THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

AUGUST 5, 2011 and JANUARY 12, 2012

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXXII

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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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	Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
		Andrew R. Jacobsen	Lincoln
		Stephanie F. Stacy	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gary B. Randall	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
		Duane C. Dougherty	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	Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
		Richard A. Birch	North Platte
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
		Travis P. O'Gorman	Alliance

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	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
		Sheryl L. Lohaus	Omaha
		Thomas K. Harmon	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
		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	Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
		Arthur S. Wetzel	Grand Island
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
Thomas E. Stine	Omaha

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OMAID M. ZABIH
DANIEL JAMES ZIEG

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No. S-10-885: **State v. Dixon**. Dismissed. Connolly, J. Wright, J., not participating.

No. S-10-1135: **State v. Neelands**. Affirmed. Per Curiam. Wright, J., not participating in the decision.

No. S-11-013: **In re Interest of Olga M**. Affirmed. McCormack, J. Heavican, C.J., participating on briefs. Stephan, J., not participating.

No. S-11-094: **State v. Tamayo**. Affirmed. Heavican, C.J. Wright, J., not participating in the decision.

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No. S-11-270: **State v. Sing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

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No. S-11-350: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-11-459: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-11-494: **State v. Lyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

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No. A-10-160: **Salumbides v. Salumbides**. Petition of appellant for further review denied on August 24, 2011.

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No. A-10-652: **No Frills Supermarkets v. Brookside Omaha Ltd**. Petition of appellant for further review denied on August 24, 2011.

No. A-10-662: **Mlakar v. Union Pacific RR. Co**. Petition of appellant for further review denied on November 23, 2011.

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No. A-11-078: **State v. Johnson**. Petition of appellant for further review denied on August 24, 2011.

No. A-11-104: **State v. Fletcher**. Petition of appellant for further review denied on December 14, 2011. See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

No. A-11-106: **State on behalf of Paulson v. Paulson**. Petition of appellee for further review denied on September 28, 2011.

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No. S-11-182: **Engler v. Accountability & Disclosure Comm**. Petition of appellant for further review sustained on November 30, 2011.

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No. A-11-198: **State v. Manning**. Petition of appellant for further review denied on September 21, 2011.

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No. A-11-241: **Brundo v. Claus**. Petition of appellant for further review denied on August 24, 2011.

No. A-11-261: **DeLeon v. Reinke Mfg. Co**. Petition of appellant for further review dismissed on September 20, 2011, as premature.

No. A-11-261: **DeLeon v. Reinke Mfg. Co**. Petition of appellant for further review denied on November 23, 2011.

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Nebraska Supreme Court

In Memoriam

Chief Justice William C. Hastings

Nebraska Supreme Court Courtroom
State Capitol
Lincoln, Nebraska
December 9, 2011
1:30 p.m.

Proceedings before:
SUPREME COURT
Chief Justice Michael G. Heavican
Justice John F. Wright
Justice William M. Connolly
Justice John M. Gerrard
Justice Kenneth C. Stephan
Justice Michael McCormack
Justice Lindsey Miller-Lerman

Chief Justice William C. Hastings

Proceedings

CHIEF JUSTICE HEAVICAN: Good afternoon and welcome to everyone this afternoon. The Nebraska Supreme Court is meeting in special session on this 9th day of December, 2011, to honor the life and memory of former Supreme Court Chief Justice, William C. Hastings, and to note his many contributions to the legal profession.

I would like to start this afternoon by introducing my colleagues here on the bench. To my immediate right is Justice John Wright from Scottsbluff, and we would like to give him a special welcome being back with us today. To his right is Justice John Gerrard of Norfolk. And to Justice Gerrard's right is Justice Michael McCormack of Omaha. To my immediate left is Justice William Connolly of Hastings, and to his left is Justice Kenneth Stephan from here in Lincoln. And to Justice Stephan's left is Justice Lindsey Miller-Lerman of Omaha.

The Court further acknowledges the presence of the Hastings family here today and I'm going to ask you to please stand, if you would, when I call your name. And first up, of course, is Chief Justice Hastings' wife, Julie. Thank you very much. And the rest of the family can stand also. Present are Chief Justice Hastings' daughter Pam and her husband Jim Carrier. Their son, Daniel, was unable to be here today because he is at basic training for the Nebraska Army Guard in Fort Jackson, South Carolina. We also have son and daughter-in-law Chuck and his wife Jeanne Hastings of Hastings, their daughters Diane and Beth and Diane's husband Dustin were unable to be here today because of work commitments. And finally, son Steve Hastings is also with us here today. So, thank you very much all of the Hastings family and you may be seated. We certainly appreciate your presence here.

I would also like to welcome and recognize former members of the Nebraska Supreme Court and members of the Nebraska Court of Appeals who are here with us today. Other members of the judiciary and members of the bar and other guests, welcome to you all.

At this time, the Court recognizes Former Nebraska Supreme Court Chief Justice C. Thomas White. Justice White is the Chairman of the Supreme Court's Memorial Committee and he will now conduct the proceedings for us today.

Good afternoon, Mr. Chief Justice White.

CHIEF JUSTICE WHITE: Good morning, Your Honor. Good afternoon, rather. May it please the Court, four speakers have been arranged to honor the memory of Chief Justice Hastings. The first of these speakers is the Honorable D. Nick Caporale, former trial judge of the Fourth District in Omaha, Nebraska, and Justice of this Supreme Court.

Judge Caporale.

JUSTICE CAPORALE: Good afternoon, Your Honors. Ladies and gentlemen, members of the Hastings family, we find ourselves assembled in a chamber that echoes the life of one who contributed much to the jurisprudence of this state and to the work and legacy of this Court. William Charles Hastings, who preferred to be simply called Bill, spent almost two thirds of his 89 years on this life serving the law and half of that as a full-time jurist, an unusual accomplishment indeed.

Justice Hastings had considered a variety of careers, as a forest ranger, perhaps, as an engineer, or as a Navy man; however, color blindness kept him from the Naval Academy, and he returned to the interest he acquired in the law taking courses in public speaking and debate at Newman Grove High School. He entered the University of Nebraska. World War II intervened and he discharged his obligations to his country during that conflict by serving as a fingerprint specialist with the FBI and in the Army as well. Having discharged those duties, he returned to law school and began his legal career with what became known as Holland, Chambers, Dudgeon, and Hastings, started that in 1948. While with the firm, he served from time to time as a part-time county court judge. He remained with

the firm until 1965 when he was appointed to the district court bench by then-Governor Morrison where he served with distinction and was appointed to this Court by then-Governor Thone in 1979. In 1987, he was appointed Chief Justice by then-Governor Orr, and he remained in that capacity until retirement in 1995.

I would expect that if Justice Hastings were asked to isolate what he perhaps thought to be his most significant professional achievement, he would point to his leadership role, although he would not characterize it as such, in the establishment of the Nebraska Court of Appeals, which has demonstrated itself to be a worthy servant of the rule of law in this state, and without the existence of which the appellate process would take far more time than reasonableness would allow.

Those few words tell us what Judge Hastings did. They do not tell us who he was. And though others will address that topic, I'd like to spend a moment or two reflecting on my relationship with Judge Hastings whom I first met as a trial lawyer appearing before him as a trial judge. What I remember is that I tried a couple cases before him, and that's all I remember about those cases. And that's not a complaint. It's a compliment, because it means that the cases were tried without drama. If I must be completely candid, I suppose it's also possible I don't remember them because I lost them.

(Laughter.)

But, my later experiences with Judge Hastings convinced me that they became forgettable because there was no drama.

What I learned in serving with Judge Hastings on this Court is that he approached all issues, legal or administrative in nature in the same calm, informed, deliberative way. It was that style which earned him justly the reputation of doing what needed to be done, when it needed to be done, in a fair and compassionate way. It was that same style which earned him a number of professional recognitions and awards including the George Turner Award by the Nebraska State Bar Association and the Herbert Harley Award presented by the American Judicature Society.

In sum, the recurring echoes of Bill Hastings make this a better chamber than it would be without them. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Justice Caporale.

Chief Justice White.

CHIEF JUSTICE WHITE: The next speaker, Your Honor, is Pam Carrier, a retired member of the bar of this Court and Judge Hastings' daughter.

CHIEF JUSTICE HEAVICAN: Thank you.

MS. CARRIER: May it please the Court, members of the Court, past members of this Court, members of the Appellate Court, judges, lawyers, staff and friends, my family and I both present and those unable to attend extend our appreciation to you for your attendance today and for the Supreme Court's tradition to honor Court members after their death. Such events and the memories and condolences from friends and acquaintances since Dad's death mean so much to all of us, but would truly embarrass Dad. Dad said, "I'm just a guy who's up there on the bench because of circumstances. I happened to be at the right place at the right time." As he said, "In my life, I do not think I ever pointed to any of the things that came my way. I did what I did because someone asked me to."

I remember Dad's professional career for three major changes that were made during his term on the Court, and specifically as Chief Justice. Dad would never let me say they were his ideas or that he was responsible for them occurring, as he always reminded everyone that the Court was seven justices and none of them could do anything alone. However, I firmly believe the Gender Fairness Task Force, the Alternative Dispute Resolution system, and the Court of Appeals should be known as his legacies to the Nebraska justice system. Yet these changes occurred because Dad listened to people and respected them and their ideas. He then worked collaboratively with others to get these changes made. He worked well with the other members of the Supreme Court, with the other judges in the state judicial system, with the Legislature, with lawyers, and with the community at large.

Asked why he had agreed to accept the position of Chief Justice at the age of 66, he said he felt everyone had a duty to give back to society if they were able to do so. That duty

to return something to the community was the beacon leading his professional life and one of his legacies to his children and grandchildren and others around him.

In presenting a speech to the National Honor Society in his hometown, he reminded them of the four elements of the National Honor Society, leadership, scholarship, character, and service. He commented on the first three elements and then said, "The most important of all is service, for without service, you've wasted the other three. Talents not shared are not talents. Service is simply paying your dues for being a member of society." His service to his community included president of the Junior Chamber of Commerce, president of the Child Guidance Center, on the board of the Lincoln Symphony, as well as serving as deacon, elder, trustee and president of our church's foundation. He was a life-long member of the Masonic Lodge in Newman Grove, and active in Scottish Rite in Lincoln where he participated in many ceremonies over the years and was awarded the Honorary 33rd Degree.

During his retirement years, he was on the State Retirement Board and the Lincoln Parks and Recreation Board. He was a strong financial supporter of the United Way and other charitable community organizations throughout his life, again believing that it was his duty to give back. I have been told by persons who were on boards with him that he would listen to everyone going back and forth on an issue for a while, and then he would make a statement that clarified the issue for both sides and often resolved any dispute. That, in my opinion, was evidence of his wisdom and strength of character.

His devotion and participation in the church was not a duty for him, but a faithful commitment. He was at church every Sunday it was possible and was an active participant. I'm always surprised at church when people remark to me that he was always so nice to them despite the fact that he was Chief Justice.

(Laughter.)

He always respected everyone no matter what their station in life. He never felt that he was better than anyone else. My brothers and I grew up assuming that was how everyone should

act. As an adult, I now see how special Dad was in treating everyone with equal respect. Dad was faithful in his prayers right up to the end. He prayed every night, some of which were repeated each night, but otherwise having a fresh conversation with God each day.

Dad was proud of his hometown, Newman Grove, and returned often to attend reunions and visit friends still there. Again, in the speech he made to the National Honor Society, he told the inductees to always play over their heads and that would lead to their success. He said he used to play tennis in his youth against older players. He said, "I usually got beat, but every once in a while I won. I feel I became a better tennis player by playing with tennis players better than I." He went on, "Same thing on the bench. After 18 years of practicing law, the opportunity to be a judge came up and I had a lot of doubts about whether I had the ability to do it. That's when I had this concept of playing over my head come into it again. I thought, well, if I play over my head, maybe I can make it, and I've been doing that ever since." When asked to be Chief Justice, he said, "I knew I was going to be—have to play over my head again," and he did, and I believe he won.

In spite of Dad's professional and community obligations, family was always his priority. My mother, Julie, and Dad were married for 63 years and had a true partnership in everything they did. Dad would be the first one to give Mom full credit for his successes. She was beside him and encouraged him all along the way. I am especially grateful for the opportunities that they had to travel in attending the chief justices conferences, that twice a year for over eight years they were able to travel to wonderful places with all their activities and arrangements planned for them. Planning and traveling was not something Dad enjoyed, but Mother did, and so with these trips, Mom was able to see many wonderful places while Dad participated in the meetings. These trips are part of Mom's special memories.

Dad's grandchildren would have loved to have been here today to celebrate their grandfather. Each one of them was influenced by him in a unique way. An example is that Dad was in the Army during World War II, and yet none of us

kids or Mom had ever heard stories of that time. But our son, Daniel, who has now enlisted in the Army Guard, told us of stories Dad had told him at the time when we were sharing memories after his death. We learned many things we did not know.

An incident occurred with a nurse aide near the end of Dad's life when he just didn't feel like eating, which showed that he remained in charge until the end. She was trying to get him to eat and told him it was against the law to starve yourself to death.

(Laughter.)

And Dad looked up at her and into her eyes and smiled, "Not in my court."

(Laughter.)

Dad's legacy will live on through the improved justice in Nebraska and he will live on in the hearts of his family and friends forever. I trust that each of us here today will be comforted by our memories of Chief Justice William C. Hastings, my dad. Thank you, again, for this special session of the Nebraska Supreme Court honoring Dad's memory. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you, Ms. Carrier, for that wonderful presentation.

Chief Justice White.

CHIEF JUSTICE WHITE: Justice, Judge William Blue served on the trial bench with Bill Hastings. Many of the stories—and we're lucky some of them we should be able to get him to share.

(Laughter.)

Judge Blue.

JUDGE BLUE: I don't know what I can say after these presentations, but I'll try. I feel quite privileged to be asked to appear here to say some words about Chief Justice Bill Hastings who passed away last summer. As you heard, Bill served in the FBI, and in the artillery—as a member of the artillery in World War II. He graduated from the University of Nebraska Law School—Law College, when it was located on 10th Street. Maybe some of us, the old-timers, graduated in that old building on 10th Street. Now, of course, they have a real palace.

He practiced law when he graduated. He practiced law with Guy Chambers' firm, which was a very good law firm and I'm sure he learned a lot there. I hope not too much from Mr. Holland, but he learned a lot there.

(Laughter.)

He was a good lawyer and he presented cases, tried a lot of civil cases and tort cases in the district court. He was, essentially he was served—I don't know how this happened, but he was appointed as a part-time county judge. The history of that's very interesting. The county judge before—Ralph Slocum was county judge then and they—county judge before Ralph Slocum, I won't mention the name, refused to take any civil cases or criminal cases, no preliminary hearings, just the estate matters, and he did perform a few marriages, but when Ralph Slocum was appointed judge, he agreed to do the criminal stuff, all the traffic stuff, and civil matters along with all the probate matters. And so it was important that he have a helper and Judge Hastings was appointed. This is where I think we became really acquainted. We were in a little courthouse and my office was across the aisle from the County Court, and so it was very convenient. We had talked to—the Lincoln Police Department would bring the people over there and we'd violate all kinds of brand rules—

(Laughter.)

—and get confessions of everybody, then slip across the street and have a preliminary hearing. And it worked pretty good, really.

And he served, as I say, a deputy county attorney and things became—yeah, part-time county attorney and things became a little more up to date in our procedures. And then he became—the county court began to take more civil and criminal matters. And so Judge Hastings did acquire a lot of experience there. He was appointed district judge and he was the first—the procedure was in those days, they'd divide up the duties and, of course, the new judge always got the divorce court, so he had the divorce court for two years and then he'd move on to the criminal court and the civil court. He served very well, very fairly in all courts he was in, the criminal courts, divorce court, civil courts. He wanted matters to be handled efficiently

and he wanted people to be on time to the court proceedings. I found that out when I was a deputy county attorney. I was visiting in the hall with somebody, with some friend, and Judge Hastings was on the bench. The defendant was there, the defendant's attorney, Clem Gaughan was there, the sheriff was there. Everybody was there except the deputy county attorney. So, I finally strolled in. And I can tell you about the efficiency of Judge Hastings. I really felt the brunt of it there. And I was never late again.

(Laughter.)

He was absolutely right. We had one district judge who would get everybody assembled there, then he'd stroll out the door and have a smoke, so we were kind of used to that business, but not with Judge Hastings.

Bill was an excellent judge in every way. He was fair and he had a great family and children, as we know now. Two are lawyers, one has a doctor's degree, so he has a great family.

Judge Hastings was a very good member of the Supreme Court and Chief Justice. When I was a lowly district judge, we'd come up here and occasionally fill in for a judge who was ill or something, and so I got to know the procedures very well. I think it started with Paul White when I'd come up here and Paul White was the Chief Justice, so I got kind of used to that. One little story about that. I was asked by Paul White, Chief Justice Paul White, to hear this case. So we were in the room and I came in there early and he turned around and said, "What the hell are you doing here?" And I said, "I think you appointed me to hear this case." "Oh, okay."

(Laughter.)

Anyway, but Judge Hastings ran quite an efficient and strict Supreme Court. I think that his greatest accomplishment was helping to establish the Court of Appeals. At that time, if you recall, it was almost chaos. There were so many cases on appeal and they tried all kinds of things. They started a special court that just contained district judges, but it was really a supreme court, and everybody realized, and certainly the Chief Justice realized there had to be some intermediate court and he was very important in establishing the Court of Appeals. He saw people downtown and asked for their support. And as

a result, we have the Court of Appeals, and I don't know what would happen without that, because it was a disaster when so many appeals were filed.

He was really a good guy. I think we forgot about our little fuss. I had lunch with him almost every day. We'd kind of sneak out and have lunch together by ourselves, and I miss him very much. I've had contact with him since he retired and I retired. Yeah, he was a good man and he was a great judge. He was a good friend and great to know. Thank you.

CHIEF JUSTICE HEAVICAN: Thank you very much, Judge Blue.

Chief Justice White.

CHIEF JUSTICE WHITE: May it please the Court, that completes the last of the formal speakers, but I'd like the Court to note something. That the passing of Judge Hastings was the passing of the last of the World War II warrior judges, people who sailed into harm's way, many of them into active combat, including Judges Fahrnbruch and Clinton, Judges McCown and Judge Grant. Judge Hastings and Judge Boslaugh as artillerymen. The last of them are gone. It is indeed the passing of people who served their country in time of war and returned to serve them in time of peace in an honorable fashion.

I served with Bill Hastings on the district bench since 1965. He followed me onto the Supreme Court. I was honored to follow him as Chief Justice. I leave you with the memory of him as a good man, a good friend, a great judge, and a fallen comrade. Thank you, Your Honors, for this appointment and your attention.

CHIEF JUSTICE HEAVICAN: Thank you very much, Chief Justice White. The Court so notes the passing of Chief Justice Hastings and the passing of our greatest generation.

I take this final opportunity to note for those present that these entire proceedings have been memorialized by the Court. After these proceedings have been recorded, which they have been today, they will be preserved on the Court's website and also published. On behalf of the Nebraska Supreme Court, I extend our appreciation to Former Chief Justice C. Thomas White, again, who chairs and chaired today the Court's memorial committee. And also, again, thanks to all of the presenters

here today for your excellent presentations. This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage you all, however, to stay around and meet and greet friends and acquaintances and we here on the bench will come down and participate hopefully in some conversation with you now. With that, the Court is adjourned and again, thank you all very much for being here.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

HASTINGS STATE BANK, APPELLEE, V. MIRIAM MISLE, IN HER CAPACITY AS TRUSTEE OF THE JULIUS MISLE REVOCABLE TRUST, APPELLANT.

804 N.W.2d 805

Filed August 5, 2011. No. S-10-549.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

James B. Cavanagh and Adam E. Astley, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Richard P. Jeffries and Megan S. Wright, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HEAVICAN, C.J., GERRARD, STEPHAN, and MILLER-LERMAN, JJ., INBODY, Chief Judge, and MOORE, Judge.

GERRARD, J.

Hastings State Bank (the Bank) sought to enforce a commercial guaranty against Miriam Misle in her capacity as trustee of the Julius Misle Revocable Trust. The Bank claimed that Julius Misle had signed a guaranty in favor of the Bank, which guaranteed debt owed by NOVI, LLC. The district court determined that Julius' trust was liable for up to $500,000 in principal on the commercial guaranty and granted partial summary judgment in favor of the Bank. After trial, the district court found in favor of the Bank and entered judgment in the amount of $500,000. Miriam appeals. For the following reasons, we affirm the judgment of the district court.

BACKGROUND

Julius and Miriam's daughter and son-in-law are the sole members of NOVI. On October 18, 2006, their son-in-law, Jeffrey Mellen, acting on behalf of NOVI, signed a promissory note with the Bank in the amount of $500,000 payable to the Bank on April 18, 2007. On the same day that Jeffrey signed the note, Julius executed a commercial guaranty, guaranteeing payment of the indebtedness of NOVI on the $500,000 note. The face of the note reflects that it is payable on demand. However, the guaranty treats the note as a line of credit. The guaranty states that Julius authorized the Bank to extend additional loans to the borrower and to change the time for payment without notice or demand and without lessening Julius' liability under the guaranty.

After the execution of the guaranty, over a period of 2 years, Jeffrey and the Bank executed several change-in-terms agreements, which increased Jeffrey's maximum line of credit and extended the maturity date of the loan. The undisputed evidence established that $1,900,000 was advanced on the note and subsequent change-in-terms agreements and that the maturity date was extended to April 18, 2008. The record reflects that some of the moneys advanced after execution of the change-in-terms agreements were deposited into an account owned by EDM

Corporation (EDM). EDM manages NOVI, and Jeffrey is the president of EDM.

On October 10, 2007, Julius died. When the promissory note became due, NOVI failed to pay on its obligation. On October 8, 2008, the Bank issued a written demand to Miriam in her capacity as the trustee for payment of the amount the Bank claimed was due on the note guaranteed by Julius: $1,999,579.38. On October 10, the Bank filed a complaint in the county court, later transferred to the district court, against Miriam, claiming that the trust was liable for the $500,000 initial loan as well as the amounts loaned pursuant to the subsequent change-in-terms agreements, in the total amount of $1,999,579.38.

Both parties moved for summary judgment. Miriam asserted that the Bank failed to provide sufficient notice of its claim pursuant to Neb. Rev. Stat. § 30-3850 (Reissue 2008), that the Bank failed to state a claim for relief, that the Bank did not give valuable consideration for Julius' guaranty, that the Bank had a duty to disclose certain information about NOVI and Jeffrey, that the extension of additional credit to NOVI released Julius from the obligation of the guaranty, and that the Bank breached the implied covenant of good faith and fair dealing. The district court found Miriam's defenses and counterclaims were without merit and refused to grant summary judgment in her favor.

In support of the Bank's motion for summary judgment, it asserted that the trust was liable for the entire amount due under the promissory note and its amendments and sought partial summary judgment on the amount of the original note, $500,000. The district court noted that the language of the guaranty did not permit the Bank to increase the maximum principal amount of the indebtedness guaranteed by Julius, so it determined that Julius was not bound by the subsequent change-in-terms agreements. The court determined that the maximum amount for which Julius could be liable under the guaranty was $500,000, and it granted partial summary judgment in the Bank's favor.

