect of Jaime. The court awarded custody of Jaime to Alicia.

Despite its conclusion that Cesar had not rebutted the presumption of custody in Alicia, the court found that Cesar had established that his relationship with Jaime was protected by the in loco parentis doctrine and that therefore, Cesar was entitled to parenting time with Jaime. The court found that Cesar should have "extensive and liberal parenting time" with Jaime and set forth a parenting plan to provide such time. Finally, the court determined that because Cesar stood in loco parentis to Jaime, he had an obligation to support Jaime; the court therefore ordered Cesar to pay monthly child support.

Cesar filed a motion for a new trial or to reconsider or modify the August 19, 2010, order. The court granted a new trial limited to a specific evidentiary issue. Cesar noted that at the prior hearing, the court did not explicitly rule on Alicia's offering into evidence the results of the genetic testing that excluded Cesar as Jaime's biological father. When Alicia again offered the evidence at the new trial, Cesar objected. Cesar argued that based on equitable estoppel, Alicia should not be allowed to present evidence that he was not Jaime's biological father. The court overruled Cesar's objection, stating that equitable estoppel did not prevent admission of the evidence. In an order entered September 16, the court concluded that admission of the evidence did not change the findings and conclusions it had reached in its August 19 order.

Cesar appeals the August 19 and September 16, 2010, orders. Alicia cross-appeals.

ASSIGNMENTS OF ERROR

In his appeal, Cesar claims that the district court erred when it (1) found that Alicia was not equitably estopped from offering the results of genetic testing to establish that Cesar was not Jaime's biological father, (2) found that Alicia was not unfit to have custody of Jaime, and (3) did not order Alicia to pay child support.

In her cross-appeal, Alicia claims that the district court erred when it concluded that Cesar had established the elements of equitable estoppel by clear and convincing evidence.

STANDARDS OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[2] 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. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

ANALYSIS

Before considering the assigned errors, we note plain error which requires reversal: to wit, the district court failed to give proper legal effect to the signed and notarized acknowledgment of paternity. Because such error resolves the appeal, we need not consider the errors assigned by Cesar or those assigned by Alicia in her cross-appeal. Instead, we reverse the August 19 and September 16, 2010, orders of the district court which encompassed the court's rulings on custody and the admission of genetic testing, and remand the cause for further proceedings consistent with this opinion.

[3,4] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008). We note plain error in the district court's failure to give proper legal effect to the notarized acknowledgment of paternity signed by Cesar and Alicia at Jaime's birth, and we determine that to leave the error uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process, because the error affected Cesar's legal relationship to Jaime and beyond doubt affected the court's decisions with respect to evidentiary matters and custody.

At Jaime's birth, Cesar and Alicia executed a notarized acknowledgment of paternity in which they asserted that Cesar was Jaime's biological father. Cesar offered the notarized acknowledgment into evidence at the hearing in this case, and the court received the evidence without objection by Alicia. The court noted in its August 19, 2010, order that the acknowledgment was signed. However, the court failed to give proper legal effect to the signed, unchallenged acknowledgment. As explained below, the proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.

With regard to the legal effect of a notarized acknowledgment of paternity, Neb. Rev. Stat. § 43-1409 (Reissue 2008) provides as follows:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party. *After the*

> *rescission period a signed, notarized acknowledgment is considered a legal finding* which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger, and the legal responsibilities, including the child support obligation, of any signatory arising from the acknowledgment shall not be suspended during the challenge, except for good cause shown. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support.

(Emphasis supplied.)

[5] We also note that Neb. Rev. Stat. § 43-1402 (Reissue 2008), regarding the liability of parents to support a child, refers to the "father of a child whose paternity is established either by judicial proceeding or by acknowledgment as hereinafter provided." Section 43-1402 therefore contemplates that paternity may be established by acknowledgment and that establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding. Reading these statutes together, we interpret the provision in § 43-1409 that the acknowledgment is a "legal finding" to mean that it legally establishes paternity in the person named in the acknowledgment as the father.

For completeness, we further note that Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides in part as follows:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. . . . A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.

The provision in § 43-1412.01 that a court shall not grant relief if the father completed a notarized acknowledgment provides further support for the conclusion that an acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.

Finally, we note that under § 43-1409, any signatory has a right to rescind the acknowledgment within the earlier of 60 days or the date of a legal proceeding related to the child. There is no indication in this case that either party rescinded the acknowledgment within the statutory rescission period, and no proceeding relating to the child was noted during the rescission period. Thus, the acknowledgment remained in full force and effect.

Prior to 1994, § 43-1409 (Reissue 1993) read as follows:

> A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child. A child whose parents marry is legitimate.

This court applied the pre-1994 version of § 43-1409 in *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 163-64, 481 N.W.2d 165, 174 (1992), and held that "in a filiation proceeding for support of a child born out of wedlock, evidence of the performance of acts described in § 43-1409 is not conclusive on the trier of fact, but constitutes relevant evidence of a biological relationship." In reaching such conclusion, this court noted that "some state legislatures do distinguish between a formal written acknowledgment of paternity and informal acknowledgment through the performance of certain acts, according only the former the conclusive effect of a judgment," and this court concluded that "[i]n the absence of such a distinction between formal and informal acknowledgments in the Nebraska statutes, we do not think the Legislature intended to give either form of acknowledgment conclusive effect." 240 Neb. at 162, 481 N.W.2d at 173-74.

The pre-1994 version considered in *State on behalf of J.R. v. Mendoza, supra*, was replaced. Section 43-1409 as it now

exists resulted from legislative amendments in 1994 and 1997 and now gives conclusive effect to a notarized acknowledgment of paternity. In 1994, the statute was amended by deleting the entire statute and replacing it with the current first and last sentences. See § 43-1409 (Cum. Supp. 1996). The middle sentences of the current version of § 43-1409, which version includes provisions relating to rescission of the acknowledgment and designating the acknowledgment as a "legal finding" after the rescission period, were added as part of 1997 Neb. Laws, L.B. 752. See § 43-1409 (Reissue 1998). The stated purpose of L.B. 752 was to comply with federal requirements relating to child support enforcement. Introducer's Statement of Intent, 95th Leg., 1st Sess. (Feb. 26, 1997), and Floor Debate, 1st Sess. 67 (Feb. 26, 1997). See, also, Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. Balt. L. Rev. 53 (2010) (regarding federal mandates on voluntary paternity acknowledgments as condition of receiving federal aid).

The current version of § 43-1409 recognizes only a formal written and notarized acknowledgment, and by designating such acknowledgment as a "legal finding" after the rescission period, the Legislature indicated that under the current version, as contrasted with the version at issue in *State on behalf of J.R. v. Mendoza, supra*, an acknowledgment has the conclusive effect of a judgment finding paternity.

In the present case, at the time Cesar initiated the current proceedings, the notarized acknowledgment signed by Cesar and Alicia legally established Cesar's paternity as to Jaime. A judicial proceeding was not needed to establish Cesar's paternity. The legal finding of paternity that is implicit in the acknowledgment is made explicit by the terms of §§ 43-1402 and 43-1409. Upon finding that the notarized acknowledgment of paternity had been signed, the court should have treated Cesar's paternity as having been legally established and treated this action as one solely to determine issues of custody and support as between two legal parents, and not one to establish paternity.