Trial was then held to determine for what amount, up to $500,000, the trust was liable under the guaranty. The Bank

entered into evidence an affidavit of its former vice president, who attached copies of the loan history and payoff statement for the note at issue. Ultimately, the district court determined that the amount due under the note underlying the guaranty exceeded $500,000 and found that the trust was liable in the amount of $500,000. Miriam appeals.

ASSIGNMENTS OF ERROR

Miriam assigns that the district court erred in (1) concluding that the Bank's notice to the trust was sufficient under § 30-3850; (2) finding that the Bank's material alteration of the note did not void the purported guaranty; (3) finding that the Bank had no legal duty to make disclosures to Julius concerning the terms of the transaction, the Bank's history with the borrower, or the circumstances surrounding the note; (4) granting partial summary judgment in favor of the Bank; (5) denying Miriam's motion for summary judgment; (6) finding that the outstanding liability on the note subject to the purported guaranty was $500,000; and (7) entering judgment for the Bank in the amount of $500,000.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.[1]

[2,3] 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, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

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[1] See *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

[2] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

[3] *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 786 N.W.2d 902 (2010).

[4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[4] The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[5]

ANALYSIS

Notice Under § 30-3850

Miriam argues that the Bank failed to provide sufficient notice to the trust pursuant to § 30-3850. Miriam argues that because the Bank issued a written demand requesting payment of $1,999,579.38, rather than the $500,000 amount of the guaranty, she, as the trustee, was not provided with sufficient notice of the claim against the trust. We disagree. Section 30-3850(a)(3) states, in relevant part:

> A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after the death of the decedent.

The notice provision contained in § 30-3850 merely required the Bank to issue to Miriam written notice of the claim against the estate before commencing the proceeding. Section 30-3850 does not require that the amount requested match the amount ultimately recovered. It is undisputed that the Bank sent notice before commencing the proceeding and that such proceeding was commenced within 1 year. The Bank's timely notice to Miriam of the amount claimed due under the guaranty, $1,999,579.38, put her on notice of the claim against the estate and complied with the notice requirements of § 30-3850. The

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[4] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[5] *Id.*

district court therefore did not err when it denied Miriam summary judgment after determining that notice was sufficient.

Extension of Additional Credit to NOVI

Miriam claims that when the Bank extended additional credit to NOVI, those extensions materially altered the note and voided Julius' obligation on the guaranty. Miriam argues that under Nebraska law, "'[a]ny material change in the terms of [the] principal contract which is covered by the guaranty agreement, made without the consent of the guarantors will release them from the obligation of the guaranty.'"[6] Miriam also cites authority that "'[w]here the principal contract, which is described and covered by the guaranty agreement is, without the consent of the guarantors, materially changed or varied from such contract as it is described in such agreement, the guarantors will be released.'"[7] Miriam also cites other sources which generally state that a guarantor is discharged when a creditor has unilaterally increased the amount of the underlying obligation.

However, unlike the authority cited by Miriam, here, the guaranty specifically stated that the guarantor authorized the lender, without notice or demand and without lessening the guarantor's liability under the guaranty, to extend additional loans to the borrower and change the time for payment without notice to the guarantor. As the district court correctly noted, when Julius signed the guaranty, he acknowledged that the Bank's additional loans would not lessen his obligation under the guaranty.

Miriam notes that the guaranty authorized the Bank "'to make one or more additional secured or unsecured loans to the Borrower.'"[8] Miriam argues that the Bank's subsequent advances to NOVI were not "'additional loans'" as contemplated by the guaranty, but were in fact modifications of the existing note

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[6] Brief for appellant at 23, quoting *Bash v. Bash*, 123 Neb. 865, 244 N.W. 788 (1932).

[7] *Id.*, quoting *Hunter v. Huffman*, 108 Neb. 729, 189 N.W. 166 (1922).

[8] Reply brief for appellant at 6.

which discharged Julius' liability under the guaranty.[9] But Julius specifically acknowledged that fluctuations in the aggregate amount of the indebtedness would occur.

The guaranty states that it "covers a revolving line of credit and it is specifically anticipated that fluctuations will occur in the aggregate amount of the Indebtedness. Guarantor specifically acknowledges and agrees that fluctuations in the amount of the Indebtedness . . . shall not constitute a termination of this Guaranty." Thus, it does not matter whether the subsequent amounts loaned to NOVI were viewed as additional loans under the guaranty or were advanced under the revolving line of credit guaranteed by Julius for the purpose of determining whether the subsequent loans terminated Julius' obligation under the guaranty. Julius agreed that additional loans could be made without reducing his obligation and agreed that fluctuations in the aggregate amount of the indebtedness did not terminate the guaranty. The fact that the Bank subsequently loaned additional moneys to NOVI does not discharge Julius' obligation under the guaranty, and the district court did not err when it so found.

Duty to Disclose

Miriam argues that the Bank had a duty to disclose to Julius the terms of the transaction, the Bank's history with the borrower, and the circumstances surrounding the note. We first note that the terms of the guaranty do not impose a duty on the Bank to disclose to Julius information regarding either NOVI or Jeffrey. Rather, the guaranty specifically states that Julius had asked to sign the guaranty, that the Bank made no representations as to the creditworthiness of NOVI or Jeffrey, and that Julius had adequate means of knowing and keeping abreast of NOVI's financial condition.

Though the guaranty itself did not impose a duty on the Bank to disclose information regarding NOVI or Jeffrey, we have previously held:

> A duty of disclosure may arise when the creditor knows or has good grounds for believing (1) the surety is being

[9] *Id.* at 7.

> deceived or misled or (2) the surety has been induced to enter the contract in ignorance of facts materially increasing his risks, of which the creditor has knowledge and the opportunity to disclose prior to the surety's acceptance of the undertaking.[10]

However, deception or ignorance of the facts is not presumed; there must be some evidence that would put the lender on notice that the surety was being deceived or was ignorant of the facts.[11] Miriam had the burden of producing such evidence, and no such evidence is contained in the record.

Though Miriam states that the Bank had knowledge that Jeffrey and his other corporation, EDM, had "massive" outstanding loans,[12] that the Bank's directors were concerned about Jeffrey and EDM's ability to repay, and that EDM had an overdrawn checking account at the time of the $500,000 loan, Miriam did not present evidence that the Bank knew or had grounds to know that Julius was being deceived or misled, or that Julius was induced to enter the guaranty in ignorance of the facts. And again, Julius represented that he requested the guaranty, that the Bank made no representations to him as to the creditworthiness of NOVI or Jeffrey, and that he had adequate means of knowing and keeping abreast of NOVI's financial condition. Accordingly, we conclude that the district court did not err when it determined that the Bank did not owe Julius a duty to disclose the financial condition of NOVI or Jeffrey.

Consideration

Miriam also argues that Julius did not receive valuable consideration to support the guaranty, because the amounts loaned to NOVI exceeded the legal lending limit of the Bank. But whether the amounts loaned exceeded the legal lending limit of the Bank is not relevant to the issue of valuable consideration.[13]

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[10] *Bock v. Bank of Bellevue*, 230 Neb. 908, 917, 434 N.W.2d 310, 316 (1989).

[11] See *id.*

[12] Brief for appellant at 28.

[13] See *Schuyler State Bank v. Cech*, 228 Neb. 588, 423 N.W.2d 464 (1988).

Generally, sufficient consideration for an agreement will be found if there is some benefit to one of the parties or a detriment to the other.[14] It is undisputed that the Bank agreed to, and in fact did, advance at least $500,000 on the note which Julius guaranteed. That served as a detriment to the Bank and constituted consideration sufficient to support the agreement. And though Miriam argues that no valuable consideration exists because the advances on the loan were not deposited in accounts belonging to NOVI, the "'benefit rendered need not be to the party contracting but may be to anyone else at [the contracting party's] procurement or request.'"[15]

Miriam also argues that the officer who made the loan did not have the authority to do so. However, Miriam does not explain or cite authority for the proposition that a loan officer who grants a loan without authority from the officer's superior somehow transforms valuable consideration into insufficient consideration. The Bank's promise and subsequent advance of $500,000 on the note underlying the guaranty served as a detriment to the Bank, and as such, Julius received consideration for the detriment he incurred when he guaranteed the loan.

Summary Judgment

Miriam argues that the district court erred when it denied summary judgment in Miriam's favor and instead granted partial summary judgment in the Bank's favor. Miriam argues that the facts, viewed in a light most favorable to her, demonstrate that a material issue of fact existed as to whether the Bank knew or had grounds to know that Julius was being deceived or misled or that he had been induced to enter into the guaranty in ignorance of the facts. However, as discussed, it was Miriam's burden to produce evidence that the Bank knew or had reason to know that Julius was being deceived or was ignorant of the facts. No such evidence is contained in the record. Therefore the evidence, even when viewed in a light most favorable to

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

[15] *Bock, supra* note 10, 230 Neb. at 914, 434 N.W.2d at 314, quoting *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

Miriam, reveals that there exists no genuine issue of material fact as to whether the Bank knew or should have known that Julius was being deceived or misled or that he had been induced to enter the guaranty in ignorance of the facts.

Miriam also argues that the district court erred when it granted partial summary judgment in the Bank's favor after determining that the guaranty was supported by consideration. As discussed, the Bank provided consideration to support the agreement, so the district court did not err when it granted partial summary judgment in the Bank's favor after it determined that the undisputed facts, taken in a light most favorable to Miriam, indicated that the parties' agreement was supported by consideration.

Miriam also argues the district court erred when it refused to grant summary judgment in her favor. However, Miriam fails to cite any evidence adduced at the hearing which would tend to show that summary judgment in Miriam's favor was appropriate. And, for the reasons previously discussed, the district court did not err when it determined that Miriam was not entitled to summary judgment as a matter of law.

District Court's Determination After Trial

The sole issue at trial was what amount was due on the $500,000 guaranty. At trial, an affidavit from the Bank's assistant vice president noted that the principal amount due under the note was $1,598,594.37 and that the total amount of principal and interest due on the note was $1,933,280.56. An accounting of the note was also entered into evidence, which indicated that a principal payment of $490,000 had been made on June 30, 2009. Miriam's counsel specifically stated that the trust did not claim to have made the $490,000 payment. The Bank did not identify the source of the payment, and Miriam did not present any evidence that the payment was made by Julius, his estate, or the trust. The district court ultimately determined that the evidence adduced at trial established that the underlying debt exceeded $500,000 and that Julius' trust was liable to the Bank in the full amount of the guaranty, $500,000.

Miriam argues that even if Julius was liable for $500,000 under the guaranty, there exists a question whether the $490,000

payment was applied to the guaranteed portion of the loan or to the unguaranteed portion. Again, Miriam does not assert that the payment was made by Julius, his estate, or the trust.

As discussed, the guaranty specifically states that it encompasses a line of credit and that the guarantor understands and agrees that it shall be open and continuous until the indebtedness is paid in full. The guaranty also states that the lender was authorized "to determine how, when and what application of payments and credits shall be made on the Indebtedness." Miriam cites no authority in support of her argument that the $490,000 payment should be credited against the $500,000 ceiling of the guaranty. In fact, there is authority to the contrary—that a guaranty that contains only a ceiling on the guarantor's aggregate liability requires the guarantor to answer for deficiencies up to the specified ceiling without respect to the amount of proceeds received by the creditor from the debtor.[16]

On appeal, we do not disturb the trial court's factual finding unless clearly wrong.[17] The only evidence adduced at trial indicated that the total amount of principal and interest due on the note underlying the guaranty was $1,933,280.56, so the district court was not clearly wrong when it determined that the evidence established that the amount due under the note underlying the guaranty exceeded $500,000. And because we determine that Julius was liable under the guaranty to answer for deficiencies up to the $500,000 specified ceiling without respect to the $490,000 payment received by the Bank, the district court did not err when it determined that Julius was liable for the full amount which he guaranteed. Miriam's claims to the contrary are without merit.

CONCLUSION

The district court did not err when it granted partial summary judgment in the Bank's favor and denied Miriam's motion for summary judgment. The district court's factual determination

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[16] See *Woodruff v. Exchange Nat. Bank of Tampa*, 392 So. 2d 285 (Fla. App. 1980).

[17] See *Davenport Ltd. Partnership, supra* note 4.

that the trust was liable for the full amount of the guaranty, $500,000, is supported by the evidence and not clearly wrong. We therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, CONNOLLY, and MCCORMACK, JJ., not participating.

THE CHICAGO LUMBER COMPANY OF OMAHA, A NEBRASKA CORPORATION, APPELLANT, V. JOANN SELVERA, AN INDIVIDUAL, ET AL., APPELLEES.

809 N.W.2d 469

Filed August 5, 2011. No. S-10-741.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory construction is a question of law that an appellate court decides independently of the trial court.
4. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. **Mechanics' Liens: Intent: Words and Phrases.** Under Neb. Rev. Stat. § 52-157(2) (Reissue 2010), one acts in "bad faith" if the claimant either knows its lien is invalid or overstated or acts with reckless disregard as to such facts.
7. **Mechanics' Liens: Notice.** Sending a copy of a recorded lien to a contracting owner under Neb. Rev. Stat. § 52-135(3) (Reissue 2010) is a prerequisite for foreclosing the lien.
8. **Attorney Fees: Appeal and Error.** On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.
9. **Actions: Attorney Fees.** Attorney fees can be awarded when a party brings an action that is without rational argument based on law and evidence.

10. **Attorney Fees: Words and Phrases.** Regarding bad faith litigation, the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
11. **Trial: Attorney Fees: Pleadings.** Attorney fees for a bad faith action under Neb. Rev. Stat. § 25-824 (Reissue 2008) may be awarded when the action is filed for purposes of delay or harassment.
12. **Actions.** Relitigating the same issue between the same parties may amount to bad faith.
13. ____. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Angela L. Burmeister and Angela M. Boyer, of Berkshire & Burmeister, for appellant.

Emmett D. Childers, of Hillman, Forman, Childers & McCormack, for appellee JoAnn Selvera.

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

CONNOLLY, J.

The Chicago Lumber Company of Omaha (Chicago Lumber) recorded a construction lien on JoAnn Selvera's home and sued to foreclose the lien. Selvera brought a counterclaim under Neb. Rev. Stat. § 52-157 (Reissue 2010), which provides a remedy against claimants who, in bad faith, file liens, overstate liens, or refuse to release liens. Chicago Lumber eventually withdrew its foreclosure action and released its lien, but Selvera maintained her suit. The court later granted Selvera summary judgment on her bad faith claim and awarded her $10,000 in attorney fees.

Because Chicago Lumber had a reasonable belief that its lien was valid—at least before it received Selvera's clarifying documents—Chicago Lumber did not act in bad faith. But after it received these documents, questions of fact exist whether Chicago Lumber was acting in bad faith. We reverse, and remand for further proceedings.

I. BACKGROUND

After a fire damaged Selvera's home, she contracted with Turnbull, Jenkins & Krueger Construction, Inc. (Turnbull), to reconstruct part of her home. Turnbull, in turn, contracted with Chicago Lumber to provide material for the project.

While working on Selvera's home, Turnbull abandoned the project and breached the contract with Selvera. At the time of the breach, Turnbull had not paid Chicago Lumber for all the materials that it had provided and owed Chicago Lumber $1,034.13.

Because Chicago Lumber had not been paid, it recorded a lien on Selvera's property. Selvera claimed that she never received a copy of the lien. But a secretary who worked at the law office representing Chicago Lumber stated in an affidavit that it was the regular policy and procedure of the firm to mail copies of all recorded liens to the homeowner whose home was subject to a lien. She stated that she typically mailed these copies on the same day that the liens were recorded. And she recalled doing so with all the liens that she handled during her time with the firm.

In September 2007, Chicago Lumber sued to foreclose its lien on Selvera's property. In her answer, Selvera asserted that she was a protected party under the Nebraska Construction Lien Act (NCLA).[1] Selvera also counterclaimed under § 52-157, alleging that Chicago Lumber had refused to release its lien even though it was unenforceable. Attached to her answer, Selvera included exhibits, one of which was two pages long. We refer to this exhibit as "Exhibit B."

Exhibit B appeared to be an invoice or account statement from Turnbull to Selvera. The first page seems to track the payments that Selvera made and her outstanding balance with Turnbull. The first page indicates that Selvera still owed Turnbull $131,800. The second page, however, sets out Turnbull's profit and overhead and inconsistently states that Turnbull owed Selvera $14,912.88.

The record indicates that Chicago Lumber made several attempts to reconcile these two pages, which the company

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[1] Neb. Rev. Stat. § 52-125 et seq. (Reissue 2010).

claimed were confusing. Chicago Lumber claims that Exhibit B did not clearly show whether Selvera had paid Turnbull the full amount because one page seemed to indicate that Selvera owed Turnbull money while the next indicated the opposite. At oral argument, Selvera's counsel admitted that the joining of the two pages in Exhibit B was an inadvertent mistake and probably was confusing.

Later, in February 2009, about 17 months after she first presented Exhibit B, Selvera submitted another two-page exhibit with another affidavit. The second page was the same as the second page to Exhibit B. The first page, however, was different. This first page listed costs for labor, materials, and subcontractors. The numbers from the first page corresponded to the numbers on the second, and thus supported Selvera's claim that she had paid Turnbull in full. Along with this document, Selvera also submitted an affidavit of the vice president of Turnbull stating that Selvera owed no money to Turnbull under the contract.

In late February 2009, shortly after receiving this new document, Chicago Lumber dismissed its action to foreclose. In May, it released its lien on Selvera's property. Selvera, however, maintained her counterclaim against Chicago Lumber.

The parties eventually moved for summary judgment on Selvera's counterclaim. Chicago Lumber also moved for "Rule 11 Sanctions." It claimed that Selvera should have to pay the costs that Chicago Lumber incurred in prosecuting and defending the actions.

The court granted summary judgment to Selvera. It found that she had fully paid the contract and that she had not received a copy of the lien. The court concluded that providing a copy to the homeowner was a prerequisite to a valid lien. Because Selvera had never received a copy, the lien was invalid. Finally, the court concluded that Chicago Lumber's failure to dismiss its action until February 2009 and its failure to release the lien until the following May constituted bad faith. The court awarded Selvera $10,000 in attorney fees.

II. ASSIGNMENTS OF ERROR

Chicago Lumber assigns, restated and renumbered, that the district court erred in (1) granting Selvera, and not Chicago

Lumber, summary judgment under § 52-157; (2) granting Selvera attorney fees; and (3) failing to sanction Selvera.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] Statutory construction is a question of law that we decide independently of the trial court.[4]

IV. ANALYSIS

1. Summary Judgment Under § 52-157

In granting summary judgment to Selvera, the district court found that Selvera had not received a copy of Chicago Lumber's lien within 10 days of its recording and that thus, the lien was invalid.[5] Further, the court concluded that Chicago Lumber's refusal to release the lien until May 2009 constituted bad faith.

[4,5] When reviewing cross-motions for summary judgment, we acquire jurisdiction over both motions and may determine the controversy that is the subject of those motions; we may also specify the issues as to which questions of fact remain and direct further proceedings as we deem necessary.[6] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant

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[2] *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 792 N.W.2d 134 (2010).

[3] *Id.*

[4] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[5] See § 52-135(3).

[6] See, *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008); *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000).

is entitled to judgment if the evidence were uncontroverted at trial.[7]

Section 52-157(2) addresses bad faith claims. It provides:

> If in bad faith a claimant records a lien, overstates the amount for which he or she is entitled to a lien, or refuses to execute a release of a lien, the court may:
>
> (a) Declare his or her lien void; and
>
> (b) Award damages to the owner or any other person injured thereby.

Under this section, a court may invalidate a lien and award damages, which may include attorney fees,[8] if the claimant acts in bad faith. It is undisputed that Chicago Lumber recorded a lien on Selvera's property and initially refused Selvera's requests to release the lien. So, the only factor at issue is whether Chicago Lumber acted in bad faith.

Under § 52-157(2), bad faith will invalidate a lien and provide a basis for awarding damages. But the statute does not define "bad faith." We have previously discussed bad faith that would invalidate a lien in the context of mechanics' liens, although before the enactment of the NCLA. We have stated that a claimant could not enforce a lien "'[w]here a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust . . . .'"[9] But if the errors are the result of mistake and no element of willfulness appears, then we will not invalidate a lien.[10]

[6] In these prior cases, we were perhaps a bit loose with our language. The above-quoted language could lead some to think that mere negligence would suffice to invalidate a lien. But

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[7] *Builders Supply Co., supra* note 6.

[8] § 52-157(3).

[9] *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 692, 217 N.W.2d 472, 477 (1974), quoting *Central Construction Co. v. Highsmith*, 155 Neb. 113, 50 N.W.2d 817 (1952). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 305, 287 N.W.2d 435 (1980); *Rosebud Lumber and Coal Co. v. Holms*, 155 Neb. 459, 52 N.W.2d 313 (1952).

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

other language in these cases indicated that an element of willfulness was required. Today, we conclude that to act with bad faith, one must either know his or her lien is invalid or overstated or act with reckless disregard as to such facts. We base our conclusion on the fact that the Legislature included the term "bad faith." An act taken in bad faith, by definition, cannot be unintentional.[11] The Legislature has made clear that honest mistakes should not invalidate construction liens and subject a party to damages under § 52-157. Requiring knowledge or recklessness to invalidate the lien ensures that the claimant has the culpable mental state that the Legislature desired.

Here, the inquiry is whether Chicago Lumber knew that its lien was invalid or overstated or that it acted with reckless disregard in such belief when it refused to release it. As the district court and parties have framed the issues, there are two possible defects in Chicago Lumber's lien: whether Selvera had fully paid her contract with Turnbull, which would mean that Selvera had no lien liability; and whether she had received a copy of the lien.

The focus of the test for bad faith is on Chicago Lumber's state of mind during its refusal to release its lien. Did the company know, or was it reckless as to whether, its lien was invalid? Whether its lien is actually invalid is not the question under § 52-157(2). A lien could ultimately be found to be overstated without the claimant necessarily acting in bad faith. When a claimant is honestly mistaken about the validity of its lien and does not recklessly disregard facts showing its lien may be invalid, the person on whose property the lien was filed would not be entitled to damages. So we focus on whether the facts show Chicago Lumber knew or was reckless as to whether its lien was invalid when it refused to release its lien.

Chicago Lumber argues that it did not act in bad faith and thus, the district court erred in granting Selvera summary judgment. It argues that it did not release its lien because questions of fact existed whether Selvera received a copy of the lien and whether Selvera had paid the prime contract in full. It argues

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[11] See, e.g., *Weatherly v. Blue Cross Blue Shield*, 2 Neb. App. 669, 513 N.W.2d 347 (1994).

that it could not have been acting in bad faith when it had a reasonable basis for believing that it had a valid lien. Chicago Lumber argues that the court should have awarded it summary judgment.

(a) Did Chicago Lumber Act in Bad Faith Regarding Whether Selvera Had Paid in Full?