In her answer, Alicia questioned Cesar's status as Jaime's father by alleging that another man might be the biological

father and requested the court to order Cesar to submit to genetic testing. However, under the statutory scheme, before Alicia could challenge paternity and subject Cesar to genetic testing, she needed to overcome the acknowledgment that she and Cesar had both signed which established that Cesar was Jaime's legal father.

Section 43-1409 provides that an acknowledgment that has become a legal finding of paternity "may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger." Under § 43-1409, Alicia had the burden to prove fraud, duress, or material mistake of fact with regard to the execution of the acknowledgment. Alicia made no allegation of fraud, duress, or material mistake and therefore did not properly challenge the acknowledgment under § 43-1409. The acknowledgment remained a legal finding, and Cesar had the legal status as father. Because such legal status had been established and the acknowledgment was unchallenged, the results of genetic testing were not relevant to any issue properly raised in the case and the district court should not have ordered or considered genetic testing. See § 43-1412.01.

Courts in other states have similarly found that an acknowledgment has the effect of a judgment and can only be challenged on the bases stated in the statutes. In *Matter of Gendron*, 157 N.H. 314, 318, 950 A.2d 151, 154 (2008), the New Hampshire Supreme Court applied Massachusetts law similar to Nebraska statutes and concluded that under the Massachusetts provisions, an acknowledgment signed by a child's mother and the purported father established paternity and had "the same force and effect as a Massachusetts court judgment of paternity." The court concluded that the trial court erred when it ordered genetic testing upon the mother's request, because "the acknowledgment established the father as the child's legal father." *Id.* at 321, 950 A.2d at 156. The court reasoned that "the unchallenged acknowledgement established the father's paternity, thus dispensing with the need for additional proof of paternity. Therefore, genetic marker testing was irrelevant to determining the father's request for custody." *Id.* at 320, 950 A.2d at 155. The court noted a case in which a father who had

acknowledged paternity was not allowed to rebut his paternity by blood tests, and the court reasoned that "[a]lthough it is the mother who is attempting to disprove the father's paternity in this instance, the mother has proffered, and we see, no reason for reaching a different result. Whether the mother or father is the petitioner, the paramount interests are certainty and finality." *Id*. at 320, 950 A.2d at 156.

In *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1110, 890 N.E.2d 944, 954-55, 322 Ill. Dec. 25, 35-36 (2008), the Illinois Court of Appeals stated that an acknowledgment of parentage, signed by the mother and the purported father and certified by a hospital representative, was an "admission of paternity [that] operated as conclusively as a judicial determination based on evidence or a judgment establishing paternity" under Illinois law. The court cited an Illinois Supreme Court case in which that court held that a man who had acknowledged paternity could challenge the voluntariness of the acknowledgment if he could show that it was procured by fraud, duress, or material mistake of fact, but that

> "it would be unreasonable to allow a man in this position to undo his voluntary acknowledgment years later on the basis of DNA test results, when his paternity was based not on a mere marital presumption that he was the child's father but on the conscious decision to accept the legal responsibility of being the child's father."

382 Ill. App. 3d at 1111, 890 N.E.2d at 955-56, 322 Ill. Dec. at 36-37, quoting *People ex rel. Dept. of Public Aid v. Smith*, 212 Ill. 2d 389, 818 N.E.2d 1204, 289 Ill. Dec. 1 (2004). The court of appeals in *In re Parentage of G.E.M.* noted that the voluntary acknowledgment was not rescinded or challenged based on fraud, duress, or mistake and that therefore, the mother could not extinguish the status of father conferred by the acknowledgment. The court stated:

> The permanent consequences of voluntary acknowledgments of parentage extend to both the mother who gives birth and the man who knowingly assumes the role of father. By voluntarily acknowledging paternity, both mother and [named father] accepted the legal consequences

> of the statutory presumption of paternity and waived their option to request DNA testing.

Id. at 1116, 890 N.E.2d at 959, 322 Ill. Dec. at 40. The court stated that "[i]n spite of mother's change of heart, statutory procedures control whether an acknowledgment of paternity may be rescinded or whether the presumption arising from the acknowledgment remains in full force and effect." *Id*. at 1110, 890 N.E.2d at 955, 322 Ill. Dec. at 36. The court noted "a strong judicial policy favoring the finality and stability of judgments" and found such principles "particularly poignant in the context of parentage determinations that become part of a child's personal history and sense of self." *Id*. at 1118, 890 N.E.2d at 961, 322 Ill. Dec. at 42.

In *In re Paternity of H.H.*, 879 N.E.2d 1175, 1178 (Ind. App. 2008), the Indiana Court of Appeals concluded that "once a mother has signed a paternity affidavit, she may not use the paternity statutes to deprive the legal father of his rights, even if he is not the biological father." The court reasoned that "a woman always has the information necessary to question paternity prior to signing the affidavit. A man, however, could easily sign an affidavit without awareness of the questionable nature of his paternity." *Id*. The court noted that the legal father was "the only father [the child] has ever known . . . was there when she was born, [and] has provided for her financially and emotionally since her birth," and the court concluded that "[c]hanging his legal status at this late date is not in the best interests of" the child, the legal father, or the State. *Id*.

We agree with these authorities that not only do the applicable statutes require that an unchallenged acknowledgment have the effect of making the acknowledged father the legal father but that the best interests of the child are ordinarily served by certain parentage determinations and continuity in the child's life.

The court in this case committed plain error when it failed to give proper legal effect to the acknowledgment. Such failure resulted in the court's ordering Cesar to submit to genetic testing, which led to a determination that Cesar was not Jaime's biological father, which in turn led the court to apply

the parental preference doctrine and conclude that Alicia had a superior right to custody of Jaime. If the court had given proper legal effect to the acknowledgment, the court would have viewed both Cesar and Alicia as legal parents to Jaime, and the issues in this case would have, and should have, been considered within this legal framework. The orders of August 19 and September 16, 2010, are reversed. Because our finding of plain error resolves this appeal, we need not consider the assignments of error raised by the parties.

CONCLUSION

We conclude that the district court erred when it failed to give proper legal effect to the acknowledgment of paternity that was signed by Cesar and Alicia and notarized at the time of Jaime's birth, named Cesar as Jaime's father, and was not challenged by Alicia. The acknowledgment established Cesar as Jaime's legal father. See § 43-1409. We reverse the August 19 and September 16, 2010, orders regarding custody and other issues, and remand the cause to the district court for further proceedings. In the absence of a challenge to the acknowledgment, the court should consider the issues raised in this proceeding regarding custody and support within the framework that under the applicable statutes, Cesar is legally Jaime's father.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating in the decision.

WRIGHT, J., not participating.

FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT, APPELLANT AND CROSS-APPELLEE, V. DEPARTMENT OF NATURAL RESOURCES, APPELLEE AND CROSS-APPELLANT.