Selvera argues that under § 52-136(2), she had no lien liability to Chicago Lumber. Section 52-136(2) provides that the amount of the lien is the lesser of the amount unpaid under the claimant's contract or the amount unpaid under the prime contract. The former would be Chicago Lumber's contract with Turnbull, under which Chicago Lumber was owed $1,034.13. The latter "prime contract" is Selvera's contract with Turnbull. Selvera argues that she had fully paid Turnbull for the work the company did and so there was no amount unpaid under the contract. Therefore, the amount of any lien Chicago Lumber had would be $0. She argues that she provided Chicago Lumber with documentation showing that she had paid in full and that its refusal to release a lien it knew was worthless amounts to bad faith.

(i) Chicago Lumber Did Not Act in Bad Faith Before It Received Clarifying Documents Because Selvera's Exhibit Was Confusing

As noted, Selvera attached a two-page document, Exhibit B, to her answer. Chicago Lumber claimed that these two pages were confusing. We agree. The calculations from the two pages simply do not match up; one page states that Selvera owed Turnbull $131,800 while the next page states that Turnbull owes Selvera $14,912.88. As Selvera conceded during oral argument, the original Exhibit B was mistakenly joined and probably was confusing. Selvera did not explain this discrepancy until February 2009, when she provided additional documentation. This documentation included the correct documents and an affidavit from Turnbull's vice president stating that Selvera owed the company no money.

To have acted in bad faith, Chicago Lumber would have had to refuse to release its lien either knowing it was invalid or overstated or acting with reckless disregard as to such

facts. Selvera has presented no evidence of either. In fact, when faced with an internally inconsistent document, Chicago Lumber did what any commercially reasonable business would do: it sought answers through correspondence with Selvera and later through the discovery process. But the answers did not come until Selvera filed additional affidavits in February 2009. Shortly after receiving documentation showing that Selvera had paid in full, Chicago Lumber dismissed its foreclosure action. A couple of months later, Chicago Lumber released its lien.

Selvera has failed to show that Chicago Lumber had exercised bad faith in maintaining its lien before she supplied the correct documentation. The evidence submitted showed that Chicago Lumber made reasonable attempts to ascertain whether Selvera had fully paid the Turnbull contract. We conclude that the district court erred in ruling that Chicago Lumber acted in bad faith in refusing to release a lien when there were questions of fact whether Selvera owed money to Turnbull.

(ii) An Issue of Fact Exists as to Whether Chicago Lumber Acted in Bad Faith After Selvera Had Provided Clarifying Documents

Chicago Lumber, however, did not immediately release its lien upon receiving the correct documents from Selvera in February 2009. It waited until May to release its lien. This was a period of almost 3 months. During this interval, Chicago Lumber had documents seemingly indicating that Selvera had overpaid Turnbull and an affidavit from Turnbull indicating the same. We do not, however, believe that this shows as a matter of law that Chicago Lumber was acting in bad faith. Chicago Lumber, already the recipient of mismatched documents, could justifiably be hesitant to immediately release its lien. A question of fact remains as to whether this was merely innocent reluctance or bad faith.

Summing up, Selvera presented no evidence that Chicago Lumber acted in bad faith before she presented the company with the correct documents. The evidence fails to show that Chicago Lumber knew its lien was invalid or overstated. Nor does the evidence show that it was reckless as to such facts.

After Selvera presented the correct documentation, however, a question of fact exists as to whether Chicago Lumber was acting in bad faith.

(b) Chicago Lumber Had a Basis for Believing That Selvera Had Received a Copy of the Lien

The district court found that Selvera had not received a copy of the lien. It concluded that such a copy was required for an enforceable lien. Although the court did not mention whether Chicago Lumber knew that Selvera had not received a copy of the recorded lien, it then determined that Chicago Lumber's failure to release the lien was bad faith. Chicago Lumber argues that the court erred in granting summary judgment to Selvera because Chicago Lumber "had reason to believe that it had an enforceable lien against [Selvera]"[12] and, thus, was not acting in bad faith.

Section 52-135(3) provides that "[t]he claimant shall send a copy of a recorded lien to the contracting owner within ten days after recording, and the recording shall be within the time specified for the filing of liens under section 52-137." Selvera claims that she never received a copy of the lien, which rendered Chicago Lumber's lien unenforceable, and that Chicago Lumber acted in bad faith by not releasing its lien. Chicago Lumber views it differently. It claims that the secretary's affidavit—in which she stated that it was the firm's usual practice to send out copies the day that liens are recorded and that this practice was followed that day—created a presumption of receipt.[13]

As a preliminary matter, we note that there is no dispute that Selvera is a protected party under the NCLA.[14] The NCLA governs notice to an owner and applies only if the owner is a protected party.[15]

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[12] Brief for appellant at 28.

[13] See, e.g., *City of Lincoln v. MJM, Inc.*, 9 Neb. App. 715, 618 N.W.2d 710 (2000).

[14] See § 52-129.

[15] See § 52-135(6).

[7] We have previously stated that giving notice of a right to assert a lien under § 52-135(1) was permissive, and not mandatory, because that subsection uses the word "may."[16] But unlike subsection (1), subsection (3) uses the directive "shall." In drafting subsection (3), the Legislature obviously desired that property owners would receive notice and have an opportunity to respond and protect their property. To allow a claimant to foreclose a lien without providing a copy of that lien would undermine the Legislature's intent of giving owners notice and a better opportunity to defend their property. Finally, under our previous construction lien statutes, the claimant's failure to send notice of the recorded lien within the statutory time limit rendered the lien void and unenforceable.[17] We conclude that sending a copy of a recorded lien under § 52-135(3) is a prerequisite to foreclosing a lien under the NCLA.

As stated, however, under § 52-157, the question is not the lien's actual validity, but whether Chicago Lumber acted in bad faith. Selvera does not show bad faith by merely stating that she never got a copy of the lien; she must present evidence that Chicago Lumber knew Selvera had not received the copy or that it recklessly disregarded facts showing that she had not received a copy when it refused to release the lien.

We conclude that Selvera has failed to present any evidence that creates an issue of fact on Chicago Lumber's alleged bad faith. She failed to show that Chicago Lumber actually knew she had not received a copy of the lien or that it was reckless as to that fact. In contrast, Chicago Lumber presented an affidavit detailing its usual custom in sending copies of liens and stating that the practices were followed that day. It had a reasonable basis for believing that Selvera had received a copy. The court erred in granting Selvera summary judgment because Selvera had presented no evidence of Chicago Lumber's bad faith as to whether it had provided Selvera a copy of the lien.

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[16] *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 566 N.W.2d 115 (1997).

[17] Neb. Rev. Stat. § 52-103 (Reissue 1978). See, also, *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980).

2. Attorney Fees Under Neb. Rev. Stat. § 25-824 (Reissue 2008)

Because we conclude that the court erred in granting Selvera summary judgment on her bad faith claim under § 52-157, it was error to award Selvera attorney fees under that section. But Selvera also argues that she should receive attorney fees for defending the foreclosure action under § 25-824. To the extent that the award of attorney fees rested upon § 25-824, we conclude that it too was error.

[8-13] On appeal, we will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.[18] Attorney fees can be awarded when a party brings a frivolous action that is without rational argument based on law and evidence.[19] We have also previously explained that the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[20] Attorney fees for a bad faith action under § 25-824 may also be awarded when the action is filed for purposes of delay or harassment.[21] We have also said that relitigating the same issue between the same parties may amount to bad faith.[22] Finally, any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.[23]

Again, we conclude that Chicago Lumber had a reasonable basis for believing it had an enforceable lien. A suit to foreclose that lien would thus have a rational basis in law and fact.

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[18] See *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[19] See *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

[20] See *id.*

[21] § 25-824(4). See, also, *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

[22] See, e.g., *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

[23] See *id.*

The record fails to show that Chicago Lumber had an improper motive when it sued to foreclose the lien. Nor was Chicago Lumber's legal position unreasonable. We conclude that the district court abused its discretion in awarding attorney fees to Selvera.

3. Chicago Lumber's Requests for Sanctions

Chicago Lumber argues that the court erred in not imposing sanctions on Selvera. Chicago Lumber claims that Selvera brought her counterclaim in bad faith and contends that Selvera's tactics in prosecuting her claim, namely presenting the court with Exhibit B, warranted an award of attorney fees to Chicago Lumber.

We note that Chicago Lumber filed a motion for "Rule 11 Sanctions." We assume this motion refers to Neb. Ct. R. Pldg. § 6-1111 (rev. 2008). The comment to § 6-1111 states that bad faith or frivolous litigation is subject to sanction under Neb. Rev. Stat. §§ 25-824 to 25-824.03 (Reissue 2008). We will thus treat this as a motion under § 25-824.

Applying § 25-824 and the standards previously discussed, we conclude that Selvera did not bring her counterclaim in bad faith. The difficulties that arose stem largely from the ambiguous Exhibit B attached to Selvera's counterclaim. Selvera apparently believed that she had paid in full and tried to provide Chicago Lumber with documents to that effect. Unfortunately, the exhibit was confusing. Selvera apparently did not realize the error until late in the action. We do not believe that her apparently innocent reliance on Exhibit B, which was confusing, amounts to bad faith. The court did not abuse its discretion in refusing to award attorney fees to Chicago Lumber.

V. CONCLUSION

We conclude that the court erred in granting Selvera summary judgment. Exhibit B was confusing, and so Chicago Lumber was not acting in bad faith when it refused to release its lien. The company was reasonably seeking answers. But after Chicago Lumber had received proper documentation, there is a genuine issue of fact whether the company acted in

bad faith by not releasing its lien. Finally, we conclude that neither side is entitled to attorney fees under § 25-824.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and MCCORMACK, JJ., not participating.

JONI MUELLER, APPELLEE, V. LINCOLN PUBLIC SCHOOLS, APPELLANT.
803 N.W.2d 408

Filed August 5, 2011. No. S-10-748.

1. **Workers' Compensation: Wages.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
2. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
3. **Employer and Employee: Wages.** In calculating an employee's average weekly wage, abnormally low workweeks resulting from circumstances such as vacation time, sick leave, or holidays should be excluded from the calculation.
4. **Workers' Compensation.** The goal of any average income test is to produce an honest approximation of a workers' compensation claimant's probable future earning capacity. The emphasis is on not distorting the employee's average weekly wage.
5. **Stipulations.** The construction of a stipulation is a question of law.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Jon Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

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

GERRARD, J.

Joni Mueller, an employee of the Lincoln Public Schools (LPS), was awarded workers' compensation benefits after she

was injured on the job. As a school employee, Mueller worked only during the school year and did not work during summer vacation. But her salary was spread out so that she was paid every month of the year, even during the summer. The issue presented in this appeal is how to calculate Mueller's average weekly wage for workers' compensation purposes.

BACKGROUND

Mueller sought workers' compensation benefits after she suffered a whole body injury on February 2, 2007, arising out of and in the course of her employment as a food service manager at Arnold Elementary School. The compensability of her injury is not at issue—only the determination of her wage.

At trial, Mueller explained that when she was hired, it was understood that she would be paid monthly for 12 months a year, even though she would work only during the school year—essentially, 9 out of 12 months. Mueller's health insurance benefits were also provided over a 12-month period. And each year, Mueller was essentially assured of returning to her job the following year, after filling out a form notifying LPS of her desire to do so. In other words, Mueller's employment contract with LPS was on a 1-year renewable basis, wherein Mueller would work during the school year, but her income would be spread out so she would be paid every month.

The director of LPS' school nutrition services explained that the hourly wage paid to LPS food service workers was higher than the surrounding market rate, because the intent was to offer workers an annual salary that was competitive with the annual salary offered in the field. LPS food service employees were considered full-time employees at 37½ hours per week. In essence, the workers' hourly wage was used as a means to calculate an annualized 12-month salary.

LPS offered to stipulate that Mueller's hourly wage was $15.27 and that her average weekly wage was $411.49. Mueller accepted that her hourly wage was $15.27, but disagreed with respect to the average weekly wage. The dispute, as presented to the court, was whether the average weekly wage should be calculated over a 9-month period or a full calendar year. Based on what Mueller had actually been paid over the 6 months

before her injury, LPS calculated her average weekly wage for purposes of temporary indemnity as being $411.49. LPS also proposed that because Mueller's wages were earned over 39 weeks, but paid over 52 weeks, her average weekly wage for purposes of permanent indemnity should be calculated by annualizing her hourly income, then dividing that total by 52 weeks—resulting in a proposed average weekly wage of $458.10.

But the trial court rejected those arguments, reasoning that the basis of calculation should be what Mueller earned during the 6 months before her injury, not necessarily what she was paid. The trial court acknowledged LPS' observation that its reasoning would result in wage calculations for workers' compensation purposes that would significantly exceed the wages Mueller had actually been receiving from LPS. But the trial court believed that LPS' proposal would, in effect, lower the hourly wage to which the parties had stipulated.

So, the trial court determined that Mueller's average weekly wage for temporary total disability purposes was $572.62 ($15.27 per hour × 37½ hours per week). And for permanent partial disability purposes, the trial court found that Mueller's average weekly wage was $610.80 ($15.27 per hour × 40 hours per week). The trial court rejected the opinion of the court-appointed vocational rehabilitation counselor with respect to Mueller's loss of earning capacity, because her opinion had been based on LPS' calculation of Mueller's average weekly wage. The trial court made its own calculation of Mueller's loss of earning capacity and awarded Mueller temporary and permanent disability benefits based upon its determinations.

LPS appealed to the review panel of the Workers' Compensation Court, which panel found that the trial court's decision was "based on findings of fact which are not clearly wrong." The review panel affirmed the award. LPS appeals.

ASSIGNMENTS OF ERROR

LPS assigns that the Workers' Compensation Court erred in (1) determining how to calculate the average weekly wage of a school employee who is paid over 12 months for work performed during the 9-month school year and (2) declining to

adopt the court-appointed vocational rehabilitation counselor's opinion that Mueller's loss of earning capacity was 20 percent, based upon her 26-week wage history, or alternatively, 25 percent, based upon an annualized average weekly wage of $458.10.

STANDARD OF REVIEW

[1,2] The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.[1] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[2]

ANALYSIS

In workers' compensation cases, the amount of benefits awarded to a claimant is dependent upon the court's calculation of the claimant's average weekly wage. For employees who are paid by the hour, the average weekly wage is determined pursuant to Neb. Rev. Stat. §§ 48-121 (Reissue 2004) and 48-126 (Reissue 2010). Section 48-126 provides in relevant part that "wages" mean "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." In continuous employment, if immediately before the accident the claimant's rate of wages was fixed by the hour, the claimant's weekly wage is "his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer," except as provided (as relevant in this case) in § 48-121.[3] And § 48-121(4) provides that for purposes of calculating permanent disability benefits of an hourly employee, "the weekly wages shall be taken to be computed . . . upon the basis of a workweek of a minimum of forty hours."

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[1] *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000).

[2] *Id.*

[3] § 48-126.

We have said that as a general rule, "[t]he weekly wage of a worker compensated on an hourly basis is a simple function of the hourly rate multiplied by the number of hours worked in a given week."[4] And in *Ramsey v. State*,[5] we further explained that for claimants with permanent disabilities, § 48-121(4) requires that a minimum of 40 hours per week be utilized in that computation, so part-time employees with permanent disabilities are treated as though they had worked a 40-hour workweek.

[3] But we have also recognized that this formula is not inflexible. For instance, in *Ramsey*, we held that § 48-126 does not permit the backward extrapolation of a wage increase so as to distort the average weekly wage actually earned by the worker before a compensable injury. And in *Harmon v. Irby Constr. Co.*,[6] we held that a $30 per diem which a worker earned during the 6 days immediately before his injury would be considered income only for each of the 6 days on which he actually earned it, because application of the $30 per diem to the entire 26-week period preceding his injury would distort the calculation of his average weekly wage. Similarly, we have held that in calculating an employee's average weekly wage, abnormally low workweeks resulting from circumstances such as vacation time, sick leave, or holidays should be excluded from the calculation.[7]

[4] In other words, as we explained in *Powell v. Estate Gardeners*,[8] "the addition of the language '"ordinarily constituting his or her week's work"' precludes an automatic mathematical calculation based on the past 6 months' work." So, for instance, "abnormally low output or weekly hours due to illness or vacation will not be averaged in."[9] The goal of any

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[4] *Ramsey, supra* note 1, 259 Neb. at 181, 609 N.W.2d at 21.

[5] *Ramsey, supra* note 1.

[6] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999).

[7] See, *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990); *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988).

[8] *Powell v. Estate Gardeners*, 275 Neb. 287, 294, 745 N.W.2d 917, 923 (2008) (emphasis omitted).

[9] *Id.* at 294-95, 745 N.W.2d at 923.

average income test is to produce an honest approximation of the claimant's probable future earning capacity.[10] The key to these cases is our emphasis on not *distorting* the employee's average weekly wage.[11]

The Workers' Compensation Court's decision in this case, however, had the effect of distorting Mueller's average weekly wage well beyond what she was actually earning at the time of her injury. To some extent, such distortion is required by § 48-121(4), which requires the use of a 40-hour workweek in calculating benefits, rather than the 37½-hour week that Mueller was actually expected to work during the school year. This is because, while LPS may consider Mueller to be a full-time employee at 37½ hours per week, § 48-121(4) establishes a 40-hour-per-week minimum for workers' compensation purposes.

But the Nebraska Workers' Compensation Act does not dictate that Mueller's weekly wages be calculated without accounting for the unique circumstances of her employment. Part of the problem faced by the Workers' Compensation Court in this case, and this court on appellate review, is that the record is far from clear about how, precisely, Mueller was compensated. The parties seem to assume that because Mueller had an hourly wage, her rate of wage was fixed by the hour within the meaning of §§ 48-121(4) and 48-126. However, if Mueller was purely an hourly employee, her paycheck each month would depend on the number of hours she had worked that month. Obviously, that is not the case, because in the summer, Mueller is paid during months she did not work at all. And neither party does a particularly good job of explaining how Mueller's monthly paycheck is derived from her hourly wage—facts which might have helped the Workers' Compensation Court's calculation.

The record suggests that Mueller's monthly wage is determined by taking her hourly wage, projecting the hours she would be expected to work over the course of the school year, and dividing that total by 12. And as explained above,

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[10] See *id.*

[11] *Id.*

the hourly wage is apparently determined by taking a desired annual salary and dividing it by the number of hours an employee is expected to work during the year. This is confusing, but it does not make for an hourly employee as the term is usually understood. For an employee's "rate of wages" to be "fixed by the day or hour," an hourly wage and the number of hours worked during each pay period should be the starting points for determining remuneration—not the result of some other calculations.[12]

Nevertheless, each of the parties has started from the premise that Mueller had an hourly wage, and then set about trying to pound a square peg into a round hole. And each party argues that the other should bear the consequences of an imperfect fit. But while a perfect fit may not be possible given the applicable statutes, we agree with LPS that a better fit is possible and that the Workers' Compensation Court erred in calculating Mueller's average weekly wage without accounting for the fact that her hourly wages do not, if simply multiplied by 40 hours a week, approximate her actual weekly wages.

Section 48-126 requires that an hourly employee's weekly wages

> be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer.

Under these circumstances, the trial court erred in not calculating Mueller's average weekly wage, for temporary disability purposes, based upon her *actual weekly income*. And for permanent disability purposes, although § 48-121(4) requires that Mueller's workweek be extended to 40 hours, it does not require the court to ignore that she was paid over the entire year for 39 weeks of work. So, the trial court erred in not accounting for that fact, as LPS suggested.

The trial court's reasoning, in fact, could cut both ways. The basis of the trial court's calculation was, in effect, not what Mueller had been paid during the 6 months before her injury,

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[12] See §§ 48-121(4) and 48-126.

but the hours she had actually *worked* during those 6 months. Which, because Mueller was injured in February, worked to her benefit. Had Mueller been injured in August, however, the court's reasoning would have deprived her of "earnings" because she would not have worked during summer vacation. This appeal would most likely be the same, except the parties' positions would be reversed. As we said in *Powell*, such a result would "not be an accurate reflection" of the employee's loss of earning capacity and "thus would not carry out the beneficent purposes" of the Nebraska Workers' Compensation Act.[13] That, in itself, demonstrates how the court's reasoning runs up against our emphasis, explained in *Powell*, on "'not distorting' the employee's average weekly wage."[14] Neither employers nor injured workers in this situation should experience feast or famine based upon when they were injured.

[5] In arguing to the contrary, Mueller contends that LPS stipulated away its argument about her average weekly wage by stipulating to her hourly wage. Mueller contends that LPS is barred from arguing that her average weekly wage is lower than what the trial court calculated based on that stipulation. We agree that generally, parties are bound by stipulations voluntarily made.[15] But we have also said that the construction of a stipulation is a question of law.[16] In this case, we do not agree with Mueller's construction of the stipulation. An examination of the colloquy at issue will illustrate why:

> [LPS' counsel]: Your Honor, I think that [LPS] would be willing to stipulate that there was an injury on February 2, 2007; that [Mueller's] average weekly wage at that time was 411.49; her hourly rate at that time was $15.27. Are you okay with that so far?
>
> [Mueller's counsel]: Well, I would disagree over the average weekly wage.

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[13] *Powell, supra* note 8, 275 Neb. at 296, 745 N.W.2d at 924.

[14] *Id.* at 295, 745 N.W.2d at 923.

[15] *Lincoln Lumber Co. v. Lancaster*, 260 Neb. 585, 618 N.W.2d 676 (2000).

[16] *Jackson v. Brotherhood's Relief & Comp. Fund*, 279 Neb. 593, 779 N.W.2d 589 (2010); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

> [LPS' counsel]: They're challenging the average weekly wage. That's the average weekly wage that was used.
>
> THE COURT: All right. So we don't have an agreement on average weekly wage.
>
> . . . .
>
> THE COURT: The hourly rate . . . of 15.27, do you concede that, or is that at issue too?
>
> [Mueller's counsel]: I think we would — actually, the hourly rate is correct. It's a matter of how you — how it's calculated, the amount of time it's calculated over.
>
> THE COURT: I understand from my reading of the dispute, it's whether or not the average weekly wage is calculated over a nine-month period or a full calendar year; is that correct?
>
> [LPS' counsel]: That's correct.
>
> THE COURT: Is that your understanding?
>
> [Mueller's counsel]: Correct.
>
> THE COURT: I assume you will agree with the other stipulations proposed . . . ?
>
> [Mueller's counsel]: Correct.
>
> THE COURT: I will accept those.

Read in context, it is apparent that LPS' stipulation of Mueller's hourly wage was not a concession of its arguments about her average weekly wage. Mueller seems to be arguing that once the hourly wage is established, the rest is just math. But Mueller's math is based on her construction of the relevant statutes—a construction which, as explained above, is inconsistent with our jurisprudence. As *Powell* notes, we already make exception where the determination of an employee's average weekly wage is distorted by abnormally low output or weekly hours due to illness and vacation.[17] Basic fairness requires that principle to be applied in both directions—as *Powell* explains, the goal is to honestly approximate the claimant's probable future earning capacity.[18] That did not happen here.

Therefore, we find merit to LPS' assignments of error. But rather than recalculate Mueller's award, we find that the cause

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[17] See *Powell, supra* note 8.