801 N.W.2d 253

Filed July 29, 2011. No. S-10-608.

1. **Parties: Standing: Jurisdiction.** 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.

2. **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.
3. **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.
4. **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.
5. **Standing: Proof.** To have standing, a litigant must clearly demonstrate that it has suffered an injury in fact. 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.
6. **Standing: Statutes: Presumptions: Legislature: Intent.** If mere interest in the outcome of an application was all that was necessary for standing, then every citizen of the state would have standing to object to an application. In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result.
7. **Standing: Jurisdiction.** The requirement of standing is fundamental to a court's exercising jurisdiction, and litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.

Appeal from the Department of Natural Resources. Appeal dismissed.

Jeanelle R. Lust and Katherine S. Vogel, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellee.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., INBODY, Chief Judge, and MOORE, Judge.

HEAVICAN, C.J.

INTRODUCTION

The Frenchman-Cambridge Irrigation District (FCID) appeals from the decision of the Department of Natural Resources (DNR) denying FCID's petition to reevaluate relevant portions of the Republican River Basin to determine if such areas are overappropriated. FCID challenges the DNR's interpretation of the term "interstate cooperative agreement" as it appears in Neb.

Rev. Stat. § 46-713(4)(a) (Reissue 2010). FCID alleges that the status of the basin should be changed from "fully appropriated" to "overappropriated," which would allow the DNR to assert more authority over the basin. Section 46-713(4)(a), as interpreted by the DNR, allows the DNR to declare a river basin "overappropriated" only if it was subject to an "interstate cooperative agreement" as of July 16, 2004. The Republican River Basin is currently subject to an "interstate compact," which FCID claims is the equivalent of an "interstate cooperative agreement." The DNR has cross-appealed, alleging that FCID failed to demonstrate an injury in fact for standing purposes. We find that FCID does not have standing, and we therefore dismiss the cause for lack of jurisdiction and do not reach the merits of the litigation.

FACTS

Republican River Basin "Interstate Compact."

FCID holds surface water appropriations for purposes of irrigation within the Republican River Basin. The basin has been the subject of an interstate compact between Colorado, Kansas, and Nebraska since 1943, the Republican River Compact (Compact).[1] On January 19, 1999, the U.S. Supreme Court granted Kansas' motion for leave to file a bill of complaint alleging that Nebraska was using more than its share of water, as per the 1943 Compact.[2] The special master assigned to the case found that ground water depletions to streamflow should be accounted for. In early 2002, the states notified the special master that they had reached a settlement. The parties filed the final settlement stipulation (FSS) with the special master, who recommended approval. The U.S. Supreme Court approved the FSS on May 19, 2003.[3] The FSS was signed by the governors and attorneys general of the three states.

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[1] See, e.g., Pub. L. No. 78-60, 57 Stat. 86 (1943); 2A Neb. Rev. Stat. appx. § 1-106 (Reissue 2008).

[2] *Kansas v. Nebraska*, 525 U.S. 1101, 119 S. Ct. 865, 142 L. Ed. 2d 767 (1999).

[3] *Kansas v. Nebraska*, 538 U.S. 720, 123 S. Ct. 1898, 155 L. Ed. 2d 951 (2003).

The Compact and the FSS require that water usages of each state fluctuate depending on the water available each year. During wet years, each state has more available water, while during dry years, the states have less. The Compact and the FSS therefore require that Nebraska live within its allocation of the Republican River Basin supply.

Platte River Basin "Interstate Cooperative Agreement."

In contrast, the Platte River Basin is subject to an "interstate cooperative agreement" between Nebraska, Wyoming, and Colorado. The interstate cooperative agreement is a voluntary agreement between the three states. The states entered into the first cooperative agreement in 1997, and then entered into a second agreement in 2006. The cooperative agreements apparently require Nebraska to return to 1997 levels of water usage for the Platte River Basin. That agreement, which is now called the Platte River Recovery Implementation Program, does not apply to the Republican River Basin.

L.B. 962.

The Nebraska Legislature enacted 2004 Neb. Laws, L.B. 962, in order to address the determination of fully appropriated and overappropriated river basins. L.B. 962 was intended to implement changes in Nebraska's water policy. The law was also intended to "modify the existing law to be more proactive and requirement [sic] certain management actions be taken jointly by the department and natural resources district in basins that are declared to be over appropriated (currently this would be the Platte River Basin above Elm Creek) or fully appropriated."[4] L.B. 962 modified and expanded the Ground Water Management and Protection Act, Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2004), which includes the statutes at issue in this case.

As part of the changes brought about by L.B. 962, the DNR was required to designate, within 60 days of July 16, 2004, which river basins were overappropriated under § 46-713(4)(b).

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[4] Introducer's Statement of Intent, L.B. 962, Committee on Natural Resources, 98th Leg., 2d Sess. (Jan. 21, 2004).

On September 14, 2004, the DNR designated portions of the Platte River Basin as overappropriated. In contrast, in 2004, portions of the Republican River Basin were declared fully appropriated pursuant to § 46-720(3)(b).

FCID's Petition for Reconsideration.

FCID is an irrigation district organized under Nebraska's irrigation district laws, Neb. Rev. Stat. §§ 46-101 to 46-1,163 (Reissue 2010). As noted, FCID owns water rights for surface water natural flow within the Republican River Basin for irrigation purposes and receives supplemental stored water from federal reservoirs. As an irrigation district, FCID provides surface water for irrigation purposes and is dependent upon the surface water supply of the basin. Because FCID supplies surface water for irrigation in the basin, the parties stipulated that it is an "interested" party under § 46-713(2)(a) (Reissue 2010) and had standing to request a reevaluation of relevant portions of the basin.

On February 27, 2009, FCID filed a petition requesting the DNR to reevaluate a portion of the Republican River Basin according to the criteria in § 46-713. FCID asked the DNR to determine whether the basin met the criteria to be considered "overappropriated" rather than "fully appropriated." FCID claimed the basin should be reclassified.

With its petition, FCID filed information showing that (1) new scientific data or other information relevant to the determination of whether the Republican River Basin was fully appropriated or overappropriated had become available since the basin was last appropriated, (2) the DNR had relied on incorrect or incomplete information since the basin had last been evaluated, and (3) the DNR had erred in its interpretation or application of the information available when the basin had last been evaluated.

In its order denying FCID's petition to reevaluate the Republican River Basin, the DNR noted that it was authorized to reevaluate a river basin under § 46-713(2) if it had reason to believe that a reevaluation might lead to a different determination. However, the DNR stated that the criteria for determining whether a basin is overappropriated under § 46-713(4)(a)

had nothing to do with a scientific or technical determination of any sort: "The criteria are satisfied only when the State of Nebraska and the [DNR] had taken certain actions on or before July 16, 2004, i.e., entered into an interstate cooperative agreement, declared a moratorium on surface water appropriations, and requested a moratorium on ground water well construction permits."

The DNR stated that it did not interpret the term "interstate cooperative agreement" to include interstate compacts. In support of its reasoning, the DNR cited the fact that the Ground Water Management and Protection Act refers to both "interstate compacts" and "interstate cooperative agreements" and that the two terms are not used interchangeably.

The DNR found that the FSS approved by a decree of the U.S. Supreme Court regarding the Republican River Basin was not an interstate cooperative agreement, but was part of the original interstate Compact.[5] Because the basin was not the subject of an "interstate cooperative agreement," the DNR could not find that the basin was overappropriated. FCID appeals from that determination.

DNR's Cross-Appeal.

On cross-appeal, the DNR argues that FCID has failed to allege sufficient facts to establish an injury in fact. Although the parties stipulated that FCID was an interested party, the DNR argues that our recent decision in *Central Neb. Pub. Power Dist. v. North Platte NRD* (*Central*)[6] requires an irrigation district to allege an injury in fact, rather than a mere interest in water rights. FCID argues that § 46-713 provides that any "interested" party may request a reevaluation, and that the stipulation overrides any potential insufficiencies in the record.

ASSIGNMENTS OF ERROR

FCID contends that the DNR's interpretation of § 46-713(4) is wrong for three reasons: (1) The Compact and the 2002 FSS

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[5] See *Kansas v. Nebraska, supra* note 3.

[6] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

should satisfy the condition of the statutes; (2) under Neb. Rev. Stat. § 61-206(1) (Reissue 2009), the DNR has broad authority to reevaluate the appropriation status of a river basin; and (3) in so refusing to reevaluate the Republican River Basin, the DNR has interpreted § 46-713(4) in a manner that violates the prohibition in Neb. Const. art. III, § 18, against special legislation. On cross-appeal, the DNR assigns as error that it found that FCID had alleged sufficient facts to demonstrate an injury in fact for standing purposes.

STANDARD OF REVIEW

[1] 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.[7]

ANALYSIS

[2-4] We first address the DNR's claim on cross-appeal that FCID lacks standing because it did not plead an injury in fact. 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.[8] 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.[9] 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.[10]

[5] The DNR cites *Central*,[11] a case we decided after the DNR issued its final opinion in this case. Although FCID and the DNR stipulated to the fact that FCID was an interested

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

party, the DNR argues that *Central* requires FCID to plead an injury in fact in order to have standing. In *Central*, we stated that

> 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. 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.[12]

FCID argues that § 46-713 allows any "interested" party to request reevaluation of a river basin. FCID claims that it is an entity with a specific interest in the appropriation status of the Republican River Basin because it holds surface water appropriation rights within that basin. FCID also claims that if the basin is overappropriated, its own appropriation rights will not be satisfied and it will not be able to generate as much revenue. FCID argues that it relied on the DNR's stipulation and therefore did not present evidence of an injury in fact. FCID distinguishes its case from that of *Central*, because in *Central*, the parties did not stipulate that Central Nebraska Public Power and Irrigation District was an interested party.

The DNR argues that *Central* changed the traditional understanding that irrigation districts have standing by virtue of holding water rights. The DNR contends that we now require that a party state an injury in fact in order to have standing. The DNR cites *Metropolitan Utilities Dist. v. Twin Platte NRD*[13] to support its contention that the use of "interested party" in a statute does not supplant the common-law understanding of standing.

[6] In *Metropolitan Utilities Dist.*, we discussed Neb. Rev. Stat. § 46-233 (Reissue 1993), which provided that "[a]ll interested parties" be allowed to testify and present evidence in a public hearing regarding an application for appropriation of

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[12] *Id.* at 542, 788 N.W.2d at 260.

[13] *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

induced ground water recharge. We stated: "If mere interest in the outcome of an application was all that was necessary for standing, then every citizen of the state would have standing to object to an application. In construing a statute, it is presumed that the Legislature intended a sensible rather than an absurd result."[14] The DNR argues that the same logic applies to the present case and that "interested party" does not supplant the common-law definition of standing in § 46-713.

We recently had cause to address the definition of an "interested" party as it appears in § 46-713(2). In *Middle Niobrara NRD v. Department of Nat. Resources*,[15] we discussed what was necessary to be considered an interested party and determined that the natural resources districts were interested parties because they were asserting the rights of the taxpayers whose interests were represented. Specifically, we reasoned that the DNR's action triggered duties for the natural resources districts that would require the entities to spend public funds.[16] And the natural resources districts alleged that the action of the DNR required regulatory measures that would be costly to the taxpayers in their districts.[17]

Here, FCID is not asserting the rights of taxpayers, however, and it has not alleged any specific injury it suffered when the DNR did not declare the river basin overappropriated. FCID alleged only that *if* the basin is overappropriated, its appropriation rights will not be satisfied and it will not be able to raise enough revenue. FCID did not claim that its appropriation rights are currently unsatisfied or that it has not been able to raise enough revenue. This case is more akin to that of *Central*, in which the speculative nature of the irrigation district's claims was insufficient to plead an injury in fact, which is imperative to standing.

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[14] *Id.* at 451, 550 N.W.2d at 913.

[15] *Middle Niobrara NRD v. Department of Nat. Resources, ante* p. 634, 799 N.W.2d 305 (2011).

[16] *Id.*

[17] *Id.*

[7] The requirement of standing is fundamental to a court's exercising jurisdiction, and litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.[18] In this case, FCID and the DNR stipulated to standing, but FCID made no claim that it had suffered an injury in fact. Because FCID did not plead an injury in fact, it does not have standing and we do not have jurisdiction over FCID's claims.

CONCLUSION

FCID has failed to plead an injury in fact and therefore has not established standing. Without standing, we have no jurisdiction over FCID's claims, and we therefore dismiss for lack of jurisdiction.

APPEAL DISMISSED.

WRIGHT and CONNOLLY, JJ., not participating.

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[18] *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993).

RONALD FRY, APPELLANT, V.
JANET R. FRY, APPELLEE.
800 N.W.2d 671

Filed July 29, 2011. No. S-10-698.

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.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

David A. Domina and, of Counsel, Mark D. Raffety, of Domina Law Group, P.C., L.L.O., for appellant.

Susan A. Anderson and Molly M. Blazek, of Anderson & Bressman Law Firm, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Ronald Fry appeals orders of the district court for Douglas County filed June 14, 2010. The court entered an amended qualified domestic relations order (QDRO) which, in addition to stating that Janet R. Fry was entitled to an absolute amount from Ronald's profit-sharing plan, awarded Janet postjudgment interest thereon for the period commencing with entry of the decree of dissolution on July 17, 2006, during the pendency of a previous appeal which had challenged an earlier version of the QDRO and concluding on June 10, 2010. The district court did not err when it ordered postjudgment interest. We affirm.

STATEMENT OF FACTS

Ronald and Janet's marriage was dissolved pursuant to a decree of dissolution entered by the district court on July 17, 2006. The decree included the following provision:

> 14. Profit[-]Sharing Plan. [Ronald] enjoys an American Bar Association AKC Profit[-]sharing plan with an accumulated value of $635,243 as of January 1, 2005. All of the accumulation has occurred during the course of the marriage. There are tax consequences for withdrawals from the plan by either party, but either party will determine by their own choices how and when the taxable events will occur. [Ronald] is awarded the profit[-]sharing plan. [Janet] is awarded a portion of the plan which is $182,599.00. Counsel shall prepare a [QDRO] to facilitate transfer of the funds.