[18] See *id.*

should be remanded to the Workers' Compensation Court for further proceedings consistent with this opinion—and, perhaps, greater clarity from the parties about how Mueller's actual take-home pay is calculated. Any issues with respect to possible overpayment should be addressed by the trial court. And because it is not clear whether the trial court would have adopted the opinion of the court-appointed vocational rehabilitation counselor had it not disagreed with her assumptions regarding Mueller's average weekly wage, the court should reconsider that issue in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the review panel of the Workers' Compensation Court is reversed, and the cause is remanded with directions to remand the case to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

MCKINNIS ROOFING AND SHEET METAL, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JEFFREY D. HICKS, APPELLEE AND CROSS-APPELLANT.

803 N.W.2d 414

Filed August 5, 2011. No. S-10-1048.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is 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.
2. **Contracts.** When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

David V. Drew, of Drew Law Firm, for appellant.

Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

McKinnis Roofing and Sheet Metal, Inc. (McKinnis), and homeowner Jeffrey D. Hicks entered into two contracts. The first contract related to Hicks' roof, and the second contract related to copper awnings on Hicks' residence.

McKinnis filed a complaint in the district court for Douglas County alleging that Hicks breached both contracts. After trial, the district court filed an order of judgment on October 1, 2010, in which it determined that Hicks had breached both contracts. With regard to the roofing contract, the court awarded McKinnis damages in the amount of $4,419.88. With regard to the awning contract, the district court awarded McKinnis damages in the amount of $789.80.

McKinnis appeals, claiming that the district court erred in calculating the amount of damages to which it was entitled. Hicks cross-appeals and claims, inter alia, that the district court erred when it determined that he breached the contracts. As explained below, based on the facts and contract language, we determine that Hicks did not breach either contract. Accordingly, we reverse the order and remand the cause to the district court with directions to enter judgment in favor of Hicks.

STATEMENT OF FACTS

Hicks' home was damaged in a hailstorm in June 2008. The storm caused damage to Hicks' wood shake roof and copper awnings. McKinnis and Hicks entered into a written contract presented by McKinnis on July 10 regarding the roof. The contract provided that McKinnis would replace or repair the roof upon approval and payment from Hicks' insurance company, Chubb Group of Insurance Companies (Chubb). Paragraph 7 of the roofing contract also provided that acceptance under the agreement "cannot be withdrawn after McKinnis . . . personnel appear on site ready to perform except by mutual written agreement of the parties."

The record is replete with evidence, not necessary to repeat here, regarding the efforts required to obtain the insurance payment. Chubb agreed to pay for the roof repair and issued a payment to Hicks in the amount of $74,913.23. Hicks notified McKinnis that he was going to replace the roof with a slate roof using a different contractor. McKinnis sued Hicks for lost profits for losing the wood shake roof replacement job.

On September 16, 2008, the parties agreed that McKinnis would replace Hicks' copper awnings damaged in the storm. Paragraph 15 of the awning contract provided that Hicks would pay McKinnis the cost of material and labor for job setup "when the same are delivered to the job site" and that the balance would be due upon completion. Despite the ongoing litigation, McKinnis informed Hicks through its attorney that it still intended to perform its obligation under the awning contract. However, because of the pending issues involving the roof contract and despite the language of the awning contract, McKinnis demanded payment on the awning contract before it would perform. Hicks declined McKinnis' proposal for advance payment and repeatedly indicated his readiness to adhere to the awning contract. McKinnis did not go forward with the awning contract and sued Hicks for loss of profits for the copper awning job based generally on a theory that Hicks' refusal of its demand for advance payment was a breach by Hicks.

The district court conducted a trial and filed its order on October 1, 2010, in which it determined that Hicks had breached both contracts and owed McKinnis damages. The district court generally determined that McKinnis had satisfied the conditions of the roof contract and that, in reliance on Restatement (Second) of Contracts § 251 (1981), McKinnis was justified in seeking "assurance of performance" by requesting advance payment before performing under the awning contract. The court awarded McKinnis $4,419.88 on the roof contract and $789.80 on the awning contract. McKinnis appeals, and Hicks cross-appeals.

ASSIGNMENTS OF ERROR

In its appeal, McKinnis generally claims that the district court awarded insufficient damages and specifically erred

when it calculated damages due to the breach of the contracts based on McKinnis' net profit margin rather than its gross profit margin.

In his cross-appeal, Hicks claims, summarized and restated, that the district court erred when it determined that Hicks had breached both contracts.

STANDARD OF REVIEW

[1] The meaning of a contract is 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. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

ANALYSIS

McKinnis' Appeal: Because There Is Merit to the Cross-Appeal, We Need Not Consider the Correctness of the Damage Awards.

McKinnis claims that the damage awards entered by the district court were insufficient as to each of the contracts. In this regard, McKinnis urges this court to adopt a theory of contract damages which would, in certain cases, permit the award of damages based on a gross lost profit margin rather than a net lost profit margin. Without regard to the desirability of endorsing such a damage formulation, and despite the scholarship exhibited in the briefs related thereto, because we determine that Hicks did not breach either the roof contract or the awning contract, we do not consider McKinnis' assignment of error related to the proper measure of damages.

Hicks' Cross-Appeal: Hicks Did Not Breach the Roof Contract.

Hicks claims that because he properly withdrew his acceptance of the roof contract in accordance with paragraph 7, he did not breach the contract, and that the district court erred when it determined that he had breached the roof contract. We find merit to Hicks' cross-appeal and determine that the district court erred when it determined that Hicks breached the roof contract.

The parties and the district court devote considerable attention to the relative efforts of the parties to obtain the insurance

settlement check. In any event, there is agreement that Chubb sent the check, and we determine the means by which this was achieved was not a breach of the contract and is not determinative of the outcome of this appeal regarding the roof contract.

Although we recognize that the district court stated generally that Hicks did nothing to rescind or cancel the roof contract, elsewhere, it specifically found in its order that "[f]ollowing receipt of the insurance settlement from Chubb, [Hicks] informed [McKinnis] that [Hicks] was having his roof replaced with a slate roof, by another contractor." The court found that "[McKinnis] then sued [Hicks]."

In his answer, Hicks alleged in the sixth affirmative defense that he "withdrew any alleged acceptance prior to any McKinnis . . . personnel appearing on site ready to perform." At trial, Hicks testified that he terminated the agreement, inter alia, because under the roof contract, he was allowed to withdraw his acceptance. At trial, a representative of McKinnis testified essentially that McKinnis "never had a crew of construction personnel show up at the Hicks [residence] to do any of the replacement tasks because [McKinnis] never even bought any of those raw materials."

Notwithstanding its specific finding that Hicks informed McKinnis that he was going to engage another contractor to replace the roof, the district court failed to analyze the significance of this fact in the context of the rights and obligations of the parties under the roof contract. In this regard, Hicks draws our attention to paragraph 7 of the roof contract which provides that the agreement "cannot be withdrawn after McKinnis . . . personnel appear on site ready to perform except by mutual written agreement of the parties."

In its appellate brief, McKinnis does not meaningfully suggest that its personnel appeared on the site ready to replace the roof, but instead asserts that "McKinnis personnel came to the Hicks residence several times to take pictures documenting the hail damage to be presented to the insurance carrier [and] this appearance at the Hicks residence by McKinnis personnel eliminated Hicks' right to withdraw his acceptance of the contract." Reply brief for appellant at 13. We disagree with

McKinnis regarding the significance of these facts under the terms of the roof contract.

[2] The roof contract was presented by McKinnis to Hicks. When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it. *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008). The plain language of paragraph 7 permits Hicks to withdraw and terminate the roof contract before McKinnis' personnel appear on the site ready to perform the work of replacing the roof. We do not accept McKinnis' reading of the roof contract equating inspection of the roof and photographing roof damage for insurance purposes as an appearance "on site ready to perform" roof replacement work as provided for in paragraph 7.

The meaning of a contract is 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. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). Upon our review on appeal, we conclude that the district court erred when it failed to accord legal significance under the controlling contract to its finding that Hicks decided to use another contractor at a point in time prior to McKinnis' appearance to perform the replacement work. Hicks' decision had the legal effect of withdrawing from the roof contract, as he was permitted to do under paragraph 7. Hicks' withdrawal was not a breach of the roof contract. The district court erred when it found that Hicks breached the roof contract.

Hicks' Cross-Appeal: Hicks Did Not Breach the Awning Contract.

Hicks claims that the district court erred when it determined that he breached the awning contract. We find merit to this assignment of error.

The parties entered into the awning contract in September 2008. Paragraph 15 of the awning contract provides that Hicks would pay McKinnis the cost of material and labor for job setup "when the same are delivered to the job site" and that the balance would be due upon completion. Reference

is made in the record to a letter dated February 10, 2009, in which Hicks informed McKinnis that he was ready to perform his obligations under the awning contract. McKinnis filed its complaint on March 5, in which it alleged that the parties had entered into the awning contract on September 16, 2008, that McKinnis had performed conditions precedent, and that Hicks had breached the awning contract by refusing to permit McKinnis to perform replacement of the copper awnings on Hicks' residence.

In a letter dated April 1, 2009, Hicks referred to his February 10 letter and again expressed his willingness to adhere to the awning contract. In his answer filed April 2, Hicks denied McKinnis' allegations "because [McKinnis] has not performed, at all . . . despite . . . Hicks' requests for [McKinnis] to perform under this [awning] contract." In his third affirmative defense, Hicks alleged that McKinnis had "materially breached the contracts between the parties." In McKinnis' answer to request for admissions, it admitted that as of April 2, it had not replaced the copper awnings.

On April 9, 2009, McKinnis demanded prepayment of the cost of the awning contract "prior to performance." On April 22, Hicks declined McKinnis' demand to prepay but repeated his willingness to abide by the awning contract.

In the district court's order, it found that Hicks had "made [his] demand on [McKinnis] to perform on the [awning] contract in February and April, 2009, and [McKinnis] would have presumably accomplished the copper awnings job in 2009." Although the district court found that Hicks stood ready to abide by the contract, the district court nevertheless found that

> under the circumstances, [McKinnis] was justified in demanding [on April 9, 2009,] assurance of performance from [Hicks]. . . . See Section 251 of Second Restatement of Contracts. When [Hicks] refused to pay the entire contract price prior to [McKinnis'] performance, [McKinnis] was justified in treating the refusal as [Hicks'] breach . . . .

Restatement (Second) of Contracts § 251 at 276-77 (1981), upon which the district court relied, provides:

> When a Failure to Give Assurance May Be Treated as a Repudiation
>
> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

The district court did not specifically explain "the circumstances" upon which it relied as a basis for invoking § 251 and endorsing McKinnis' demand for prepayment, the refusal of which it deemed a breach by Hicks. McKinnis asserts that its demand for prepayment was based primarily on Hicks' having breached the roof contract.

We need not consider the wisdom of adopting § 251 of the Restatement or whether, if adopted, it would apply to the facts of this case. The basis on which McKinnis and the district court evidently believed that McKinnis' demand for assurance was appropriate was the presumed meritoriousness of McKinnis' claim that Hicks had already breached the roof contract and was therefore inclined to also breach the awning contract. As we have already determined in this opinion, the foundation for these beliefs was erroneous.

The basis for McKinnis' belief that Hicks would commit a breach of the awning contract was nullified by Hicks' assurances of performance both before and after McKinnis filed the lawsuit. As the district court's finding that Hicks demanded that McKinnis perform makes clear, Hicks did not repudiate the awning contract. See *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002) (stating that repudiation is question of fact). Further, we have determined that Hicks did not breach the roof contract; thus, even if we were to adopt § 251 of the Restatement, the belief by McKinnis and the court

that one breach foreshadows another and serves as a basis for McKinnis to demand assurance and avoid its duty under the awning contract was not reasonable. Hicks has not breached the roof contract or repudiated the awning contract. The prepayment by McKinnis was not warranted, and Hicks' refusal of the demand was not a breach of the awning contract.

The district court's findings show that Hicks stood ready to perform his obligations under the awning contract and that, inter alia, in the absence of a breach of the roof contract by Hicks, McKinnis was not justified in seeking prepayment contrary to the payment terms and schedule in paragraph 15 of the awning contract. Hicks' refusal to prepay for the awning job was not a breach by Hicks.

The district court erred when it determined that Hicks breached the awning contract.

CONCLUSION

Hicks did not breach the roof contract or the awning contract. We therefore reverse the order of the district court and remand the cause with directions to vacate the judgment entered on McKinnis' behalf and to enter judgment in favor of Hicks.

REVERSED AND REMANDED WITH DIRECTIONS.

ELIZABETH GRANT JOHNSON, APPELLEE, V.
KARI JOHNSON, APPELLANT.
803 N.W.2d 420

Filed August 12, 2011. No. S-10-1092.

1. **Service of Process: Waiver: Time.** A voluntary appearance signed the day before the petition is filed waives service of process if filed simultaneously with or after the petition.
2. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate only if the litigant shows that the district court abused its discretion.
3. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.

5. **Jurisdiction: Service of Process: Waiver.** Proper service, or a waiver by voluntary appearance, is necessary to acquire personal jurisdiction over a defendant.
6. **Judgments: Jurisdiction.** A judgment entered without personal jurisdiction is void.
7. **Judgments: Collateral Attack.** A void judgment may be attacked at any time in any proceeding.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Virginia A. Albers, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Christine A. Lustgarten, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

[1] Kari Johnson seeks to have a dissolution decree vacated. He argues that because he signed his voluntary appearance before his wife had filed her petition, he did not effectively waive service of process and thus the court did not have personal jurisdiction over him. We disagree and hold that a voluntary appearance signed the day before the petition is filed waives service of process if filed simultaneously with or after the petition. We affirm.

BACKGROUND

On November 23, 2009, Kari and his wife, Elizabeth Grant Johnson, went to a self-help legal clinic for assistance in filing a dissolution action. With the help of the clinic, Elizabeth prepared several documents, including a petition for dissolution, a voluntary appearance for Kari, an application for support, a motion for default judgment, and a proposed dissolution decree. Under a notary's supervision, Kari signed the voluntary appearance and the proposed decree. Both of these documents were dated November 23, 2009.

The next day, Elizabeth filed the petition for dissolution and Kari's voluntary appearance in the district court. The time

stamps on the two documents reflect that the documents were filed simultaneously.

On January 27, 2010, the court held a hearing in which it reviewed the proposed decree with Elizabeth. Kari did not attend the hearing, but the court found that the voluntary appearance Kari had signed established personal jurisdiction. After a few modifications, the court entered the decree that the parties had signed. Among other things, the decree required Kari to pay child support and alimony to Elizabeth.

In September 2010, Kari moved to vacate the decree of dissolution. He argued that the decree was void because the court lacked personal jurisdiction over Kari when it entered the decree. He argued that his voluntary appearance, which he signed before Elizabeth's filing of the petition, did not establish jurisdiction. Further, he argued that he had done nothing else that would waive his objection to insufficiency of service. The court denied this motion.

ASSIGNMENT OF ERROR

Kari assigns that the district court erred in refusing to vacate the dissolution decree, because the court did not have personal jurisdiction over him when Elizabeth failed to serve him with process and he never waived service.

STANDARD OF REVIEW

[2] We will reverse a decision on a motion to vacate only if the litigant shows that the district court abused its discretion.[1]

[3,4] A jurisdictional issue that does not involve a factual dispute presents a question of law.[2] We independently review questions of law decided by a lower court.[3]

ANALYSIS

Kari argues that Elizabeth never served him with process and that his voluntary appearance was not effective to waive

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[1] See, e.g., *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

[2] *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

[3] *Id.*

process. So, he argues, the court never acquired personal jurisdiction and the decree is void.

[5-7] Kari is correct in that proper service, or a waiver by voluntary appearance,[4] is necessary to acquire personal jurisdiction over a defendant.[5] And we have stated that a judgment entered without personal jurisdiction is void.[6] As mentioned, Kari signed a voluntary appearance, but did so before Elizabeth filed the petition. If we conclude that this voluntary appearance is insufficient to waive service of process, the court's decree is void. And a void judgment may be attacked at any time in any proceeding.[7]

Kari argues that a voluntary appearance cannot be signed before an action is filed, because there is no pending action in which to enter an appearance at that point. Kari views the operative time for a voluntary appearance as the point at which he signed the document—not when Elizabeth filed it with the court. And because Kari signed his appearance before the petition was filed, he argues his appearance does not establish personal jurisdiction.

But as a general rule, documents are given effect as of the date and time they are filed. For example, an action is commenced on the day that the complaint is filed.[8] Similarly, we look to the date of filing for other matters of procedure, such as a motion to alter or amend a judgment[9] or a notice of appeal.[10]

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[4] See Neb. Rev. Stat. § 25-516.01 (Reissue 2008).

[5] See, e.g., *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008); *Nebraska Methodist Health Sys. v. Dept. of Health*, 249 Neb. 405, 543 N.W.2d 466 (1996). See, also, 49 C.J.S. *Judgments* § 32 (2009).

[6] See, e.g., *Cave v. Reiser*, 268 Neb. 539, 684 N.W.2d 580 (2004); *State v. Roth*, 158 Neb. 789, 64 N.W.2d 799 (1954); *Ehlers v. Grove*, 147 Neb. 704, 24 N.W.2d 866 (1946). See, also, 49 C.J.S. *supra* note 5, § 30.

[7] *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

[8] See, *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003); Neb. Rev. Stat. § 25-217 (Reissue 2008).

[9] See Neb. Rev. Stat. § 25-1329 (Reissue 2008).

[10] See, Neb. Rev. Stat. § 25-1912 (Reissue 2008); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

We see nothing in § 25-516.01(1) that leads us to conclude that the Legislature wanted a voluntary appearance to take effect at a time other than its filing.

We also note that other courts considering similar facts have likewise ruled that the voluntary appearance signed before a party filed a petition effectively waives service. For instance, in *Vayette v. Myers*,[11] the Illinois Supreme Court ruled that the voluntary appearance of the defendant was valid when it was filed the same day as the complaint—even though it was signed the day before. The Missouri Court of Appeals has held that the "entry of appearance, even though signed before the suit was actually filed, was sufficient to confer jurisdiction."[12] A Georgia Supreme Court decision states that a waiver of service may occur before filing if the waiver is "strictly limited to a specific suit in the minds of both parties at the time and . . . is filed in due course and without reasonable delay."[13] Most courts that have considered this question hold that a voluntary appearance under such circumstances is valid.[14]

Admittedly, some of these cases highlight issues that may, in the future, lead to a different result. For example, in some cases, no suit was filed for months or years after the appearance was signed.[15] Whether an appearance signed long before the suit was filed would be valid is a question we need not consider because the record shows that Elizabeth filed the petition the next day. Other cases have limited an effective appearance to those situations in which it is clear that the appearance was

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[11] *Vayette v. Myers*, 303 Ill. 562, 136 N.E. 467 (1922).

[12] *Shields v. Shields*, 387 S.W.2d 242, 245-46 (Mo. App. 1965).

[13] *Adair v. Adair*, 220 Ga. 852, 856, 142 S.E.2d 251, 254 (1965). See, also, *Russell v. Russell*, 257 Ga. 177, 356 S.E.2d 884 (1987).

[14] See, *Drinkwater v. Drinkwater*, 111 F. Supp. 559 (D.D.C. 1953); *Withers v. Starace*, 22 F. Supp. 773 (E.D.N.Y. 1938); *Kirk v. Bonner*, 186 Ark. 1063, 57 S.W.2d 802 (1933); *In re Adoption of Matthew B.-M.*, 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18 (1991); *Estate of Raynor*, 165 Cal. App. 2d 715, 332 P.2d 416 (1958); *Joaquin v. Joaquin*, 5 Haw. App. 435, 698 P.2d 298 (1985); *Jacobs v. Ellett*, 108 Utah 162, 158 P.2d 555 (1945). See, also, 24 Am. Jur. 2d *Divorce and Separation* § 264 (2008); Annot., 159 A.L.R. 111 (1945).

[15] See, e.g., *Reagan v. Reagan*, 22 Ill. App. 3d 211, 317 N.E.2d 581 (1974).

filed in a case that the parties had been contemplating.[16] Here, Kari knew that Elizabeth intended to file the voluntary appearance with the dissolution petition, which she filed the next day. We conclude that the voluntary appearance waived service and thus the court had jurisdiction. We affirm.

AFFIRMED.

[16] See, e.g., *Adair, supra* note 13.

MANUELA DOMINGO GASPAR GONZALEZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EFRAIN RAMOS-DOMINGO, DECEASED, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

803 N.W.2d 424

Filed August 19, 2011. No. S-10-115.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence: Pretrial Procedure.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Damages: Pleadings: Proof.** One who seeks to avoid the legal effect of a release of a claim for damages has the burden of pleading and proving the facts which entitle such party to relief.
6. **Contracts: Fraud.** In the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.
7. **Releases: Fraud.** A release of a claim for relief should not be upheld if fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.
8. **Releases: Fraud: Intent.** If a releasor was under a misapprehension, not due to his or her own neglect, as to the nature or scope of the release, and if this

misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releasor. The release, to the extent it purports to release claims other than any understood by the releasor to be included, is ineffective to that extent.

9. **Fraud: Words and Phrases.** Overreaching, which is closely related to fraud, is the result of an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.
10. **Releases: Fraud.** In circumstances affording an opportunity for overreaching, the law demands good faith on the part of a releasee and a full understanding on the part of the person injured as to his or her legal rights.
11. **Pleadings: Appeal and Error.** An appellate court reviews a district court's decision on a motion for leave to amend a complaint for an abuse of discretion.
12. ____: ____. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
13. ____: ____. It is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.
14. **Rescission: Consideration: Words and Phrases.** Tender or return of consideration is only a condition precedent in a case where rescission is by act of the party—a legal rescission. Tender or return is not a condition precedent in a case involving equitable rescission—an action to obtain a decree of rescission.
15. **Rescission: Consideration: Fraud.** A rescinding party is not required to tender or return consideration when the ground for rescission is fraud in the execution as opposed to fraud in the inducement.
16. **Contracts: Releases: Consideration: Fraud.** When a settlement or release is merely voidable, due to fraud in the inducement, the consideration should be tendered or returned as a condition precedent to maintaining an action on the original claim. But in a case of fraud in the execution, because there never was a contract or release, tender or return of the consideration is not required.
17. **Rescission: Consideration: Fraud.** While the power of a party to avoid a transaction for fraud or misrepresentation may be conditioned on an offer to return the consideration received, a failure to do so does not preclude avoidance if the consideration is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, or constitutes a comparatively small part of the whole consideration.
18. **Rescission: Consideration: Equity.** The rule requiring tender or return of consideration is not absolute, is not to be strictly construed where restoration is impossible, and is to be applied in accordance with equitable principles.
19. **Releases: Consideration: Fraud.** A release procured by fraud will be set aside, without tender or return of the consideration, when the releasor, because of conditions of poverty, is unable to meet the tender-or-return requirement and the

fraud remained undiscovered until after the consideration had been expended or otherwise put beyond the releasor's control.