No QDRO was entered prior to September 2008, when Ronald filed a motion to reopen the case, and Ronald and Janet filed separate motions to compel entry of their respective competing proposed QDROs. After an initial hearing, subsequent motions to amend by each party, and an additional hearing, the district court on December 15, 2008, entered an amended QDRO, which awarded Janet $182,599, together with interest thereon at the rate of 6.849 percent from July 17, 2006, until December 8, 2008.

Ronald appealed the December 15, 2008, QDRO and related orders to the Nebraska Court of Appeals. Ronald claimed, inter

alia, that the district court had erred when it treated the division of retirement funds as a monetary judgment consisting of an absolute dollar amount rather than as a judgment for a percentage of the funds and when it awarded postjudgment interest on Janet's share of the retirement funds accruing from the date of the decree of dissolution. See *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009). The Court of Appeals determined that the decree of dissolution "plainly awarded Ronald the profit-sharing plan and awarded Janet $182,599 from the plan" and concluded therefore that the QDRO properly awarded Janet the dollar amount of $182,599 rather than a particular percentage of the plan. 18 Neb. App. at 79, 775 N.W.2d at 442. The Court of Appeals cited *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983), for the proposition that interest on the unpaid balance of pension and profit-sharing funds shall accrue from the date of the divorce decree and concluded that "the district court did not err in awarding interest from July 17, 2006—the date of the divorce decree—because that is when Janet was assigned her share of Ronald's profit-sharing plan." 18 Neb. App. at 81, 775 N.W.2d at 443. The Court of Appeals affirmed the orders appealed.

After the affirmance, Janet filed motions in the district court to reopen the case and to enter an amended QDRO. She sought to amend the QDRO which had been affirmed in *Fry* to provide for interest that had accrued during the appeal of the prior orders. Ronald opposed the amendment on the basis that he had not filed a supersedeas bond during the appeal or taken any action that would have prevented Janet from executing on the prior QDRO. Janet noted in response that one of the issues on appeal was whether the QDRO properly provided that she was to receive a specific dollar amount from the retirement funds or whether the QDRO should have provided that she was to receive a certain percentage of the plan. She argued that it would have been unwise to execute on the QDRO before that issue was resolved because if it had been resolved in Ronald's favor, she could have owed him money back.

Following a hearing, on June 14, 2010, the district court ordered the case reopened and entered the amended QDRO proposed by Janet. It is this QDRO and related orders which

are at issue in this appeal. The QDRO provided for interest from the date of the decree of dissolution through June 10, 2010, the date of the hearing on the motions before the court. The QDRO provided in part as follows:

> [Janet] shall be awarded the sum of One Hundred Eighty Two Thousand Five Hundred Ninety Nine and no/100 Dollars ($182,599.00) from [Ronald's] 401(k) Profit[-]Sharing Plan, together with interest thereon at the rate of 6.849% from July 17, 2006, until June 10, 2010, for a total of $231,385.24, said amount representing the total amount awarded to [Janet]. ($182,599 + $48,786.24 interest). Said amount shall be paid from [Ronald's] Income Plus Fund to assure that said funds are paid in cash as opposed to equities, and [Janet] is entitled to an immediate distribution from the Plan of the entire balance of [Janet's] account and any earnings thereon in accordance with the directions specified by [Janet].

Ronald appeals the order to reopen the case and the amended QDRO entered by the district court.

ASSIGNMENT OF ERROR

Ronald claims, summarized and restated, that the district court erred when it awarded Janet postjudgment interest for the period after the decree encompassing the pendency of a prior appeal of an earlier QDRO and up to June 10, 2010.

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. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

ANALYSIS

Ronald claims that the district court erred when it awarded Janet additional postjudgment interest following the remand from the Court of Appeals' decision in *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009). The earlier QDRO that had been appealed and affirmed by the Court of Appeals in *Fry* awarded postjudgment interest from the date of the decree

through December 8, 2008. On remand, the district court extended the award of postjudgment interest through June 10, 2010, which period included the pendency of the appeal resulting in *Fry*. We conclude that the award of additional postjudgment interest up to June 10, 2010, now challenged on appeal, was not error.

In *Fry*, the Court of Appeals determined that the district court did not err when it awarded interest from the date of the divorce decree "because that is when Janet was assigned her share of Ronald's profit-sharing plan." 18 Neb. App. at 81, 775 N.W.2d at 443. The Court of Appeals reasoned that the award was required by Neb. Rev. Stat. § 45-103.01 (Reissue 2010), which provides that postjudgment interest "shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." The Court of Appeals cited *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002), and noted that the language of § 45-103.01 is mandatory and that a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. The Court of Appeals also relied on *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983), in which this court concluded that interest on the unpaid balance of a specific dollar amount of a pension and profit-sharing trust awarded in a divorce decree should accrue from the date of the decree. Based on these authorities, the Court of Appeals concluded in *Fry* that the divorce decree in this case awarded Janet a specific dollar amount from Ronald's profit-sharing plan and that she was entitled to postjudgment interest on that amount from the date of the decree. Ronald petitioned for further review of *Fry*. We denied the petition.

We agree with the Court of Appeals' reasoning in *Fry* that Janet was awarded a specific dollar amount of the plan and its conclusion that Janet was entitled to postjudgment interest from the date of the decree until the satisfaction of judgment. We extend the reasoning of *Fry* and conclude in this case that because the judgment had not been satisfied at the time the cause was remanded to the district court after *Fry* and the case reopened, the court did not err when it entered a QDRO that extended the award of postjudgment interest through the

June 10, 2010, hearing. Janet continued to be entitled to postjudgment interest pursuant to § 45-103.01 from the date of decree until she received the specific dollar amount that she had been awarded. Therefore, it was appropriate for the court to update the award of postjudgment interest until Janet actually received her share of the profit-sharing plan.

Ronald argues that Janet should not have been awarded additional postjudgment interest beyond the December 8, 2008, date specified in the earlier QDRO, because she could have executed on that QDRO during the pendency of the appeal. In this regard, he notes that he did not post a supersedeas bond and that therefore Janet was not prevented from executing on the QDRO and receiving her share of the profit-sharing plan during the appeal.

We determine that although Janet could have executed on the earlier QDRO, there was nothing that required her to do so and there was no conclusive reason to cut off the accrual of postjudgment interest during the appeal. A supersedeas bond serves to suspend further proceedings on the judgment or decree from which an appeal is taken. See *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001). However, Ronald points to no authority to the effect that the absence of a supersedeas bond requires a party to execute on a judgment during an appeal. Indeed, we observe, but need not comment on the fact, that there may be valid reasons that a person or entity who can execute on a judgment chooses not to do so immediately.

In connection with Ronald's execution discussion, we note that Neb. Rev. Stat. § 25-1515 (Reissue 2008) generally provides that a judgment shall become dormant if it has not been executed upon within 5 years. The statute thus indicates that within that 5-year period, the party who obtained a judgment can execute on it at a time of his, her, or its choosing. Referring to § 25-1515, we note that the QDRO at issue in this case included postjudgment interest through June 10, 2010, which was within 5 years after the July 17, 2006, date of the divorce decree. Therefore, in terms of the dormancy statute, it cannot be said that the judgment had been outstanding an unreasonable period of time.

Janet asserts that she did not execute on the earlier QDRO during the appeal, because the appeal involved an issue regarding whether the decree awarded a specific dollar amount or a percentage of the plan. She argues that if she had executed on the QDRO based on a specific dollar amount and it had been determined on appeal that she was actually awarded a percentage rather than a specific dollar amount, a correction may have been warranted which might have required Janet to pay money back into the plan. Janet instead chose to await the resolution of the appeal. We find no authority indicating that Janet could not await execution during the pendency of the appeal. Ronald points to no authority which would serve as a basis to cut off the accrual of postjudgment interest, the accrual of which, as noted above, is mandatory under § 45-103.01.

Ronald also argues that the award of postjudgment interest resulted in an impermissible "double recovery" to Janet. We are unclear as to Ronald's reasoning on this point. We note, however, that Janet was awarded a specific dollar amount of $182,599 from Ronald's profit-sharing plan in the July 17, 2006, decree. In the June 2010 QDRO at issue in this appeal, she was awarded postjudgment interest on that amount from July 16, 2006, through June 10, 2010. The QDRO on appeal further provided that after Janet's share had been put into a separate account, which evidently would occur on or shortly after June 10, she would be entitled to distributions of cash from the plan and, after segregation and the cessation of postjudgment interest, of earnings, if any, on those funds from the time the funds were put into a separate account until they were actually distributed. In sum, Janet was awarded postjudgment interest from July 17, 2006, through June 10, 2010, and she was entitled to earnings on the funds that would be put into a separate account from June 10, or whatever later date the funds were separated, until the funds were distributed in cash to her. Therefore, there were two distinct periods bearing different economic consequences: the first period encompassed the time during which Janet was awarded postjudgment interest, and the second period encompassed the time during which Janet received earnings on the funds. Contrary to Ronald's assertion, under the controlling order, there was not a period when Janet

was awarded both postjudgment interest and earnings on her awarded share of the profit-sharing plan. We find this argument to be without merit.

CONCLUSION

The district court properly reopened the case and did not err when it determined that Janet was entitled to postjudgment interest from the date of the divorce decree until June 10, 2010, the date set forth in the QDRO at issue in this appeal. Accordingly, we affirm the orders of the district court.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF CHRISTOPHER T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER T., APPELLANT.

801 N.W.2d 243

Filed July 29, 2011. No. S-10-1105.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
3. **Due Process: Proof.** The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the fact finder concerning the degree of confidence our society thinks he or she should have in the correctness of factual conclusions for a particular type of adjudication.
4. **Courts: Expert Witnesses.** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), require the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact.
5. **Trial: Presumptions: Evidence.** In a bench trial, there is a presumption that the finder of fact disregards inadmissible evidence.
6. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.

7. **Trial: Expert Witnesses: Pretrial Procedure: Evidence.** Assuming that the opponent to expert testimony has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.
8. **Malpractice: Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least probable, in other words, more likely than not.
9. **Mental Health.** The nonexistence of an instrument which will perfectly predict future conduct does not preclude the use of rationally based instruments developed and validated by mental health professionals.

Appeal from the County Court for Scotts Bluff County: JAMES M. WORDEN, Judge. Affirmed.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellant.

Tiffany A. Wasserburger, Deputy Scotts Bluff County Attorney, for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Christopher T. appeals from the decision of the Scotts Bluff County Court, sitting as a juvenile court. Christopher was adjudicated under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008), in that he deports himself so as to injure or endanger seriously the morals or health of himself or others, and under § 43-247(3)(c),

in that he is a mentally ill and dangerous juvenile as defined by Neb. Rev. Stat. § 71-908 (Reissue 2009). We affirm.

II. BACKGROUND

The State of Nebraska brought a petition before the county court, sitting as a juvenile court, alleging that Christopher was a juvenile within § 43-247(1), in that he committed two law violations. Christopher was 15 years old at the time of the petition. The State alleged that on or about January 1 through November 8, 2009, Christopher unlawfully subjected his stepbrothers, J.P. and R.V., to sexual contact without consent. The State later amended the charges to include an allegation that Christopher was a juvenile within the meaning of § 43-247(3)(b) and (c).

Prior to the adjudication hearing, the State gave notice that Dr. Alan Smith, a psychologist, would be testifying. Christopher then filed a written objection, alleging that a *Daubert*/*Schafersman*[1] hearing ought to be held before Smith's testimony could be admitted. Christopher did not cite any specific reasons for challenging Smith's testimony.

At the adjudication hearing on September 28, 2010, the State called several witnesses, including Smith; Christopher's stepbrother, R.V.; Monica Bartling, a lieutenant with the Nebraska State Patrol; and Christopher's school counselor. The witness testimony is discussed in detail in the analysis section, but is briefly summarized here.

Smith testified regarding his diagnosis of Christopher, including the psychological testing he used and his interviews with staff at the Scotts Bluff County juvenile detention center. Christopher renewed his objection on *Daubert*/*Schafersman* grounds at that time, and the juvenile court overruled the objection, allowing Smith to testify as to the allegations that Christopher was mentally ill and dangerous.

Christopher's school counselor gave testimony regarding Christopher's actions at school, including actions that resulted

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

in his suspension. R.V., one of the alleged victims and 12 years old at the time, testified regarding Christopher's actions within the home. When R.V. stated that he was afraid to testify in front of Christopher and apparently changed his testimony on the stand, the State called Bartling to impeach R.V.'s testimony. Bartling had interviewed R.V. as part of an investigation into the sexual assault charges against Christopher.

Christopher did not offer any evidence, and at the close of the case, the State dismissed the § 43-247(1) law violations. The juvenile court then adjudicated Christopher under § 43-247(3)(b) and (c) and placed Christopher in the care, custody, and control of the Nebraska Department of Health and Human Services.

III. ASSIGNMENTS OF ERROR

Christopher assigns, consolidated and restated, that the juvenile court erred (1) in adjudicating under § 43-247(3)(c) using the clear and convincing standard of evidence to find that Christopher was a mentally ill and dangerous person; (2) in finding that the State had adduced sufficient evidence to adjudicate Christopher under either § 43-247(3)(b) or (c); (3) in overruling the objection to the testimony of Smith on *Daubert/Schafersman* grounds; and (4) in relying on the testimony of Smith, because Smith did not testify as to a reasonable degree of medical or psychological certainty.

IV. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[2]

[2] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.[3]

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[2] *In re Interest of Kevin K.*, 274 Neb. 678, 742 N.W.2d 767 (2007).