20. **Rescission: Fraud: Time.** A party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind.
21. **Rescission: Fraud: Duress: Time.** Whether one seeking to rescind a contract on the ground that it was procured by fraud or duress has acted with reasonable promptness is ordinarily a question of fact.
22. **Rescission: Time: Equity.** A delay in seeking to rescind a contract is unreasonable only if a litigant has been guilty of inexcusable neglect and, during the lapse of time, circumstances have changed such that permitting rescission would work inequitably to the disadvantage or prejudice of the other party.
23. **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.
24. **Fraud: Judgments.** The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.
25. **Fraud: Pleadings.** The allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.
26. **Fraud: Words and Phrases.** A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind.
27. **Fraud: Undue Influence: Equity.** In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence are thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.
28. **Fraud: Undue Influence.** Superiority of bargaining power alone does not create a fiduciary duty, because there must also be an opportunity to exercise undue influence.
29. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
30. **Courts: Evidence: Trade Secrets.** The law gives trial courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.
31. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-326(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.
32. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.

33. **Attorney Fees: Pretrial Procedure.** Attorney fees are a permissible sanction for a discovery violation.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed in part, reversed and remanded in part for further proceedings, and in part remanded with directions.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and Horacio J. Wheelock, of Law Office of Horacio Wheelock, for appellant.

Mark E. Novotny, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

GERRARD, J.

Thirteen-year-old Efrain Ramos-Domingo (Efrain) was killed by a Union Pacific Railroad Company (Union Pacific) train in Schuyler, Nebraska, on July 27, 2005. Two days later, Efrain's mother, Manuela Domingo Gaspar Gonzalez (Manuela), was approached by a Union Pacific claims representative and signed a document releasing Union Pacific from liability for Efrain's death, in exchange for $15,000. The primary question presented in this appeal is whether Manuela has alleged facts that would show the purported release to be void or voidable.

I. BACKGROUND

Manuela filed a complaint in district court on November 27, 2006, alleging claims for wrongful death and breach of fiduciary duty. Specifically, Manuela alleged that the design of the pedestrian crossing at which Efrain had been killed, and the way in which Union Pacific operated trains there, had been negligent and that Union Pacific's negligence had caused Efrain's death.

But Manuela also alleged facts with respect to her release of Union Pacific from liability. Manuela alleged that 2 days after Efrain's death, a Union Pacific claims representative had approached her with respect to settlement. Manuela does not

speak English and had no financial resources, including the means to pay for Efrain's burial. Manuela admitted having signed a release in exchange for $15,000, after which Union Pacific had petitioned the probate court to appoint a Union Pacific representative to act as special administrator of Efrain's estate. (Manuela has since been appointed as Efrain's personal representative.)

Manuela alleged that she had not understood the meaning of the release and had not known that by signing the release, she was giving up the right to pursue legal action against Union Pacific arising from Efrain's death. She alleged that Union Pacific's claims representative had not advised her of the legal consequences of signing the release.

Union Pacific filed a motion to dismiss Manuela's complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). Union Pacific argued that the release barred Manuela's claims and that if Manuela was asking the court to void the release, then she was required to tender the proceeds of the settlement before doing so. The district court sustained the motion to dismiss with respect to the wrongful death claim, reasoning that the release was an "insuperable bar to relief." But the court overruled the motion with respect to the fiduciary duty claim.

Discovery proceeded on the remaining claim. Among other things, Manuela sought to compel Union Pacific to produce information relating to "each 'direct settlement' in which the claimants are not employees of Union Pacific . . . and which involved a death" for the 5 years preceding Efrain's death. Union Pacific objected on the grounds that the information sought was not relevant to the fiduciary duty claim and that the request was overly broad and unduly burdensome. In particular, Union Pacific claimed that the information was not easily available for disclosure. In response, Manuela argued that the information was relevant to show Union Pacific's handling of claims of this kind. And Manuela pointed to deposition testimony of Union Pacific representatives suggesting that Union Pacific maintained a claims database from which it could have easily obtained and supplied the sort of information Manuela was requesting. The district court, without explaining its precise reasoning, denied Manuela's motion.

Manuela also sought to compel production of other documents that, generally speaking, contained information relating to Union Pacific's claims representatives. Manuela sought a privilege log for a document that, according to Union Pacific, contained the handwritten notes of its claims representative about legal advice from counsel for Union Pacific. Manuela also sought documents describing Union Pacific's process for evaluating the performance and productivity of its claims representatives; Union Pacific and Manuela disagreed about their relevance to her fiduciary duty claim. And Manuela sought the Union Pacific file for the claims representative who met with Manuela in this case. Again, Union Pacific and Manuela disputed the relevance of the materials. And again, without particularly explaining its reasoning, the court denied Manuela's motion.

The district court also, upon Union Pacific's motion, entered a protective order with respect to Union Pacific's production of the section of its claims manual dealing with grade crossing accidents. Union Pacific had reservations about producing the document, alleging that it was outdated, was not in use at the time of Efrain's death, was proprietary, and potentially could be used against Union Pacific in other litigation. Union Pacific agreed to produce the document, but asked for and obtained an order from the district court directing the parties to keep the document secure and private, not disclose it for any purpose other than this case, and not distribute it to any third persons other than counsel or retained experts. And the parties were ordered to return the document to Union Pacific once the litigation was concluded.

Manuela moved for attorney fees in association with her motions to compel discovery and submitted an affidavit evidencing expenses that, in her appellate brief, she argues added up to $3,756.70.[1] And in addition to litigating the issues that arose during discovery, Union Pacific filed a motion for summary judgment on Manuela's remaining claim. After a hearing, the district court granted the motion for summary judgment. The court found, as a matter of law, that there was no fiduciary

[1] Brief for appellant at 49.

duty owed by Union Pacific to Manuela and that even if such a duty existed, the release signed by Manuela barred recovery. Therefore, the court dismissed Manuela's remaining claim. But the court, having ruled in Manuela's favor on some discovery issues that are not disputed on appeal, awarded Manuela attorney fees in the amount of $2,500. Manuela appeals.

II. ASSIGNMENTS OF ERROR

Manuela assigns, as renumbered, that the district court erred by (1) sustaining Union Pacific's motions to dismiss her wrongful death claim, (2) sustaining Union Pacific's motion for summary judgment on her fiduciary duty claim, (3) sustaining Union Pacific's motion for a protective order, (4) overruling her motions to compel discovery, and (5) awarding inadequate attorney fees.

III. ANALYSIS

It is important to note, at the outset, that the scope of our review is different with respect to each of Manuela's two claims for relief. Because Manuela's fiduciary duty claim was disposed of by summary judgment, we consider the evidence that was presented in support of and opposition to that motion.[2] But with respect to the wrongful death claim, we do not consider the evidence in the record—because that claim was dismissed for failing to state a claim upon which relief could be granted, our review is limited to the allegations in the pleadings.[3] We consider the wrongful death claim first.

1. Wrongful Death Claim

[1-4] Manuela's wrongful death claim was dismissed for failure to state a claim. We review a district court's order granting a motion to dismiss de novo.[4] When reviewing a dismissal order, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which

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[2] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[3] See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[4] *Id.*

may be drawn therefrom, but not the pleader's conclusions.[5] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[6] 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.[7]

(a) Rescission

[5] Although the issue presented is the viability of Manuela's wrongful death claim, our analysis does not relate to the facts underlying that claim. Rather, our analysis is focused on the release, because its existence is apparent on the face of the complaint, and one who seeks to avoid the legal effect of a release of a claim for damages has the burden of pleading and proving the facts which entitle such party to relief.[8] So, the question is whether Manuela has alleged facts (or could allege facts) sufficient to support an inference that the release is void or voidable. We find that she has.

[6] Manuela argues that the circumstances show her failure to understand the release and the unequal bargaining position that she was in. Union Pacific, on the other hand, relies upon the general rule that in the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.[9] But the key qualifiers in that rule are the ability to read and the absence of fraud. Manuela specifically

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

[9] See, *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

pled that she could not read. And it is longstanding, well-established law that circumstances like these are sufficient to support legal or equitable relief from a release, on grounds of fraud, overreaching, or a simple absence of a meeting of the minds.[10]

[7,8] The general rule is that a release of a claim for relief should not be upheld if fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.[11] If the releasor was under a misapprehension, not due to his or her own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releasor.[12] The release, to the extent it purports to release claims other than any understood by the releasor to be included, is ineffective to that extent.[13] This is because there was no meeting of the minds, or binding mutual understanding, necessary to create a contract.[14]

[9,10] Even an innocent or accidental misrepresentation, if intended to be acted upon by the releasor, and actually relied

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[10] See, e.g., *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (2d Cir. 1946); *Provident Life & Accident Ins. Co. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945); *Great Northern Ry. Co. v. Kasischke*, 104 F. 440 (8th Cir. 1900); *Jacobs v. Farmland Mut. Ins. Co.*, 377 N.W.2d 441 (Minn. 1985); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967); *Jordan v. Guerra*, 23 Cal. 2d 469, 144 P.2d 349 (1943); *Palkovitz v. American S. & T. P. Co.*, 266 Pa. 176, 109 A. 789 (1920); *Miller v. Spokane International R. Co.*, 82 Wash. 170, 143 P. 981 (1914); *Lusted v. The Chicago & Northwestern R. Co.*, 71 Wis. 391, 36 N.W. 857 (1888); *Heuter v. Coastal Air Lines, Inc.*, 12 N.J. Super. 490, 79 A.2d 880 (1951); *Davis v. Whatley*, 175 So. 422 (La. App. 1937).

[11] See, *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F.2d 819 (9th Cir. 1949); *Carpenter International, Inc. v. Kaiser Jamaica Corp.*, 369 F. Supp. 1138 (D. Del. 1974).

[12] *Carpenter International, Inc., supra* note 11.

[13] See, *Pacific Greyhound Lines v. Zane*, 160 F.2d 731 (9th Cir. 1947); *Jordan, supra* note 10; *Miller, supra* note 10; *Davis, supra* note 10.

[14] See *id.* See, also, e.g., *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

upon, can be effective to avoid a release.[15] Beyond that, a finding of overreaching or duress can support relief in equity from a release. Overreaching, which is closely related to fraud,[16] has been defined as the result of an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.[17] And in circumstances affording an opportunity for overreaching, the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his or her legal rights.[18]

For instance, in *Jordan v. Guerra*,[19] the dispute concerned a release that had been signed by the father of a child who had been struck and killed by a car. He was contacted by the driver of the car and the driver's insurance adjuster, who offered to pay the child's funeral expenses. The adjuster offered the father enough to cover the funeral bill and his lost wages from work and told the father that it was all the family could get. The insurer prepared a release which purported to completely settle any claim arising from the accident, which release the father signed. Later, the father sought to rescind the release, explaining that he had not known that he had a right to anything except the funeral expenses and time lost, which were the only subject of discussion, and that he had thought that was all the release covered. The California Supreme Court affirmed a judgment in the father's favor, explaining that it was

> for the trier of the facts to determine what the [father] understood was covered by the writing and whether his understanding different from the writing was induced by the defendant. If a misconception be found and that the defendant was responsible therefor, the contract insofar as it purports to release claims other than those understood

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[15] See *Doyle v. Teasdale*, 263 Wis. 328, 57 N.W.2d 381 (1953).

[16] See *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. 2000).

[17] *Schreiber v. Schreiber*, 795 So. 2d 1054 (Fla. App. 2001).

[18] *Jordan, supra* note 10. See, also, *Graham, supra* note 11; *Jacobs, supra* note 10; *Lusted, supra* note 10; *Heuter, supra* note 10.

[19] *Jordan, supra* note 10.

> by the [father] to be included, is ineffective to that extent . . . .[20]

And, the court found, there was sufficient evidence to support the findings that the adjuster had hurried to reach a settlement before the father could secure independent advice, that the settlement was inadequate, and that the adjuster had misled the father into believing that he had no claim beyond funeral expenses and time lost and that those were the only items covered by the release.[21]

Similarly, in *Jacobs v. Farmland Mut. Ins. Co.*,[22] the parents of an accident victim sought to set aside a settlement that had been reached with the tort-feasor's insurance adjuster only 7 days after the accident. The father, who agreed to the settlement, could neither read nor write, although the adjuster claimed to have explained the settlement to him. The Minnesota Supreme Court affirmed the trial court's rescission of the settlement, finding that the circumstances supported findings of "improvidence, unconscionability," and "willful indifference to the rights of others."[23] The court explained that while a finding of fraudulent misrepresentation was not implicit in the jury's findings,

> fraud is a protean legal concept, assuming many shapes and forms. In this case, [the adjuster] was guilty of overreaching, which is a species of fraud, and the jury implicitly so found. [The father] was a simple man, functionally illiterate, and inexperienced. This, combined with his grief, left him vulnerable to a superior negotiator. [The adjuster] was unaware of [the father's] illiteracy, but, as an experienced adjuster, he could not have been unaware of the man's innate incapacity to negotiate effectively. This is not a case of a hard bargain fairly made but an unfair bargain unfairly made.[24]

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[20] *Id.* at 475-76, 144 P.2d at 352.

[21] See *Jordan, supra* note 10.

[22] *Jacobs, supra* note 10.

[23] *Id.* at 444.

[24] *Id.* at 444 n.1.

And in *Heuter v. Coastal Air Lines, Inc.*,[25] the releasor was an uneducated Puerto Rican who understood Spanish, but did not read, write, or understand English. He was injured in an airplane crash and hospitalized. A week after the accident, agents of the airline came to the hospital and, according to the releasor, told him that they were going to buy him some clothes and give him some money. They took him from the hospital in a bathrobe and slippers, provided him with clothes and gave him $316 in cash, then returned him to the hospital. He signed the release proffered to him by the agents with an "X" mark, because he did not know how to write his name. But, he claimed that the release had never been read or explained to him. Nonetheless, the trial court entered summary judgment against him.

On appeal, however, the New Jersey appellate court explained that the rule permitting avoidance of a release was not limited to circumstances involving fraudulent misrepresentation or similar misconduct. Rather, the court explained, it is

> when the release is obtained "from the illiterate, the weak-minded or distressed party, under circumstances which indicate that it was procured by artifice or deception, or by undue pressure and importunity inducing action without advice or time for deliberation, or by advantage taken of distress, or for no or an inadequate consideration, or is otherwise inequitable, that it will come under condemnation."[26]

The court rejected the defense that the agents had made no "affirmative misstatement," explaining that "even assuming the agents refrained from making any affirmative misstatement," the agents' conduct gave rise to a triable issue "as to whether there had been 'imposition practiced upon the signer with intent to deceive him as to the purport of the paper signed.'"[27] And, the court reasoned, the releasor could, to avoid the release,

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[25] *Heuter, supra* note 10.

[26] *Id.* at 494, 79 A.2d at 883.

[27] *Id.* at 495, 79 A.2d at 883.

> properly rely upon the evidence of his illiteracy, his illness, the absence of friends and counsel, his lack of understanding and the omission of all explanation, the haste, pressure and somewhat startling circumstances surrounding the procurement of his mark, and invoke pertinent equitable principles based upon unfair and unconscionable conduct of the defendant.[28]

Case law is, in fact, replete with instances in which persons illiterate in English have been able to obtain relief from releases that were inadequately explained to them or that they simply did not understand.[29] In *Great Northern Ry. Co. v. Kasischke*,[30] the Eighth Circuit explained that the releasee had a duty, when informed that the releasor "could not read or write English, and that he relied upon him for an explanation of the contents of the paper, to explain its purport and the object of asking him to sign it, and to do so fully, in language which the [releasor] could comprehend." In *Miller v. Spokane International R. Co.*,[31] the Washington Supreme Court found the evidence of fraud sufficient when the releasor, who did not speak English, testified that he had signed a release for a personal injury claim that had not been explained to him, and believed that he was being paid for lost wages. In *Palkovitz v. American S. & T. P. Co.*,[32] the Supreme Court of Pennsylvania affirmed a judgment in favor of a releasor who could neither read, write, nor understand English and had placed his mark upon a release of a personal injury claim believing it to merely be a receipt for relief money. And in *Davis v. Whatley*,[33] the Louisiana appellate court also concluded that an illiterate releasor was entitled to relief from a release that he had signed

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[28] *Id.* at 496, 79 A.2d at 883.

[29] See *Heuter, supra* note 10. See, also, e.g., *Kasischke, supra* note 10; *Palkovitz, supra* note 10; *Miller, supra* note 10; *Davis, supra* note 10.

[30] *Kasischke, supra* note 10, 104 F. at 445.

[31] *Miller, supra* note 10.

[32] *Palkovitz, supra* note 10.

[33] *Davis, supra* note 10.

believing to be a receipt, in his case, for payment of his medical bill.

Nebraska law contains similar examples. For instance, in *Ward v. Spelts*,[34] the parties had entered into a contract for the sale of corn. The written contract was for the sale of 3,000 bushels of corn, but the seller claimed that had not been the actual agreement of the parties. The seller could neither read nor write and had made his mark on the contract based on the assurance of the buyers' agent that it embraced the agreement as the seller understood it. We reversed a trial court judgment for the buyers, explaining that "[t]he doctrine, that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing," does not apply "when the defense is that such writing, by reason of fraud, does not embrace the contract actually made."[35]

Similarly, in *West v. Wegner*,[36] the parties were disputing the validity of a guaranty allegedly executed on a promissory note. The purported guarantor alleged that he had been asked to sign the note only as a witness. He could read and write, but did not have his glasses, and signed the agreement not knowing that it was a guaranty. We affirmed a judgment in his favor, rejecting the creditor's reliance upon the rule that "a party . . . is not permitted to avoid the contract on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form."[37] That rule, we explained, "does not apply where the controversy is between the parties and the execution of the instrument was induced by fraud."[38]

Courts have also explained that a release can be voided on the ground of duress, which occurs when pressure is brought to force accession to unjust, unconscionable, or illegal demands.[39]

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[34] *Ward v. Spelts*, 39 Neb. 809, 58 N.W. 426 (1894).

[35] *Id.* at 815, 58 N.W. at 428.

[36] *West v. Wegner*, 172 Neb. 692, 111 N.W.2d 449 (1961).

[37] *Id.* at 694, 111 N.W.2d at 450-51.

[38] *Id.* at 694, 111 N.W.2d at 451.

[39] See *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

So, for instance, a releasor's dire economic circumstances[40] or threats of legal trouble[41] have been held to undermine the enforceability of a release.[42]

And in *Carroll v. Fetty*,[43] the Supreme Court of Appeals of West Virginia found that duress had been established when the parents of a child struck by an automobile settled with the tort-feasor's insurance adjuster 2 days after the accident, because their undertaker refused to release the child for burial without being paid. The court explained that duress sufficient to suspend the will exercised by a party to a release is sufficient to destroy its legal effect. And, the court said, the parents had been forced to sign the release in order to provide their child with "a prompt and decent burial."[44] The insurance adjuster, knowing of these "unfortunate and appalling circumstances," took advantage of them.[45] The court concluded that where a releasee knows of duress and takes advantage of it in causing the release to be executed, the release may be set aside, provided the duress was sufficient to subvert the will of the parties.[46]

When all of these well-established principles are considered, it is evident that Manuela has alleged facts sufficient to state a claim for relief from the release. She specifically alleged that she does not read or speak English and did not understand the effect of the release. While she has not made specific allegations regarding misinformation or inaccurate language interpretation, affirmative misstatements are not necessary. Manuela has alleged facts that would, if proved, support an inference that the release was void as not representing a binding mutual understanding between the parties. And Manuela has at least

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[40] See *Reliable Furniture Co. v. Fidelity & Guar. Ins. Under.*, 16 Utah 2d 211, 398 P.2d 685 (1965).

[41] See *Montoya, supra* note 10.

[42] See *Macke v. Jungels*, 102 Neb. 123, 166 N.W. 191 (1918).

[43] *Carroll v. Fetty*, 121 W. Va. 215, 2 S.E.2d 521 (1939).

[44] *Id.* at 220, 2 S.E.2d at 524.

[45] *Id.* at 219, 2 S.E.2d at 523.

[46] See *Carroll, supra* note 43.

alleged facts that "raise a reasonable expectation that discovery will reveal evidence"[47] of fraud, overreaching, or duress.

These are, obviously, only allegations, and Union Pacific is entitled to present evidence that its employees acted in good faith and acquitted themselves equitably. But Manuela has alleged facts that could allow a trier of fact to conclude otherwise, and given our standard of review on a motion to dismiss, that is all that is required. On the face of her complaint, Manuela pled a claim for relief, and the district court erred in dismissing it.

Having reached that conclusion, we do not address Manuela's alternative argument that the release was invalid because at the time it was executed, she had not been appointed personal representative of Efrain's estate. Only a decedent's personal representative may bring a claim for wrongful death of that decedent,[48] and the personal representative shall not compromise or settle a claim for damages for wrongful death until the court by which he or she was appointed shall first have consented to and approved the terms of the settlement.[49]

But the complaint in this case, while it suggests that Manuela had not been appointed personal representative at the time the release was executed, does not allege anything about when she was appointed or whether or not the settlement was ever ratified by the personal representative or the probate court. Simply put, there is no basis in the complaint to resolve this issue one way or the other, and given our conclusion above with respect to rescission, we need not address it further.

(b) Alternative Grounds for Dismissal

In arguing for affirmance, Union Pacific offers several alternative reasons which it contends support the district court's dismissal of the claim.

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[47] See *Central Neb. Pub. Power Dist., supra* note 3, 280 Neb. at 538, 788 N.W.2d at 258.

[48] See *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

[49] See Neb. Rev. Stat. § 30-810 (Reissue 2008).

(i) Prayer for Relief

Union Pacific contends that Manuela's complaint is defective because it does not contain a prayer that the release be voided. We find this argument unpersuasive for two reasons. First, as noted above, Manuela has alleged facts which would support a finding that the release was not simply voidable, but void ab initio. In that case, affirmative relief from the court is not required; as a technical matter, the claim does not involve "rescission" at all, because there is nothing to rescind. Of course, as a practical matter, the court would still need to find that the release was void in order to grant relief on the underlying claim. But if the release is void, then it is not necessary for the court to grant rescission in order to invalidate it.[50]

Second, to the extent that Manuela's complaint should have sought rescission, she asked for leave to amend her complaint at the hearing on Union Pacific's motion to dismiss. Neb. Ct. R. Pldg. § 6-1115(a) provides that leave to amend a pleading "shall be freely given when justice so requires." But the district court, finding that the release was an "insuperable bar to relief," dismissed the wrongful death claim without expressly ruling on that request.

[11-13] We review a district court's decision on a motion for leave to amend a complaint for an abuse of discretion, but a district court's discretion to deny such leave is limited.[51] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[52] None of those factors were evident here. And more specifically, it is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.[53] So, to the extent that Manuela's failure

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[50] See, generally, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

[51] See *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

[52] *Id.*

[53] See *id.*

to specifically pray for rescission in her complaint supported the court's decision on Union Pacific's motion to dismiss, the court abused its discretion in not permitting Manuela to amend her complaint.