[3] *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996).

V. ANALYSIS

The primary issue in this case is the relationship between § 43-247(3)(c) and the Nebraska Mental Health Commitment Act (MHCA), Neb. Rev. Stat. § 71-901 et seq. (Reissue 2009). Section 43-247(3)(c) provides that the juvenile court shall have jurisdiction over any juvenile "who is mentally ill and dangerous as defined in section 71-908." Section 71-908 is part of the MHCA and defines a mentally ill and dangerous person as someone who presents:

> (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or
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> (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety.

Under § 71-925, the State must prove by clear and convincing evidence that the subject of the petition before a mental health board is mentally ill and dangerous. With those statutes in mind, we turn to Christopher's first assignment of error.

1. Standard of Proof

Christopher first argues that because there is no explicit standard of proof in § 43-247(3)(c), the State should be required to prove that Christopher is mentally ill and dangerous beyond a reasonable doubt, rather than by clear and convincing evidence. The juvenile court noted that § 43-247(3)(c) does not explicitly give a standard of proof, but the court determined to apply a clear and convincing evidence standard.

Christopher asserts that the lack of a standard of proof under § 43-247(3)(c) means that the standard would "default" to the "beyond a reasonable doubt" standard,[4] but he offers no support for that assertion. Commitments under the MHCA and the Sex Offender Commitment Act, Neb. Rev. Stat. § 71-1201 et

[4] Brief for appellant at 13.

seq. (Reissue 2009), are made under the clear and convincing evidence standard.[5] We have previously found that a mental health commitment act was not unconstitutional for failing to require proof beyond a reasonable doubt.[6] And, in fact, the U.S. Supreme Court has found that the clear and convincing evidence standard may be used as the burden of proof in a civil commitment, noting that a lesser burden would deny the mentally ill person due process of law.[7]

[3] Although Christopher does not challenge the constitutionality of § 43-247(3)(c), we find the reasoning utilized by the U.S. Supreme Court to be persuasive with respect to our ultimate conclusion that "clear and convincing evidence" is the appropriate standard:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have in the correctness of factual conclusions for a particular type of adjudication."[8]

The U.S. Supreme Court recognized that different standards of proof are necessary in civil commitment proceedings as opposed to criminal prosecutions, because civil commitment is not punitive. Furthermore, the central issue in a criminal proceeding is very different from that of a mental health commitment.

> Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric

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[5] *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009); *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981).

[6] *Kraemer v. Mental Health Board of the State of Nebraska*, 199 Neb. 784, 261 N.W.2d 626 (1978).

[7] *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

[8] *Id.*, 441 U.S. at 423, citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

> diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.[9]

Using a clear and convincing evidence standard appropriately balances the liberty interests of the subject of a commitment order with the safety of both the community and the subject.

In the present case, although the Legislature did not specify a standard of proof under § 43-247(3)(c), the statute does reference the MHCA. Mental health commitments have been made under a clear and convincing evidence standard in Nebraska for approximately the last 30 years, and we find no reason to apply a different standard of proof in a juvenile case. Christopher's first assignment of error is without merit.

2. State Produced Sufficient Evidence to Adjudicate Christopher

We next address whether the State presented sufficient evidence to adjudicate Christopher under § 43-247(3)(b) and (c).

(a) § 43-247(3)(c)

Having established the appropriate standard of proof to be by clear and convincing evidence, and keeping in mind our de novo review obligation, we first examine whether the State met its burden to prove that Christopher was mentally ill and dangerous under §§ 43-247(3)(c) and 71-908. Section 71-908 defines a mentally ill and dangerous person as someone who presents a "substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm" or, in the alternative, presents a substantial risk to himself or herself. Although the juvenile court did not explicitly specify whether Christopher was adjudged mentally ill and dangerous under § 71-908(1) or (2), given the evidence presented, we assume that Christopher was judged to be a danger to others.

The evidence presented at the adjudication hearing consisted of testimony from Smith, the psychologist who evaluated

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[9] *Id.*, 441 U.S. at 429.

Christopher, as well as testimony from Christopher's stepbrother and school counselor. Smith is a licensed psychologist with specialties in physical aggression and violence, as well as in sexual misbehaviors and sexual assaults. Smith testified that 85 percent of his practice focuses on those types of issues and that he has experience in assessing sex offenders.

Smith administered to Christopher a psychosexual evaluation and stated that he had followed Christopher's progress while Christopher was in detention. Smith also administered the "Minnesota Multiphasic Personality Inventory for Adolescents[,] Millon Inventory for Adolescents[,] Wechsler Abbreviated Scale of Intelligence[,] . . . Abel Assessment for Sexual Interest, . . . Trauma Symptom Checklist, Juvenile Sex Offender Assessment Protocol[,] and the Estimate of Risk of Adolescent Sexual Offense Recidivism."

Smith's evaluation also included the report from Christopher's younger sibling that Christopher had been sexually inappropriate and had touched him in a sexual manner. As part of his evaluation, Smith also interviewed staff at the Scottsbluff youth shelter and the county juvenile detention center. Staff at the shelter reported that Christopher was "'scary'" because he was "verbally aggressive, foul mouthed, and believe[d] that rules [did] not apply to him." Staff reported that Christopher alternated between being quiet and polite and being aggressive, defiant, and sexually inappropriate. Detention center staff also informed Smith that Christopher was generally quiet, compliant, and polite with staff, but bullied younger children.

Smith diagnosed Christopher with disruptive behavior disorder; peer, parent, and sibling relational problems; sexual abuse of a child, perpetrator; and sexual abuse of a child, victim. Smith testified that Christopher was at a moderate to high risk to reoffend sexually. In his report, Smith stated that when Christopher's test scores were considered in light of Christopher's personality and recent actions, his risk of reoffending was very high. Smith stated that even though Christopher knew his behavior was inappropriate, had been confronted about his behavior, and had been placed in the detention center, Christopher refused to cease acting out and refused to take responsibility for his actions.

We agree that Smith's expert testimony, coupled with the testimony of factual witnesses, discussed below, was sufficient to show by clear and convincing evidence that Christopher was a mentally ill and dangerous juvenile.

(b) § 43-247(3)(b)

Under Neb. Rev. Stat. § 43-279 (Reissue 2008), the State is required to prove beyond a reasonable doubt that Christopher is a juvenile as described by § 43-247(3)(b), in that he deports himself so as to injure or endanger seriously the morals or health of himself or others.

The evidence presented at the adjudication hearing included testimony from R.V., one of Christopher's stepbrothers. R.V. stated that he was afraid to testify in front of Christopher and was afraid that Christopher would be mad if R.V. talked about what had happened. R.V. did not respond when the State asked whether R.V. was being honest about what had happened when Christopher lived at home. The State then asked whether R.V. had ever witnessed Christopher "do anything to animals in the house." R.V. stated that on one occasion, he had watched as Christopher anally penetrated the family's bird with a stick.