(ii) Tender and Restitution

Union Pacific argues that Manuela was required, as a prerequisite to her suit, to tender back the $15,000 she received as consideration for the release. Union Pacific relies upon *Doe v. Golnick*,[54] in which we held that a plaintiff's claim for rescission of a settlement agreement was barred because she failed to tender the settlement proceeds. We conclude, however, that *Doe* is distinguishable. But explaining how will require an examination of some basic common-law doctrine.

a. Rescission at Law and Rescission in Equity

[14] The general rule upon which we relied in *Doe* was that when a person seeks to avoid the effect of a release, he or she must first tender or return whatever he or she has received for executing the release.[55] We recognized, however, that tender or return of consideration is only a condition precedent in a case where rescission is by act of the party—a legal rescission. Tender or return is not a condition precedent in a case involving equitable rescission—an action to obtain a decree of rescission.[56] The distinction, we have explained, is as follows:

> "Strictly speaking, in a law case, the rescission is by act of the party and is a condition precedent to bringing an action to recover money or thing owing to him by any other party to the contract as a consequence of the rescission, and by his rescission or repudiation of a contract a party merely gives notice to the other party that he does not propose to be bound by the contract. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although

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[54] *Doe v. Golnick*, 251 Neb. 184, 556 N.W.2d 20 (1996).

[55] See *id.*

[56] See *id.*

> nothing is said concerning it either in the pleading or in the judgment, a contract or conveyance, as the case may be, is virtually rescinded; the recovery is based on the fact of such rescission and could not have been granted unless the rescission had taken place.
>
> "In equity, on the other hand, the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist."[57]

So, because rescission is not accomplished in equity until the court so decrees, the plaintiff has no obligation before suit to tender or return goods or money received from the defendant.[58] "'This does not mean that the plaintiff is entitled to get back what he gave and keep what he got, too. It means only that he need not make formal tender before suit.'"[59]

The distinction between rescission at law and in equity is difficult to make in a case involving rescission of a settlement agreement, given that the plaintiff generally seeks to prosecute an underlying claim, as opposed to, for instance, obtaining the return of chattel transferred under a contract. In *Doe*, we characterized it as rescission at law, based on the fact that the underlying suit was an action at law.[60] But even when a case seeks rescission at law, there are several exceptions to the tender requirement, many of which are relevant here.

b. Fraud in Inducement and Fraud in Execution

[15] First and most important, it is well established that a rescinding party is not required to tender or return consideration when the ground for rescission is fraud in the execution

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[57] *Haumont v. Security State Bank*, 220 Neb. 809, 815-16, 374 N.W.2d 2, 7 (1985). Accord *Kracl, supra* note 50.

[58] *Kracl, supra* note 50; *Haumont, supra* note 57.

[59] *Kracl, supra* note 50, 236 Neb. at 299, 461 N.W.2d at 73.

[60] See *Doe, supra* note 54.

as opposed to fraud in the inducement.[61] Fraud in the execution goes to the very existence of the contract, such as where a release is misread to the releasor, or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument he or she did not mean to execute.[62] In such cases, as explained above, there was no meeting of the minds, so the consideration received was not received for consenting to the terms of the alleged contract—in other words, it is not a question of a contract voidable for fraud, but of no contract at all.[63] Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations—for instance, as to the nature and value of the consideration, or other material matters.[64]

[16] When a settlement or release is merely voidable, due to fraud in the inducement, the consideration should be tendered or returned as a condition precedent to maintaining an action on the original claim.[65] But in a case of fraud in the execution, because there never was a contract or release, tender or return of the consideration is not required. The principle that consideration should be returned or tendered "'does not apply to cases where a party holds out that he gives the consideration

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[61] See, *Vickers v. Gifford-Hill & Co, Inc.*, 534 F.2d 1311 (8th Cir. 1976); *Ted Price Construction Co. v. Cascade Natural Gas Corp.*, 307 F.2d 741 (9th Cir. 1962); *Marshall v. New York Central Railroad Company*, 218 F.2d 900 (7th Cir. 1955); *Zane, supra* note 13; *Brusseau v. Electronic Data Systems Corp.*, 694 F. Supp. 331 (E.D. Mich. 1988); *McCarty v. Kendall Company*, 242 F. Supp. 495 (W.D.S.C. 1965); *Stewart v. Eldred*, 349 Mich. 28, 84 N.W.2d 496 (1957); *Picklesimer v. Rd. Co.*, 151 Ohio St. 1, 84 N.E.2d 214 (1949); *Jordan, supra* note 10; *Union Life & Accident Ins. Co. v. American Surety Co.*, 113 Neb. 300, 203 N.W. 172 (1925); *Swan v. Great Northern R. Co.*, 40 N.D. 258, 168 N.W. 657 (1918).

[62] See *Swan, supra* note 61.

[63] See *id.*

[64] See *id.*

[65] See *Picklesimer, supra* note 61. See, also, *Union Life & Accident Ins. Co., supra* note 61; *Swan, supra* note 61.

for one thing, and by fraud obtains an agreement that it was given for another thing.'"[66]

So, in *Union Life & Accident Ins. Co. v. American Surety Co.*,[67] this court rejected an argument that a party's right to rescind an instrument was defeated by his failure to tender the premium received, stating that while the tender-or-return argument was based on "familiar principles," they did not apply, because "the right of rescission is based upon the at-one-time existence of the contract." We explained that "where . . . there never was any contract in law, such tender was unnecessary," although the rescinding party "would doubtless be liable as for money had and received."[68]

It is on that basis that our decision in *Doe* is distinguishable. In *Doe*, although our opinion did not discuss it, an examination of the transcript shows that the plaintiff's testimony supported only fraud in the inducement. Although the plaintiff in *Doe* claimed that the settlement had been obtained by duress, she did not assert that the terms of the settlement varied from what she understood them to be. But in this case, as discussed above, Manuela's complaint alleges facts supporting both fraud in the inducement and fraud in the execution. To the extent that she has alleged fraud in the execution, she was not required to tender or return Union Pacific's consideration in order to assert her underlying wrongful death claim.

c. Other Exceptions

[17] But even where fraud in the inducement is alleged, the tender-or-return requirement may not be imposed where it would be inequitable to do so or where the underlying action is for money damages against which the value of the consideration could be set off against a recovery. We have held that while the power of a party to avoid a transaction for fraud or misrepresentation may be conditioned on an offer to return the consideration received, a failure to do so does not preclude

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[66] *Swan, supra* note 61, 40 N.D. at 273, 168 N.W. at 661.

[67] *Union Life & Accident Ins. Co., supra* note 61, 113 Neb. at 305, 203 N.W. at 174.

[68] *Id.* at 305, 203 N.W. at 175.

avoidance if the consideration "'is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim,'" or "'constitutes a comparatively small part of the whole consideration.'"[69] As the Ninth Circuit has explained, a defendant cannot claim that it is "being unduly harassed, assuming the validity of the releases. That issue can be tried separately, and tried first, and if the court finds in [the defendant's] favor, that will be the end of the matter."[70]

[18,19] And courts have also generally held, as this court did in *Davy v. School Dist. Of Columbus*,[71] that the rule requiring tender or return of consideration "'is not absolute, is not to be strictly construed where restoration is impossible, and is to be applied in accordance with equitable principles.'" So, courts have held that, in the Eighth Circuit's words,

> [a] release procured by fraud will be set aside, without tender or return of the consideration, when the releasor, because of conditions of poverty, is unable to meet the tender-or-return requirement and the fraud remained undiscovered until after the consideration had been expended or otherwise put beyond the releasor's control.[72]

Otherwise, "the wrongdoer goes unwhipped of justice in every case where fraud is practi[c]ed on the improvident or poor, who forsooth have spent some of what was obtained in the

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[69] *Collins v. Hughes & Riddle*, 134 Neb. 380, 390, 278 N.W. 888, 894 (1938). See, *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943); *Aron v. Mid-Continent Co.*, 143 Neb. 87, 8 N.W.2d 682 (1943); *Fox v. State*, 63 Neb. 185, 88 N.W. 176 (1901). See, also, *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S. Ct. 1150, 20 L. Ed. 2d 73 (1968); *Ted Price Construction Co., supra* note 61; *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827 (E.D. Pa. 1961).

[70] *Ted Price Construction Co., supra* note 61, 307 F.2d at 743.

[71] *Davy v. School Dist. of Columbus*, 192 Neb. 468, 473, 222 N.W.2d 562, 565 (1974). See, also, *Vickers, supra* note 61; *Rachesky v. Finklea*, 329 F.2d 606 (4th Cir. 1964); *Ted Price Construction Co., supra* note 61; *First Nat. Bank & Trust Co. v. Am. Sec. & Trust Co.*, 437 F. Supp. 771 (D.D.C. 1977); *Rase v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 118 Minn. 437, 137 N.W. 176 (1912); *New Amsterdam Casualty Co. v. Harrington*, 11 S.W.2d 533 (Tex. Civ. App. 1928).

[72] *Vickers, supra* note 61, 534 F.2d at 1314. See, also, *Rase, supra* note 71; *Harrington, supra* note 71.

deal before discovering the fraud."[73] As the Ninth Circuit said, in rejecting an argument that an appellant facing financial difficulties was required to return a $21,000 settlement before pursuing a multimillion-dollar claim:

> [T]he suggested rule [does not] appeal to our sense of fairness. There is an uncontradicted showing in the case at bar that appellant is in financial difficulties and cannot raise the $21,000. It does not sit well with us to say to appellant, "you may be able to prove that you were defrauded, that you are entitled to recover the entire $3,067,591 that you claim, and that, by reason of appellees' fraud you bargained your claim away for $21,000, but we will not let you until you have paid up the $21,000, whether you are able to do so or not". This smacks too much of the famous saying of Anatole France: "The law, in its magnificent equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread".[74]

In this case, although Manuela has not specifically alleged an inability to repay the $15,000 she received, she did allege that she has "no financial means," including the means to pay for Efrain's burial. It would be reasonable to infer that the $15,000 has been spent and that Manuela is unable to tender that much money to Union Pacific. Under those circumstances, it is reasonable to infer from Manuela's complaint that "restoration [may be] impossible" within the meaning of our decision in *Davy*[75] and that Manuela may receive equitable relief from the tender-or-return requirement.

(iii) Evidence That Manuela's Native Language Is Spanish

Union Pacific also argues that the release was translated to Manuela in Spanish and that, therefore, she should have understood it. In order to understand this argument, it is necessary to briefly examine the record that was developed on the fiduciary

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[73] *Rase, supra* note 71, 118 Minn. at 441, 137 N.W. at 178.

[74] *Ted Price Construction Co., supra* note 61, 307 F.2d at 743.

[75] *Davy, supra* note 71.

duty claim after the wrongful death claim was dismissed. The evidence, generally summarized, shows that when the release was executed, Manuela was accompanied and advised by the man with whom she was living and a priest who spoke Spanish, who tried to explain the release to her. But Manuela averred that her first language is not Spanish, but Q'anjob'al, a Mayan dialect. She averred that at the time of the settlement, she understood some Spanish, but was not fluent.

Union Pacific takes issue with that averment, pointing out that the affidavit she made for the record was read to her in Spanish. So, Union Pacific argues, she should have been able to understand the release too. But, we note, Manuela also averred that she had become more fluent in Spanish during the nearly 3-year period between the accident and the execution of her affidavit. We also note a distinct lack of evidence in the record suggesting that the release had been translated to her *correctly*.

But, more important, Manuela has appealed from the *dismissal* of her wrongful death claim. As noted above, the scope of our review is limited, on that claim, to Manuela's complaint. In her complaint, she alleged that she did not speak English or understand the release and its legal consequences. Union Pacific's argument is directed at whether she could ultimately prove those facts, but under our standard of review, we ask only whether her allegations are plausible. They are.

(iv) Reasonable Diligence

[20-22] Finally, Union Pacific argues that Manuela failed to prosecute her claim for rescission with reasonable diligence. We have said that a party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind.[76] But whether one seeking to rescind a contract on the ground that it was procured by fraud or duress has acted with reasonable promptness is, ordinarily, a question of fact.[77] And a delay is unreasonable only if a litigant has been

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[76] *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[77] *McGuire v. Thompson*, 152 Neb. 28, 40 N.W.2d 237 (1949).

guilty of "'inexcusable neglect'" and, during the lapse of time, circumstances have changed such that permitting rescission would work inequitably to the disadvantage or prejudice of the other party.[78]

The complaint here was filed 16 months after the accident, and there is no basis in the complaint for evaluating when Manuela might have learned of the basis for rescission. Nor is there any basis in the complaint for concluding that Union Pacific was somehow unfairly prejudiced by any delay. Nor, we note, would the timeliness of Manuela's claim for rescission be at issue were the release to be found void, as opposed to voidable. On the facts alleged here, we cannot say as a matter of law that Manuela failed to act within a reasonable time[79] or that such a finding would be legally dispositive in any event. Union Pacific's argument provides no basis for affirming the dismissal of Manuela's wrongful death claim.

(c) Conclusion on Wrongful Death Claim and Rescission

In sum, we find that Manuela has alleged facts that, if proved, could demonstrate that the release was void on the basis of its failure to represent a binding mutual understanding of the parties or was voidable as the product of fraud, overreaching, or duress. We find no merit to Union Pacific's alternative grounds for affirming the dismissal of Manuela's wrongful death claim. In particular, we find that tender or return of the consideration for the release is not necessary if the release is void due to fraud in the execution and that even if it is merely voidable, Manuela may still be able to prove an exception to the tender requirement. Therefore, we find merit to Manuela's first assignment of error. The district court erred in dismissing her wrongful death claim.

2. Fiduciary Duty Claim

[23-25] Manuela argues that the court erred in granting summary judgment against her fiduciary duty claim. In reviewing

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[78] *Kracl, supra* note 50, 236 Neb. at 300, 461 N.W.2d at 74.

[79] See *Macke, supra* note 42.

a summary judgment, we view 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.[80] But, we note, the existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.[81] The allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.[82]

Manuela argues that Union Pacific had a fiduciary duty to act in her interests, which duty its representative breached by permitting her to settle her claim. Evaluating Manuela's argument will, again, require a brief examination of the record that was made after the dismissal of the wrongful death claim and submitted on the motion for summary judgment. Manuela relies on evidence that the Union Pacific claims representative who negotiated the settlement held himself out to Manuela as being concerned about her well-being.

At his deposition, the claims representative explained that based on his knowledge of Efrain's accident, he did not believe Union Pacific had been at fault, but that Union Pacific wants to be a "good neighbor" in Schuyler, so the settlement was an attempt to help Efrain's family with burial expenses. The claims representative offered a $15,000 settlement to pay for the costs of the funeral home, travel to Guatemala to bury Efrain, and incidental expenses. Manuela points to evidence in the record suggesting that Union Pacific's claims representatives are trained to gain the trust and confidence of potential claimants in order to facilitate settlement. And in her affidavit, Manuela averred that Union Pacific employees had told her that "they were here to offer their help."

[26-28] This, according to Manuela, was sufficient to support a finding of a fiduciary duty from Union Pacific to Manuela. We disagree. A fiduciary duty arises out of a confidential

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[80] *A.W., supra* note 2.

[81] *American Driver Serv. v. Truck Ins. Exch.*, 10 Neb. App. 318, 631 N.W.2d 140 (2001).

[82] *Degmetich v. Beranek*, 188 Neb. 659, 199 N.W.2d 8 (1972).

relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind.[83] In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence are thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.[84] But superiority of bargaining power alone does not create a fiduciary duty, because there must also be an opportunity to exercise undue influence.[85]

Obviously, the mere fact that the parties entered into a settlement agreement is insufficient to support a finding of fiduciary duty.[86] And there was no evidence here that Union Pacific actually gained Manuela's trust or had the opportunity to use its claims representative's relationship with her to influence her. There is no evidence, even in Manuela's affidavit, that she did not understand Union Pacific was an adverse party.[87] Manuela did not aver that Union Pacific's representative had actually gained her confidence or that she entered into the settlement because she trusted Union Pacific.[88] In short, even if Union Pacific held itself out as acting in Manuela's interest, there is no evidence that Manuela believed it or invested sufficient trust in Union Pacific for Union Pacific to have an opportunity to unduly influence her.

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[83] *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995); *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); *Schaneman v. Schaneman*, 206 Neb. 113, 291 N.W.2d 412 (1980); *Boettcher v. Goethe*, 165 Neb. 363, 85 N.W.2d 884 (1957); *American Driver Serv., supra* note 81.

[84] *Schaneman, supra* note 83.

[85] See, *Bloomfield, supra* note 83; *Schaneman, supra* note 83, *American Driver Serv., supra* note 81.

[86] See, *American Driver Serv., supra* note 81; *Huffman v. Poore*, 6 Neb. App. 43, 569 N.W.2d 549 (1997).

[87] See, *Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92 (1975); *American Driver Serv., supra* note 81.

[88] See, *Bloomfield, supra* note 83; *Huffman, supra* note 86.

Manuela also suggests that a fiduciary duty was created by the claims representative's, in effect, "practicing law."[89] We agree that the relationship between attorney and client is a fiduciary or confidential relationship.[90] But even if there was evidence suggesting that the claims representative was engaged in something akin to the unauthorized practice of law, there is no evidence to suggest that he would have been *Manuela's* attorney—even had the claims representative been a practicing, licensed attorney, there is no evidence from which an attorney-client relationship between Manuela and the claims representative could be inferred.[91]

And the fiduciary nature of the attorney-client relationship is premised upon the client's right to believe and rely upon his or her attorney's representations and to be governed by the attorney's counsel.[92] As explained above, there is no evidence here that Manuela understood herself to have such a relationship with Union Pacific's claims representative. In the absence of such evidence, the district court correctly concluded that Union Pacific owed no fiduciary duty to Manuela. We find no merit to Manuela's second assignment of error.

3. Discovery Issues

[29] Manuela's three final assignments of error are directed at the court's rulings on the parties' disputes during the discovery process. Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[93]

(a) Protective Order

The first argument we address is Manuela's claim that the court erred in granting Union Pacific's motion for a protective

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[89] Brief for appellant at 22.

[90] See *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998).

[91] See, *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004); *Bauermeister, supra* note 76.

[92] See *Zimmer v. Gudmundsen*, 142 Neb. 260, 5 N.W.2d 707 (1942).

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

order regarding its claims manual. As described above, Union Pacific obtained an order that the parties were to keep the document secure and private, not disclose it for any purpose other than this case, not distribute it to any third persons other than counsel or retained experts, and return the document to Union Pacific once the litigation was concluded. Manuela claims that was an abuse of discretion.

[30,31] Neb. Ct. R. Disc. § 6-326(c) provides that a trial court may, "for good cause shown, . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The law gives trial courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.[94] The U.S. Supreme Court has interpreted the language of § 6-326(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."[95] The Court explained that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."[96]

Union Pacific argued that the claims manual should be protected because, among other reasons, it was outdated, was proprietary, and could be used "inappropriately" in other litigation against Union Pacific. While we recognize that this is not a particularly compelling showing of good cause for a protective order, we also note that Manuela has presented no argument, either to the trial court or this court, explaining how she has been prejudiced by the protective order, and we are mindful of the trial court's broad discretion with respect to protective orders. Because there is no suggestion that Manuela's case has

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[94] *Phillips ex rel. Estates of Byrd v. G.M.Corp.*, 307 F.3d 1206 (9th Cir. 2002).

[95] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

[96] *Id.*

been prejudiced by the protective order, we conclude that the court did not abuse its discretion by entering it.

(b) Motions to Compel

Manuela argues that the district court abused its discretion in denying several of her motions to compel, as described above. But given the procedural posture of this case, we decline to address her arguments. As described above, Union Pacific objected to the discovery requests at issue by, among other things, disputing the relevance of the materials sought. And, because the court did not explain its reasoning for denying Manuela's motions, we do not know whether the court agreed with Union Pacific that the materials sought were irrelevant.

This is significant because, at the time that the discovery disputes were resolved, the issues in this case were fundamentally different. Manuela's wrongful death claim had been dismissed, and discovery was being conducted as to her fiduciary duty claim before summary judgment was entered. But we have concluded that the wrongful death claim should not have been dismissed. And we have concluded that judgment was properly entered against Manuela on the fiduciary duty claim.

So, when this case is remanded, the claim upon which discovery was being conducted will be gone and, instead, any discovery will be conducted with respect to the wrongful death claim (and related rescission arguments). This means that the relevance of the disputed materials may well be different. We have no way of knowing whether Union Pacific will continue to dispute their relevance, whether Manuela will continue to seek their production, or whether the district court's ruling on any remaining discovery disputes would be the same given the substitution of claims required by our mandate.

Our appellate review of discovery decisions that were made in an entirely different legal context would be at best advisory, and not particularly good advice at that. In other words, because Manuela's claims for relief have changed, the discovery arguments that the parties had been making are moot. So, we do not address the merits of Manuela's arguments regarding her motions to compel. Rather, we direct the parties and the district court, upon remand, to revisit any remaining discovery

disputes in light of the changed legal context in which they are presented. And we encourage the district court, should it be required to rule on any such disputes, to articulate the basis for its rulings, in order to facilitate possible appellate review of their merits.[97]

(c) Attorney Fees

[32] Finally, Manuela argues that the court awarded her insufficient attorney fees. When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[98] As described above, in this case, Manuela sought a total of $3,756.70 in attorney fees for discovery disputes, but was awarded only $2,500. Manuela argues that she should have been awarded the full amount she asked for.

But Manuela's motion for attorney fees was based on an affidavit from her attorney, who averred as to her rates and expenses with respect to the entire January 9, 2008, hearing on her motion to compel. Manuela's attorney averred as to the time necessary for the hearing, travel to the hearing, and writing of her brief, and to various travel expenses. And as noted above, while Manuela prevailed on some of the issues presented by her motion to compel, she did not prevail on all of them.

[33] Attorney fees are a permissible sanction for a discovery violation.[99] If a court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney fees and costs.[100] In this case, however, the district court found some but not all of Manuela's discovery complaints to be warranted, which

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[97] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007) (explaining difficulty of reviewing trial court's exercise of discretion when court does not explain reasoning).

[98] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[99] See, *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

[100] Neb. Rev. Stat. § 25-824(4) (Reissue 2008).

means, of course, that not all of Union Pacific's opposition to Manuela's motion to compel was substantially unjustified.[101] In other words, even if some of Union Pacific's conduct was an "abuse" of the civil discovery procedures, not all of it was. Given that finding, the district court did not abuse its discretion in reducing the attorney fees that Manuela requested for the hearing on her motion to compel.

IV. CONCLUSION

For the foregoing reasons, we conclude that the district court erred in dismissing Manuela's wrongful death claim. As to that claim, the court's judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. But we conclude that the court correctly entered summary judgment against Manuela's fiduciary duty claim, and we affirm the court's judgment in that respect. We affirm the protective order and award of attorney fees. And finally, we neither affirm nor reverse the court's rulings on Manuela's motions to compel; instead, we direct the court upon remand to revisit any discovery issues that the parties continue to dispute.

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

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[101] See *Greenwalt, supra* note 99.

STATE OF NEBRASKA, APPELLEE, V.
HERCHEL HAROLD HUFF, APPELLANT.
802 N.W.2d 77

Filed August 26, 2011. No. S-10-562.

1. **Double Jeopardy: Lesser-Included Offenses: Appeal and Error.** Whether two provisions are the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below.
2. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

3. **Double Jeopardy: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
4. **Double Jeopardy: Sentences: Proof.** The *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same elements," test asks whether each offense contains an element not contained in the other, or, more precisely, whether each provision requires proof of a fact which the other does not. If not, they are the same offense and double jeopardy bars additional punishment. If so, they are not the same offense and double jeopardy is not a bar to additional punishment.
5. **Constitutional Law: Criminal Law: Statutes.** The test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is an aid to statutory interpretation, not a constitutional demand.
6. **Criminal Law: Statutes.** For purposes of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the possible predicates of a compound offense should not be incorporated into the offense when determining whether it contains elements that another statute does not.
7. **Homicide: Motor Vehicles: Lesser-Included Offenses.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), unlawful act manslaughter is a lesser-included offense of motor vehicle homicide.
8. **Double Jeopardy: Legislature: Statutes: Trial: Sentences.** Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), cumulative punishment may be imposed in a single trial.
9. **Sentences: Presumptions.** The collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.
10. **Appeal and Error.** Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
11. ____. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
12. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
13. **Lesser-Included Offenses: Proof.** A "lesser offense" is the one for which fewer elements are required to be proved. A court focuses on the elements of the offenses, and not comparison of the penalties.
14. **Lesser-Included Offenses: Convictions.** When a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.
15. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to

suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.

16. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs: Probable Cause: Arrests.** If a law enforcement officer has probable cause to arrest a suspect for driving under the influence of alcohol and reasonable grounds to believe that the suspect committed driving under the influence of alcohol, the officer may arrest the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered.
17. **Police Officers and Sheriffs: Probable Cause: Arrests.** Under the collective knowledge doctrine, the existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.
18. **Statutes: Appeal and Error.** Statutory interpretation is a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
19. **Prior Convictions: Drunk Driving: Blood, Breath, and Urine Tests: Sentences: Words and Phrases.** A "prior conviction" for purposes of enhancing a conviction for driving under the influence is defined in terms of other driving under the influence laws, while a "prior conviction" for purposes of enhancing a conviction for refusing a chemical test is defined in terms of refusal laws. There is no crossover between driving under the influence and refusal convictions for purposes of sentence enhancement.
20. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
21. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
22. **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.
23. **Constitutional Law: Miranda Rights: Appeal and Error.** Requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential violations of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
24. **Constitutional Law: Miranda Rights: Arrests.** The State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or postarrest, is not unconstitutional.
25. **Trial: Evidence.** Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
26. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of prejudice under Neb. Evid. R. 403, so a trial court's decision under that rule will not be reversed absent an abuse of discretion.
27. **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.

28. **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.
29. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
30. **Trial: Expert Witnesses.** Under the principles set forth in *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), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
31. **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. The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.
32. **Trial: Expert Witnesses: Pretrial Procedure: Notice.** Assuming that the opponent 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, in terms of the *Daubert* and *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, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.
33. **Trial: Courts.** A trial court has broad discretion in determining how to perform its gatekeeper function.
34. **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.
35. **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.
36. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
37. **Legislature: Criminal Law: Public Policy: Sentences: Courts.** The Legislature declares the law and public policy by defining crimes and fixing their punishment.

The responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.

38. **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.

Appeal from the District Court for Furnas County: JAMES E. DOYLE IV, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Charles D. Brewster and Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, and Richard Calkins for appellant.

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

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

GERRARD, J.

Herchel Harold Huff was driving a motor vehicle that struck and killed Kasey Jo Warner on a county road in Furnas County, Nebraska. Huff was convicted of several charges in connection with the accident, including manslaughter and motor vehicle homicide. The primary issue in this appeal is whether double jeopardy precludes punishment for both those offenses.

BACKGROUND

On the afternoon of the accident, Huff had been at a bar in Oxford, Nebraska, with some acquaintances, including Ryan Markwardt. Markwardt said that when he arrived at the bar, Huff was already there with a beer in front of him. Markwardt played pool, while Huff talked to his wife on the telephone. Both men were drinking beer. Markwardt estimated that Huff drank four or five beers. After about 1½ hours, Huff and Markwardt walked to another bar, where they drank more beers. Markwardt said they had a couple of beers and a couple of "Jägerbombs," which are cocktails made from a shot of Jägermeister liquor and a Red Bull energy drink. After a half hour, they left in Huff's vehicle and stopped at a general store.

Huff drove. Then they returned to the first bar and had a couple more beers and a cocktail. After another half hour or so, they left and stopped at a gas station on their way to Holbrook, Nebraska, where they both lived.

There was conflicting evidence regarding how much Huff had to drink that day. The bartender at the first bar that Huff and Markwardt went to testified that she served Huff only two beers and that he did not finish the second one. And Huff testified at trial that he had only four drinks that day. He admitted drinking a beer at the first bar, two Jägerbombs at the second bar, and part of another beer when they returned to the first bar.

Markwardt testified that Huff had been drinking more than him throughout the day. Markwardt's blood was tested at 8:48 p.m. on the day of the accident, and his blood alcohol content was .13 grams of alcohol per 100 milliliters of blood. At trial, Dr. Henry Nipper, a forensic toxicologist, opined over objection that Huff had been impaired by alcohol, calculating that Huff's blood alcohol content was .15 grams of alcohol per 100 milliliters of blood at the time of the accident.

Prior to the accident, Warner had been home with her family. She had dinner with her husband and two daughters at about 6 p.m. Warner, who exercised daily, said that she wanted to go for a run after dinner because it was a warm, sunny evening. Warner's 3-year-old daughter wanted to go along with her. Warner's daughter would keep up with her mother by riding a small gas-powered, four-wheel all-terrain vehicle (ATV) that had a governor on the throttle so that it would go only about as fast as Warner would jog. They left at about 7 p.m. Warner hesitated as they left the house, because the opening lineups were being announced for a televised volleyball game in which Warner had an interest. But Warner's daughter wanted to go, so Warner agreed and they headed east from their driveway on the "River Road."

At the same time, Huff and Markwardt were on their way to Holbrook. The "T-top" roof of Huff's vehicle was open, the windows were down, and they were playing loud rap music. Huff refused to let Markwardt drive, because his vehicle, a blue 1987 Chevrolet Camaro, was "his baby." Huff drove

toward Holbrook on what Markwardt described as a "packed, gravel road." They took a number of gravel county roads and Nebraska State Highway 283, until they were headed west on County Road 721, also known as the River Road. The speed limit on the River Road is 50 miles per hour, but it is a curvy, poorly maintained gravel road. Markwardt estimated that Huff was driving anywhere from 50 to 75 or 80 miles per hour, sometimes while on the telephone. Huff admitted that he was driving too fast.

Markwardt said that he was looking out the side window of Huff's vehicle, watching people harvesting, when Huff yelled and slammed on the brakes. Markwardt saw Warner and her daughter on the north shoulder of the road. The vehicle skidded as Huff braked, and Markwardt saw Warner throw her daughter out of the way. Then the vehicle hit Warner, and she went under it.

Brian Bauxbaum, an accident reconstructionist with the Nebraska State Patrol, opined that Huff's vehicle was traveling at least 72 miles per hour, and perhaps as fast as 84 miles per hour, when it started to skid. The vehicle skidded for 239 feet to the point of impact, which took about 2½ seconds. Bauxbaum opined that had Huff been traveling at 50 miles per hour, the speed limit for the River Road, he would have come to a stop before hitting Warner. Bauxbaum also opined that Warner could have been seen from 1,221 feet away, which would have given Huff 11½ seconds to avoid the collision, even at 72 miles per hour.

Warner was struck from behind by the left front wheel of the vehicle, near the driver's-side door. Warner's body was dragged under the vehicle until becoming dislodged when the vehicle finally left the road. Blood, flesh, and burn marks were later found on the underside of the vehicle. Warner died from severe, blunt force trauma to her head, trunk, and extremities.

The vehicle eventually came to a stop in a field north of the road. According to Markwardt, after the collision, Huff's immediate concern was that they "get [their] stories straight," and Huff said that he "couldn't take the fall for this," so he wanted Markwardt to say that he had been driving. Markwardt

refused. Then they got out of the vehicle and checked on Warner and her daughter. Huff covered Warner's body with his shirt, because much of her clothing had been dislodged or torn off. Markwardt made sure that Warner's daughter was all right, then ran to get help. Huff called the 911 emergency dispatch service.

Shawn and Mike Pruitt, who are brothers, had been "cutting beans" in a field near the accident, and Mike saw Huff's vehicle go off the road. Shawn headed toward the scene and came across Markwardt, who waved his arms and asked for help. Shawn went to Warner's nearby house, but no one answered the door, so Shawn entered and used a telephone to call the 911 emergency dispatch service. Then he returned to the accident scene, where he found Warner's daughter and took her to his van. Shawn also removed his shirt to help cover Warner's body. Warner's husband, who had been out in his fields, saw Shawn's van leaving his driveway, and when he heard sirens, he put his other daughter in her car seat in his pickup truck and followed Shawn's van to the accident scene.

Mike also followed Shawn to the accident scene about 6 to 8 minutes later, where he saw the ATV idling in the middle of the road, pointing southeast. Mike moved the ATV so an arriving ambulance could get through. He also found Warner's running shoes in the middle of the road. Mike said that when Huff asked to use his telephone, the smell of alcohol on Huff's breath was "[o]bvious." Mike also said that Huff was "stumbling around."

According to Markwardt, when he returned to the scene of the accident, Huff again said that they needed to "get [their] stories straight" and asked Markwardt more than once to say that he, not Huff, had been driving. But when law enforcement arrived, Markwardt reported that Huff had been driving.

The arriving officer was Sgt. Lee Lozo of the Furnas County sheriff's office. When Lozo arrived, he saw Huff's vehicle about 30 feet off the roadway and Warner's body lying on the shoulder of the road. Lozo also saw two shirtless men, one of whom was Huff. Huff was "very upset," and Lozo could smell a strong odor of alcohol coming from him. Lozo asked

who had been driving the vehicle, and Huff admitted that he had. Lozo immediately handcuffed Huff, whom Lozo described as "freaking out." Lozo later removed the handcuffs so that Huff could be examined by medical personnel, but when Huff became vocal and angry, Lozo put the handcuffs back on.

Lozo had Huff sit on the bumper of a firetruck and continued to question him, but Lozo stopped after Huff invoked his right to counsel. After Huff was examined by an emergency medical technician, Lozo arrested Huff for suspected driving under the influence (DUI) and had another deputy, Vernon Levisay, transport Huff to the hospital for a blood draw.

Lozo did not conduct a preliminary breath test or ask Huff to perform any field sobriety tests. Lozo explained that he was the only officer to have responded and was trying to manage emergency personnel and Warner's family at the scene in addition to Huff and Markwardt. Lozo also said that Huff's emotional state would not have been conducive to field sobriety tests, which depend on evaluating the suspect's ability to focus. And Lozo testified over objection that Huff had invoked his right to counsel, at which point "everything stops."

Levisay also said that he could smell a strong odor of alcohol coming from Huff, that Huff's eyes were bloodshot and glazed, and that Huff was having so much difficulty walking that he had to lean against Levisay's patrol car. Huff was crying and distraught, and he vomited before he got to the patrol car. Levisay took Huff to the hospital for a blood test. Huff vomited in the patrol car. Levisay testified that Huff was talking in the patrol car; Huff repeatedly said, "I'm fucked," but Levisay was unable to make out many of Huff's other remarks because Huff's speech was noticeably slurred.

After arriving at the hospital, Huff initially agreed to the blood test, but then changed his mind and refused the test. According to Huff, he wanted to take a breath test instead, although Levisay testified that Huff never asked for a breath test instead of a blood test. Levisay wrote down that Huff had refused to be tested, and Huff was taken to the sheriff's office to be processed and jailed. The county sheriff's deputy who took custody of Huff from Levisay also testified that Huff smelled strongly of alcohol.

Huff was charged by information with motor vehicle homicide,[1] manslaughter,[2] refusing to submit to a chemical test,[3] and tampering with a witness.[4] Huff pled guilty to manslaughter, but not guilty to the remaining charges. The court, finding that a factual basis existed for Huff's guilty plea, accepted the plea and found him guilty of manslaughter.

Huff filed a plea in bar alleging that because he had been found guilty of manslaughter, prosecution on the charge of motor vehicle homicide was barred by the Double Jeopardy Clause. But the court rejected Huff's argument that manslaughter is a lesser-included offense of motor vehicle homicide and overruled his plea in bar. Huff filed an interlocutory appeal, but we affirmed the district court's order in *State v. Huff* (*Huff I*),[5] reasoning that the case did not involve successive prosecutions, but, rather, a single prosecution involving multiple charges, only one of which had been resolved. So, we concluded, only if Huff was convicted and sentenced on the motor vehicle homicide charge could he assert a double jeopardy claim based upon alleged multiple punishments for the same offense.[6]

Huff also moved to suppress the evidence of his refusal to submit to a chemical test, arguing that no probable cause had existed to demand the test in the first place. The district court found that there had been probable cause to arrest Huff on suspicion of DUI, so the court overruled his motion to suppress. And Huff filed a motion in limine for an order directing the State and its witnesses to refrain from offering evidence that Huff had, after the accident, stated that he needed to contact a lawyer. Huff argued that his conduct had been constitutionally protected and that such testimony would be unfairly prejudicial. The court sustained that motion, which later resulted in an objection to Lozo's testimony that field sobriety tests

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[1] See Neb. Rev. Stat. § 28-306 (Reissue 2008).

[2] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[3] See Neb. Rev. Stat. § 60-6,197 (Reissue 2010).

[4] See Neb. Rev. Stat. § 28-919 (Reissue 2008).

[5] See *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[6] See *id.*

had not been performed because Huff had invoked his right to counsel.

The motor vehicle homicide charge was tried to a jury, while the charges of refusing a chemical test and tampering with a witness were tried to the court. Huff proposed that in addition to being instructed on DUI as a predicate offense for motor vehicle homicide, the jury should also be instructed on speeding as the predicate offense. If speeding was the predicate offense, as opposed to DUI, Huff's motor vehicle homicide conviction would be a misdemeanor, as opposed to a felony.[7]

The district court refused Huff's proposed instruction and instructed the jury to convict Huff of motor vehicle homicide only if it found that Huff had committed DUI. The court did, however, instruct the jury on manslaughter as a lesser-included offense of motor vehicle homicide, with speeding as the predicate offense for manslaughter. A step instruction was given instructing the jury to only consider the manslaughter charge if it found Huff not guilty of motor vehicle homicide.

But the jury found Huff guilty of motor vehicle homicide, and Huff was convicted pursuant to that verdict. In addition, the court found Huff guilty of tampering with a witness, based upon his attempt to persuade Markwardt to lie to authorities about who had been driving. And the court found Huff guilty of refusing to submit to a chemical test. Evidence was adduced that Huff had been convicted of DUI in 1999 and 2002. The court found that the prior convictions were sufficient evidence to enhance the motor vehicle homicide conviction to a Class II felony and that the two prior convictions for DUI enhanced the conviction for refusal to submit to a chemical test to a Class IIIA felony.

Huff objected to enhancement of the refusal conviction, arguing that the prior offenses had to be refusals, not DUI's. Huff also moved to discharge on double jeopardy grounds, alleging that because he had previously been convicted of manslaughter, the conviction for motor vehicle homicide should be dismissed.

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[7] See § 28-306.

But Huff was sentenced to not less than nor more than 45 years' imprisonment for motor vehicle homicide, and not less than nor more than 20 years' imprisonment for manslaughter, with those sentences to be served concurrently. Huff was also sentenced to not less than nor more than 5 years' imprisonment for refusal to submit to a chemical test, and not less than 20 nor more than 60 months' imprisonment for tampering with a witness, with those sentences to be served consecutively to the manslaughter and motor vehicle homicide sentences and to one another. Huff appeals.

ASSIGNMENTS OF ERROR

Huff assigns, restated, that the district court erred in:

(1) convicting and sentencing him to multiple punishments for the same offense, in violation of the Double Jeopardy Clauses of the state and federal Constitutions;

(2) failing to sustain his motion to suppress and allowing evidence at trial that failed to conform to constitutional and statutory requirements;

(3) enhancing his conviction for refusal to submit to a chemical test with prior DUI convictions;

(4) failing to grant a mistrial when the order in limine precluding mention of Huff's invocation of counsel was violated, denying him a constitutionally fair trial;

(5) finding sufficient evidence to convict him of tampering with a witness;

(6) ordering his counsel to guide the State through foundational evidence to introduce an expert opinion, denying his right to a constitutionally fair trial;

(7) failing to instruct the jury on "misdemeanor homicide," contrary to Nebraska law and the state and federal Constitutions; and

(8) sentencing him to excessive sentences.

ANALYSIS

Double Jeopardy

[1] Huff's first argument is that his convictions for manslaughter and motor vehicle homicide violate the Double Jeopardy Clauses of the state and federal Constitutions, because manslaughter is a lesser-included offense of motor vehicle

homicide. Huff's argument presents a question of law, on which we reach a conclusion independent of the court below.[8]

[2-4] The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[9] At issue here, as we explained in *Huff I*, are multiple punishments for the same offense. Under *Blockburger v. United States*,[10] where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.[11] The *Blockburger*, or "same elements," test asks whether each offense contains an element not contained in the other, or, more precisely, "whether each provision requires proof of a fact which the other does not."[12] If not, they are the same offense and double jeopardy bars additional punishment. If so, they are not the same offense and double jeopardy is not a bar to additional punishment.[13]

A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide. In addition, § 28-306(3)(a) provides that if the proximate cause of the death of another is the operation of a motor vehicle in violation of certain DUI statutes,[14] motor vehicle homicide is a Class III felony, instead of a Class I misdemeanor.[15]

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[8] See *Huff I, supra* note 5.

[9] *Id.*

[10] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[11] *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

[12] *Blockburger, supra* note 10, 284 U.S. at 304.

[13] See *id.*

[14] See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.06 (Cum. Supp. 2008).

[15] See § 28-306(2) and (3)(b).

"A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[16] Clearly, motor vehicle homicide requires proof of elements that are not part of unlawful act manslaughter—we have so held in the context of jury instructions, and our conclusion under *Blockburger* is the same.[17] But taken in the statutory abstract, it is impossible to convict someone of motor vehicle homicide without proving facts that would also prove the necessary elements of manslaughter: unintentionally causing the death of a person while committing an unlawful act. Motor vehicle homicide simply requires the State to additionally prove that the unlawful act was the unlawful operation of a motor vehicle.

But it is far from clear how the *Blockburger* test is to be applied where compound and predicate offenses are involved. An examination of the U.S. Supreme Court's *Blockburger* jurisprudence will help explain the problem. *Blockburger* itself did not involve compound or predicate offenses. Rather, in *Blockburger*, the defendant was convicted of two federal narcotics laws: one prohibited the sale of a controlled substance except in the original tax-paid stamped package, and the other prohibited the sale of a controlled substance without a written order of the purchaser on an official form.[18] The Court found that the offenses were separate for double jeopardy purposes, because one element of each offense was unique. The emphasis was on the *elements* of the two crimes.[19]

The Court came closer to applying *Blockburger* to a compound offense in *Iannelli v. United States*,[20] in which the defendants were convicted of both a federal gambling statute

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[16] § 28-305(1).

[17] See *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001).

[18] See *Blockburger, supra* note 10.

[19] See *id.* See, also, e.g., *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

[20] *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975).

and conspiring to violate that statute. The Court ultimately concluded that Congress intended that defendants could be convicted under both statutes. But, the Court also observed that the *Blockburger* test would be satisfied. An element of the conspiracy offense was an agreement, which was not present in the underlying gambling offense. But the underlying gambling offense also required proof of a fact that the conspiracy did not, because the gambling offense required proof that the defendants actually did "'conduct, finance, manage, supervise, direct, or own'" an illegal gambling business.[21] Because the "overt act" requirement in the conspiracy statute could be satisfied much more easily, the gambling offense also required proof of a fact that the conspiracy offense did not.[22] So *Iannelli* did not precisely present an instance of a compound and predicate offense, because the conspiracy statute at issue in *Iannelli* did not require proof that the "predicate" offense had been committed.

It is significant to note what the Court did *not* say in *Iannelli*: The Court assumed that conspiracy could potentially subsume its predicate offense, despite the fact that the conspiracy statute was general, such that the "predicate" offense could be *any* federal offense. The Court was not required to clarify that assumption in *Brown v. Ohio*,[23] in which the Court reaffirmed *Blockburger*, but not in the context of a compound offense. The Court finally addressed a compound offense in *Harris v. Oklahoma*,[24] a short per curiam opinion in which it summarily reversed a defendant's state court convictions for an armed robbery upon which a previous conviction for felony murder had been predicated. The Court explained that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser

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[21] *Id.*, 432 U.S. at 785 n.17.

[22] *Id.*

[23] *Brown, supra* note 19.

[24] *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

crime after conviction of the greater one."[25] But, while the Court's decision in *Harris* was consistent with *Iannelli*, the Court did not expressly state in *Harris* that its conclusion was based on *Blockburger* principles.

The Court made that connection in *Whalen v. United States*,[26] in which the defendant was convicted in the District of Columbia for both felony murder and the rape upon which the felony murder was predicated. Expressly applying *Blockburger*, the Court concluded that consecutive sentences for rape and for a killing committed in the course of the rape were not authorized. The Court reasoned that it was "plainly not the case that 'each provision requires proof of a fact which the other does not.' A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape."[27] The government, relying on the compound nature of felony murder, argued that felony murder and rape were not the "same" offenses under *Blockburger*, because felony murder could be predicated on other felonies and therefore did not in all cases require proof of a rape. But the Court rejected that argument, explaining:

> Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the

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[25] *Id.*, 433 U.S. at 682. See, also, *Payne v. Virginia*, 468 U.S. 1062, 104 S. Ct. 3573, 82 L. Ed. 2d 801 (1984).

[26] *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

[27] *Id.*, 445 U.S. at 693-94.

> alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity.[28]

In his dissent in *Whalen*, then-Justice Rehnquist came closer than the Court to addressing the theoretical issues raised by applying *Blockburger* to compound and predicate offenses. Justice Rehnquist explained that

> the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the lesser. . . . In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.
>
> On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U. S. C. § 924(c)(1) states that "[w]hoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of § 924(c)(1).

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[28] *Id.*, 445 U.S. at 694.

> This multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of § 924(c)(1) and the statutes defining the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of § 924(c)(1). If, on the other hand, one looks to the facts alleged in a particular indictment brought under § 924(c)(1), then *Blockburger* would bar cumulative punishments for violating § 924(c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.[29]

Justice Rehnquist observed that because the Court had not previously applied *Blockburger* in the context of compound and predicate offenses, it had not had to decide whether to apply the test to the statutes in the abstract or specifically to the indictment as framed in a particular case. But, Justice Rehnquist wrote, the Court's past decisions seemed to have assumed that *Blockburger* stood or fell on the wording of the statutes alone. And, "because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment."[30] In the end, Justice Rehnquist disagreed with the majority's decision to apply *Blockburger*, reasoning that "when applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties" and that if the polestar was to be legislative intent, there was no reason to apply *Blockburger* when it did not advance that inquiry.[31]

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[29] *Id.*, 445 U.S. at 708-09 (Rehnquist, J., dissenting; Burger, C.J., joins) (citations omitted) (emphasis omitted).

[30] *Id.*, 445 U.S. at 711.

[31] *Id.*, 445 U.S. at 712.