After R.V. testified, the State called Bartling to impeach R.V.'s testimony by demonstrating that R.V. had changed his testimony while on the stand. As noted above, Bartling is a lieutenant with the Nebraska State Patrol and has specialized training in interviewing victims of child sexual assaults. During the course of her job, Bartling interviewed R.V. regarding allegations that Christopher had sexual contact with R.V. and another sibling. Bartling testified that R.V. reported that Christopher had slapped R.V.'s buttocks and fondled his genitals.

Christopher's school counselor stated that Christopher had been suspended on a number of occasions. Christopher continued to engage in inappropriate behaviors even though Christopher admitted that he was acting inappropriately. On one occasion, Christopher shoved another student into a locker and punched him in the head. And at an earlier detention hearing held on June 29, 2010, Christopher's caseworker testified

that Christopher's parents did not feel that their other children would be safe if Christopher was in the home.

We find that such is sufficient to show that Christopher deports himself so as to injure or endanger seriously the morals or health of himself or others. As such, we agree with the juvenile court that the State proved beyond a reasonable doubt that Christopher is a juvenile described by § 43-247(3)(b). Christopher's second assignment of error is without merit.

3. Trial Court Did Not Err in Overruling Motion for *Daubert*/*Schafersman* Hearing

We next address Christopher's argument that the juvenile court erred by overruling his motion for a *Daubert*/*Schafersman* hearing. Christopher filed a written objection to Smith's testimony and asked for a *Daubert*/*Schafersman* hearing, anticipating that Smith would be relying on actuarial tables and other "'scientific theories' of unknown origin or validity."[10] The district court overruled Christopher's motion and allowed Smith to testify only as to the § 43-247(3)(c) allegations, implicitly determining that no *Daubert*/*Schafersman* hearing was necessary to allow a psychologist to testify as to his diagnosis of Christopher as well as the diagnostic tools used.

[4,5] As a preliminary matter, we note that *Daubert*/*Schafersman* requires the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue, and therefore helpful to the trier of fact.[11] We also recognize that in a bench trial, there is a presumption that the finder of fact disregards inadmissible evidence.[12]

Christopher was given the opportunity to cross-examine Smith as to the psychological measures Smith used in diagnosing Christopher, thus giving the juvenile court an opportunity to review Christopher's claims that the tests were invalid or unreliable. Therefore, we presume that the juvenile court

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[10] Brief for appellant at 18.

[11] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 1; *Schafersman v. Agland Coop, supra* note 1.

[12] See *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

disregarded any evidence that was inadmissible and that it made a determination as to the validity and relevance of Smith's evaluation and diagnosis of Christopher.

Although we have not previously addressed the requirement of a *Daubert*/*Schafersman* hearing in the context of an adjudication under § 43-247(3)(c), we did recently address what is required in order to request a *Daubert*/*Schafersman* hearing. In *State v. Casillas*,[13] the defendant objected to the introduction of testimony regarding the horizontal gaze nystagmus (HGN) test. The defendant claimed that the HGN test constituted scientific evidence and should have been subjected to a *Daubert*/*Schafersman* hearing. We held that all specialized knowledge generally falls under the rules of *Daubert*/*Schafersman* and that HGN involves scientific knowledge. Thus, we found the trial court erred insofar as it indicated that HGN fell outside of *Daubert*/*Schafersman*. But we noted that even as to specialized evidence, what specific duties *Daubert*/*Schafersman* imposed depended upon the circumstances. A pretrial hearing under *Daubert*/*Schafersman* is not always mandated. Moreover, we concluded that the extensiveness of any such hearing is left to the discretion of the trial court.[14]

[6,7] We then found that to sufficiently call specialized knowledge into question under *Daubert*/*Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.[15] Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert*/*Schafersman* should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert*/*Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources,

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[13] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[14] *Id.*

[15] *Id.*

the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.[16]

Christopher's motion did not meet these requirements. His written objection did not state any bases for challenging the admissibility of the evidence. Christopher merely stated that he "object[ed] to the expert testimony of Dr. Alan Smith at trial without a Daubert Shatesman's [sic] hearing." In addition, during one of the hearings prior to adjudication, Christopher's attorney objected to the testimony of Smith, saying, "Which, I think the State would be incumbent, if they want him—typically, I'd expect him to testify as to actuarial risk factors and things like that."

Christopher had the opportunity to cross-examine Smith about the accuracy and reliability of the psychological measures and did not object with any kind of specificity to Smith's testimony. As such, we conclude that Christopher did not sufficiently preserve any claim under *Daubert/Schafersman*. Christopher's third assignment of error is without merit.

4. Smith Testified to Reasonable Degree of Medical or Psychological Certainty

Finally, Christopher argues that Smith did not testify to a reasonable degree of medical or psychological certainty. Apparently, Christopher's argument is based on the fact that Smith failed to use the words "to a reasonable degree of medical or psychological certainty" to confirm his diagnosis of Christopher.

[8] As an initial matter, this court has never required those words in order to consider an expert's testimony to be sufficiently accurate. We addressed the sufficiency of an expert's testimony to establish dangerousness in *In re Interest of G.H.*[17]:

> G.H. also argues that [the expert's] opinion of dangerousness, expressed entirely in terms of risk, is insufficient

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[16] *Id.*

[17] *In re Interest of G.H.*, 279 Neb. 708, 717-18, 781 N.W.2d 438, 444-45 (2010).

> to support a finding that G.H. is a dangerous sex offender. G.H. contends that [the expert's] opinions establish nothing more than an increased risk or possibility that he will reoffend without treatment. According to G.H., this is insufficient under cases holding that in order to support civil commitment in civil mental health proceedings, a medical expert must establish that the subject poses a danger to others to a reasonable degree of medical certainty.
>
> This is the same standard that we require for expert medical opinion to establish causation under tort law. In that context, we have held that although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.

[9] We also stated that "the nonexistence of an instrument which will perfectly predict future conduct does not preclude the use of rationally based instruments developed and validated by mental health professionals."[18] As in *In re Interest of G.H.*, the testifying psychologist—in this case, Smith—used various peer-reviewed risk assessments in conjunction with information from other parties and clinical interviews.[19] Smith testified that Christopher's risk of reoffending was moderate to high, and that Christopher had about an 80-percent chance of repeating sexual behaviors. Smith's testimony established that it is more likely than not that Christopher will repeat his behaviors. Viewed in its entirety, Smith's testimony established that Christopher is significantly likely to reoffend. Christopher's final assignment of error is without merit.

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[18] *Id.* at 717, 781 N.W.2d at 444.

[19] See *In re Interest of G.H., supra* note 17.

VI. CONCLUSION

We find that the State is required to show by clear and convincing evidence, rather than "beyond a reasonable doubt," that a juvenile is mentally ill and dangerous under § 43-247(3)(c). The State presented sufficient evidence to adjudicate Christopher under both § 43-247(3)(b) and (c). The juvenile court did not err in admitting psychological testimony without a *Daubert/Schafersman* hearing. And finally, the expert psychological testimony given in this case satisfied the "reasonable degree of medical certainty" standard even though that specific phrase was not used by the testifying expert.

AFFIRMED.

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