Had Justice Rehnquist's view in *Whalen* carried the day, the present case might be far simpler to resolve. But it did not, and the Court reaffirmed the principles of *Whalen* in *Illinois v. Vitale*,[32] in which a juvenile's vehicle had struck and killed two children. The juvenile was convicted of carelessly failing to reduce speed to avoid an accident, but then charged with involuntary manslaughter, which he claimed was barred by double jeopardy. Applying the *Blockburger* test, the Court disagreed, explaining:

> If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and [the juvenile's] trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because [the juvenile] has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*.[33]

To the same effect, the Court wrote in *Garrett v. United States*[34] that under the *Blockburger* test, the federal offense of engaging in a "'continuing criminal enterprise' (CCE)" was the same as its predicate offenses (in *Garrett*, importation of marijuana). Justice Rehnquist, writing for the Court, explained that under *Blockburger*, "each of the predicate offenses is the 'same' for double jeopardy purposes as the CCE offense because the predicate offense does not require proof of any fact not necessary to the CCE offense."[35]

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[32] *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

[33] *Id.*, 447 U.S. at 419-20.

[34] *Garrett v. United States*, 471 U.S. 773, 775, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985).

[35] *Id.*, 471 U.S. at 778.

Then, in *United States v. Dixon*,[36] a sharply divided Court was unable to articulate a clear rule for how to apply *Blockburger* to compound and predicate offenses. In *Dixon*, a majority of the Court concluded that the Double Jeopardy Clause precluded prosecution of some, but not all, charges brought against a defendant who had previously been punished for criminal contempt arising out of the same conduct. But assembling that majority required five separate opinions. Justice Scalia wrote for the Court, but was joined only by Justice Kennedy in his *Blockburger* analysis.[37] Justice Scalia read the court order that formed the basis of the contempt conviction as directing the defendant not to commit assault, so, relying on *Harris v. Oklahoma*, Justice Scalia concluded that under *Blockburger*, simple assault was a lesser-included offense of the contempt. But other offenses that required proof of facts not implicated by the court order were not lesser included, because it was possible to violate the court order through the predicate offense of simple assault (and thus commit contempt) without committing the other offenses at issue.[38]

Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, did not join that part of Justice Scalia's opinion.[39] Chief Justice Rehnquist, echoing the concerns he had expressed in his *Whalen* dissent, contended that *Blockburger* required a focus on the elements of the generic offense of contempt of court, instead of the terms of the particular court orders involved. So, the Chief Justice would have concluded that because the generic crime of contempt of court had different elements than the substantive criminal charges at issue, they were separate offenses under *Blockburger*.

The Chief Justice argued that the Court's "double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be

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[36] *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

[37] See *id.*

[38] See *id.*

[39] See *id.* (Rehnquist, C.J., concurring in part and dissenting in part; O'Connor and Thomas, JJ., join).

proved under the particular indictment at issue—an indictment being the closest analogue to the court orders in this case."[40] The Chief Justice rejected Justice Scalia's conclusion that *Harris* suggested otherwise, concluding that the basis of *Harris* was that the two crimes at issue there were "akin to greater and lesser included offenses" because a lesser-included offense is one that is "'necessarily included'" within the statutory elements of another offense; for instance, as in *Harris*, "a defendant who commits armed robbery necessarily has satisfied one of the statutory elements of felony murder."[41]

The rest of the *Dixon* Court did not clearly express its understanding of how *Blockburger* should be applied, although Justice Souter, joined by Justice Stevens, seemed to agree with the Chief Justice's conclusion that because *Blockburger* is a test for statutory construction, it should emphasize the *elements* of the two crimes.[42] And again, had the Chief Justice's view carried the day, the appeal presently before this court would be much simpler to resolve. As it stands, however, *Dixon* leaves the matter far from clear. In its last opportunity to address *Blockburger* in the context of compound and predicate offenses, in *Rutledge v. United States*,[43] the Court concluded that the Double Jeopardy Clause precluded punishing a defendant for both continuing criminal enterprise (CCE) and conspiracy convictions, because conspiracy was a lesser-included offense. It is worth noting that although CCE and conspiracy are both arguably compound offenses, *Rutledge* does not help us in this case because both charges were based on the same predicates.

A few things are clear from all of this. First, it is clear that under the Court's precedent, *Blockburger* precludes punishing a defendant for both a compound offense and its predicate.[44]

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[40] *Id.*, 509 U.S. at 716-17.

[41] *Id.*, 509 U.S. at 718.

[42] See *Dixon, supra* (Souter, J., concurring in the judgment in part and dissenting in part; Stevens, J., joins).

[43] *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996).

[44] See *Whalen, supra* note 26.

We have also held as much,[45] most pertinently in *State v. Hoffman*,[46] in which we concluded that the defendant's right to be free from double jeopardy was violated when he was convicted of both DUI and motor vehicle homicide predicated on the DUI. So, obviously, Huff could not have been punished for both motor vehicle homicide and DUI.

It is also clear that a defendant *can* be punished for both a compound offense and another offense that *could* have been, but actually was not, the predicate offense.[47] We held as much in *Hoffman*, in which we concluded that double jeopardy did not preclude the defendant from being punished for second degree assault for recklessly causing serious bodily injury to the victim, despite the fact that reckless driving had also been alleged, in the alternative, as a predicate for motor vehicle homicide. We explained that the motor vehicle homicide conviction had been predicated on DUI and that DUI and second degree assault were not the same offenses under a *Blockburger* analysis.[48] So, Huff could have been punished for motor vehicle homicide predicated on DUI and separately for speeding.

That precedent compels the conclusion that, at least as far as a compound offense is purportedly the greater offense, a court must consider the specific predicate offense alleged when comparing the "elements of the offense" for *Blockburger* purposes. For instance, in this case, the Court's decision in *Whalen* suggests that we treat motor vehicle homicide predicated on DUI as something akin to a separate offense of "motor vehicle homicide by DUI" for *Blockburger* analysis, just as the Court in *Whalen* treated the felony murder at issue in that case as a conviction of "a killing in the course of rape."[49]

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[45] See, e.g., *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *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); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[46] *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987).

[47] See, *Vitale, supra* note 32; *Whalen, supra* note 26.

[48] See *Hoffman, supra* note 46.

[49] See *Whalen, supra* note 26, 445 U.S. at 694 n.8.

But that does not tell us what to do when the allegedly lesser-included offense is a compound offense. The State suggests, based on our decision in *State v. Winkler*,[50] that we should also incorporate the elements of the predicate offense there. In *Winkler*, we confronted a similar *Blockburger* problem: how to determine the elements of the offense, for purposes of comparison, when the offenses at issue can be committed using *alternative* sets of elements. For instance, a person may commit manslaughter by killing *either* upon a sudden quarrel *or* while in the commission of an unlawful act.[51] In *Winkler*, we concluded that "in applying *Blockburger* to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy."[52] That is why the elements of manslaughter upon a sudden quarrel are not part of our analysis here. And the State points out that in *State v. Brouillette*,[53] we characterized manslaughter and motor vehicle homicide as "single crime[s] which may be committed in a number of ways."

We disagree with the State's reading of these cases. *Winkler* involved alternative elements to the offense—not merely different predicate acts that could be different ways of proving the same element of the offense. In other words, *Winkler* stands for the proposition that a court can look to the allegations in a case for determining which alternative elements of a crime are at issue for *Blockburger* purposes. But a predicate act is simply one element of a crime, and *Winkler* does not require, for *Blockburger* purposes, that the court look behind the statutory element to see what may be used to prove it.

Nor does *Brouillette* support the State's argument. The issue in *Brouillette* was not double jeopardy—it was the sufficiency of a charging information that alleged several different theories

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[50] *Winkler, supra* note 11.

[51] See § 28-305(1).

[52] *Winkler, supra* note 11, 266 Neb. at 163, 663 N.W.2d at 108.

[53] *State v. Brouillette*, 265 Neb. 214, 223, 655 N.W.2d 876, 886 (2003).

of the crime in the alternative. Motor vehicle homicide and manslaughter are crimes that may *factually* be committed in a number of ways. But motor vehicle homicide has only one set of elements, one of which is a predicate offense, and although manslaughter has alternative elements, only unlawful act manslaughter is at issue here. *Winkler* does not help the State.

Instead, we find the Eighth Circuit's decision in *U.S. v. Allen*[54] to be helpful in addressing this problem. In *Allen*, the defendant was convicted of two federal charges: count I, armed robbery by force or violence in which a killing occurs, and count II, carrying or using a firearm during a crime of violence and committing murder. Applying *Blockburger*, the court found that count II required proof of two facts that the first count did not: carrying or use of a firearm during the commission of a violent crime and murdering by firearm. The question was whether count I required proof of any facts that count II did not, given that count II did not require proof of a taking of bank property by force or violence or intimidation. Rather, count II only required proof of some underlying crime of violence which could have been armed robbery or any other violent felony. In other words, as in the present case, the potential lesser-included offense was a compound offense that could be satisfied by any number of unlawful acts. The court explained the problem:

> It is not exactly clear how predicate offenses are to be treated for purposes of *Blockburger*. There is some indication from the Supreme Court that *Blockburger* is simply a rule of statutory construction which is neither intended nor designed to apply to the particular facts of a case. . . .
>
> On the other hand, the Supreme Court has applied *Blockburger* by considering the nature of the underlying felony in a felony-murder indictment rather than based only on the elements of the statutes at issue. . . . Under this interpretation of *Blockburger*, predicate offenses which form the basis of other statutory offenses would

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[54] *U.S. v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated on other grounds and remanded for further consideration* 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002).

> always fail the *Blockburger* test. In the present case, the underlying bank robbery satisfies the "crime of violence" element of [count II]. By definition, therefore, there is no fact that must be proved in [count I] that is different from the elements required to be proved for conviction under [count II].[55]

The court concluded, based on that reasoning, that the *Blockburger* test had not been satisfied. In other words, the *Allen* court held that *Blockburger* was not met where the lesser-included offense could *satisfy* an element of another, even if it was not the exclusive means of doing so.[56]

Based on similar reasoning, several federal courts have concluded that the federal crime of using a firearm to commit a crime of violence was, under the *Blockburger* test, a lesser-included offense of the federal crime of carjacking, despite the fact that the "crime of violence" element of the use of a firearm charge could be satisfied in any number of other ways.[57] Because the carjacking statute required proof that the defendant used a gun, it necessarily proved that the defendant used or carried a firearm. And carjacking is always a crime of violence. So, while there are other crimes of violence, proof of the elements of carjacking will *always* prove the elements of use of a firearm to commit a crime of violence. In other words, the crimes fail the *Blockburger* test because conduct that violates one of the statutes will *always* violate the other, making the other a lesser-included offense.[58]

[5,6] We find this reasoning persuasive and helpful in this case, although we recognize that it is again distinguishable because in this case, both offenses are compound offenses. Nonetheless, we cannot escape the basic fact that it is *impossible* to prove the elements of motor vehicle homicide without

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[55] *Id.* at 767-68.

[56] See, *id.*; *U.S. v. Johnson*, 225 F. Supp. 2d 1022 (N.D. Iowa 2002), *reversed on other grounds* 352 F.3d 339 (8th Cir. 2003).

[57] See, *U.S. v. Moore*, 43 F.3d 568 (11th Cir. 1995); *U.S. v. Johnson*, 32 F.3d 82 (4th Cir. 1994); *U.S. v. Mohammed*, 27 F.3d 815 (2d Cir. 1994); *U.S. v. Singleton*, 16 F.3d 1419 (5th Cir. 1994).

[58] See, *Johnson, supra* note 57; *Singleton, supra* note 57.

also proving the elements of unlawful act manslaughter. While we adhere to *Blockburger*, and have attempted to abide by the test as the U.S. Supreme Court has applied it, we are mindful of the fact that *Blockburger* is an aid to statutory interpretation, not a constitutional demand.[59] We conclude that the better application of *Blockburger*'s principles is that the possible predicates of a compound offense should *not* be incorporated into the offense when determining whether it contains elements that another statute does not. And we so hold.

To hold otherwise would elevate formalism over the substance of constitutional protection and lead to anomalous results. For instance, it is clear that however the elements of the offenses are incorporated, a defendant could not be punished for both motor vehicle homicide and manslaughter based on the same predicate unlawful act. Nor could a defendant be punished for two instances of either motor vehicle homicide or manslaughter based on different predicate offenses, given that the unit of prosecution for those offenses is the death of the victim, not the predicate unlawful act.[60] It would be peculiar, then, if combining different predicates with different compound offenses could achieve a result that neither the different predicate offenses nor the different compound offenses could achieve separately.

[7] And most fundamentally, this holding is most consistent with the test first laid out in *Blockburger*: "whether each provision requires proof of a fact which the other does not."[61] Unlawful act manslaughter requires proof of no fact which motor vehicle homicide does not. To construe *Whalen* and the U.S. Supreme Court's other precedent regarding compound and predicate offenses to permit multiple convictions here would be to read *Blockburger* out of the *Blockburger* test. So, we conclude that under *Blockburger*,

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[59] See, e.g., *Garrett, supra* note 34.

[60] See, e.g., *Brouillette, supra* note 53; *Garris v. United States*, 465 A.2d 817 (D.C. 1983). Compare, e.g., *U.S. v. Beltran-Moreno*, 556 F.3d 913 (9th Cir. 2009); *U.S. v. Phipps*, 319 F.3d 177 (5th Cir. 2003) (discussing multiple weapons convictions based on different predicate offenses).

[61] *Blockburger, supra* note 10, 284 U.S. at 304.

unlawful act manslaughter is a lesser-included offense of motor vehicle homicide.

[8,9] We note, having reached that conclusion, that *Blockburger* is not always dispositive of a double jeopardy claim. Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, cumulative punishment may be imposed in a single trial.[62] But there is no indication of such legislative intent here, and the State does not argue that this principle is applicable. We are aware that the enactment of 2011 Neb. Laws, L.B. 667, may change this conclusion, but it does not take effect until January 1, 2012, so we do not address it here. We also note that double jeopardy is implicated despite the fact that Huff's sentences on the convictions at issue are to run concurrently; in *Rutledge*, the Court held that "the collateral consequences of a second *conviction* make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence."[63]

[10-12] The remaining question is which conviction and sentence should be vacated. Huff argues that his conviction and sentence for motor vehicle homicide should be vacated. Huff relies on the "timing of the 'conviction'"[64] and essentially asks us to revisit our determination in *Huff I* that this case involves a single prosecution.[65] But matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.[66] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon,

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[62] See *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

[63] *Rutledge, supra* note 43, 517 U.S. at 302 (emphasis supplied).

[64] Brief for appellant at 12.

[65] *Huff I, supra* note 5.

[66] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

either expressly or by necessary implication.[67] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.[68] Our conclusion in *Huff I* that this case does not involve successive prosecution is the law of the case, and we decline to reconsider it.

[13,14] Huff also asserts that motor vehicle homicide should be considered the lesser-included offense to manslaughter, arguing that the more general provision should yield to the more specific and that motor vehicle homicide is the more "specific" crime. But the principle that Huff invokes is applicable only when the requirements of different statutes conflict[69] and has no relevance in this instance. Indeed, the merits of Huff's double jeopardy claim rest on the fact that the statutes at issue do *not* conflict. Rather, the applicable rule is that the "lesser offense" is the one for which fewer elements are required to be proved.[70] We are focused on the elements of the offenses, and not comparison of the penalties.[71] Here, as explained above, motor vehicle homicide is the greater offense and unlawful act manslaughter the lesser-included offense. And when a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.[72]

In summary, we find merit to Huff's argument that he has been subjected to multiple punishments, in violation of the Double Jeopardy Clause, by his convictions and sentences for motor vehicle homicide and manslaughter. But we find no merit to his argument that the motor vehicle homicide conviction should be vacated. Instead, it is his conviction and sentence for manslaughter that must be vacated.

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[67] *Id.*

[68] *Id.*

[69] See, e.g., *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

[70] See, *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009); *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[71] See *id.*

[72] *Dragoo, supra* note 70.

Motion to Suppress

[15] Next, Huff argues that the court should have suppressed evidence of his refusal to submit to a chemical test because there was no DUI investigation to establish grounds for such a test. A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.[73]

According to Huff, § 60-6,197(4) requires reasonable grounds for an officer to demand a chemical test, and Huff contends that reasonable grounds were not established by Lozo or communicated to Levisay before Huff's refusal of a blood test. Section 60-6,197(4) provides in part:

> Any person involved in a motor vehicle accident in this state may be required to submit to a chemical test of his or her blood, breath, or urine by any peace officer if the officer has reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle on a public highway in this state while under the influence of alcoholic liquor or drugs at the time of the accident.

We note that Huff appears to be conceding that reasonable suspicion is the appropriate standard, despite the fact that to *arrest* him for suspicion of DUI, probable cause would have been required.[74] But regardless, Huff's argument is without merit.

[16] To begin with, if an officer has probable cause to arrest a suspect for DUI and reasonable grounds to believe that the suspect committed DUI, the officer may arrest the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered.[75] And both reasonable grounds and probable cause were established in this case. Huff was observed to have bloodshot, glassy eyes and difficulty

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[73] *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

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

[75] See, *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983); *State v. Cash*, 3 Neb. App. 319, 526 N.W.2d 447 (1995).

standing. Nearly everyone who had contact with Huff that night reported a strong odor of alcohol coming from him. We have little difficulty in concluding that despite the lack of field sobriety tests or a preliminary breath test, there was ample evidence establishing probable cause to arrest Huff and reasonable grounds to demand a blood test.[76]

[17] Nor are we persuaded by Huff's argument that Lozo's purported failure to communicate his observations to Levisay is relevant. Levisay made his own observations, independent from Lozo, that easily established reasonable grounds to demand a blood test. And even had he not, we have explained that under the collective knowledge doctrine, the existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.[77]

For instance, in *State v. Wegener*,[78] an investigating officer sent a driver to the hospital without conducting field sobriety tests after the driver collided with a bridge guardrail. But the driver smelled strongly of alcohol and had admitted that he had been drinking. So when the investigating officer discovered several beer bottles in the vehicle, he had another officer dispatched to the hospital to obtain a blood test. On appeal from his conviction for DUI, the defendant argued that the blood test should have been excluded because the second officer, who actually arrested the defendant and obtained the blood test, had not independently determined probable cause, nor had the basis for probable cause been communicated to him. But we rejected that argument, reasoning that under the collective knowledge doctrine, an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who

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[76] See, e.g., *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986); *State v. Fischer*, 194 Neb. 578, 234 N.W.2d 205 (1975).

[77] See, *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010); *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992).

[78] *Wegener, supra* note 77.

does have probable cause. So, we concluded that because the investigating officer had probable cause to suspect the defendant of DUI, the arrest and blood test initiated by the second officer was valid.[79]

This case is functionally indistinguishable from *Wegener*. Thus, even had Levisay not made his own observations, Lozo's investigation would have been sufficient to support arresting Huff and demanding a blood test. We find no merit to Huff's argument that evidence of his refusal of a blood test should have been suppressed.

Enhancement of Refusal Conviction

[18] As noted above, Huff's conviction for refusal of a chemical test was enhanced by two previous convictions for DUI. Huff argues that a refusal conviction can only be enhanced by prior refusal convictions. This is a question of statutory interpretation, which is a question of law on which we have an obligation to reach an independent conclusion irrespective of the determination made by the court below.[80]

Huff relies on the Nebraska Court of Appeals' decision in *State v. Hansen*,[81] in which the Court of Appeals held that when a judge is sentencing for a violation of the DUI statute, the offense can be enhanced by prior DUI convictions, and that when a judge is sentencing for refusal, the offense then before the court can be enhanced, but only by prior refusal convictions. We agree with the Court of Appeals.

[19] The punishment for both DUI and refusal of a chemical test is set forth in Neb. Rev. Stat. § 60-6,197.03 (Supp. 2009), which provides that convictions for DUI and refusal may be enhanced by a "prior conviction." But a "prior conviction" is defined by Neb. Rev. Stat. § 60-6,197.02 (Reissue 2010), which differentiates between convictions for DUI and refusal. DUI is prohibited by § 60-6,196, DUI resulting in serious bodily injury is prohibited by Neb. Rev. Stat. § 60-6,198

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[79] See *id.*

[80] See *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

[81] *State v. Hansen*, 16 Neb. App. 671, 749 N.W.2d 499 (2008).

(Reissue 2010), and refusing a chemical test is prohibited by § 60-6,197. Section 60-6,197.02(1) provides:

> (a) Prior 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:
>
> (i) For a violation of section 60-6,196:
>
> (A) Any conviction for a violation of section 60-6,196;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,196;
>
> (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; or
>
> (D) Any conviction for a violation of section 60-6,198; or
>
> (ii) For a violation of section 60-6,197:
>
> (A) Any conviction for a violation of section 60-6,197;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,197; or
>
> (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 60-6,197[.]

In other words, as the Court of Appeals correctly reasoned in *Hansen*, a "prior conviction" for purposes of DUI enhancement is defined in terms of other DUI laws, while a "prior conviction" for purposes of enhancing a refusal conviction is defined in terms of refusal laws. There is simply no crossover between DUI and refusal convictions for purposes of sentence enhancement.

[20,21] That may seem counterintuitive, because it could create an incentive for an individual who has previously been convicted of DUI to refuse a chemical test. But we have often said that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in

its plain, ordinary, and popular sense.[82] And beyond that, a fundamental principle of statutory construction requires that penal statutes be strictly construed.[83] We are not at liberty to disregard the plain language of § 60-6,197.02, particularly to construe it against the defendant. Therefore, we find merit to Huff's assignment of error and conclude that he must be resentenced on his conviction for refusing a chemical test.

Testimony Regarding Huff's Invocation of Right to Counsel

Next, Huff complains of two instances during Lozo's testimony in which, according to Huff, Lozo violated the court's ruling on his motion in limine by referring to Huff's invocation of his right to counsel. First, Lozo testified that while he had been questioning Huff at the scene of the accident, Huff had said that he would not answer questions until he had spoken to an attorney. Huff did not object to that testimony. But later, Lozo explained that one of the reasons that he had not performed field sobriety tests was that Huff had invoked his right to counsel. Huff objected and moved for a mistrial. The court overruled the motion for mistrial, but did instruct the jury that it was to consider that testimony solely for the purpose of understanding why field sobriety tests had not been performed, and not for any other purpose.

[22] Huff contends that the court erred in not granting a mistrial. 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.[84] Because Huff's objection at trial was based upon his motion in limine, we assume that the legal bases for his objection were the same as that for his motion: constitutional grounds[85] and unfair prejudice.[86]

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

[83] *Id.*

[84] *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[85] See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[86] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

We address his constitutional argument first. The constitutional basis for objecting to evidence of a defendant's invocation of the right to counsel is set forth in the U.S. Supreme Court's decision in *Doyle v. Ohio*[87] and its progeny, which we addressed at length in our decision in *State v. Harms*.[88]

[23] In *Doyle*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda*[89] warnings at the time of his arrest."[90] And in *Wainwright v. Greenfield*,[91] the Court explained that with respect to post-*Miranda* warnings, "silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." So it is apparent that requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential *Doyle* violations.[92]

[24] But in *Wainwright*, the Court also confirmed and iterated its prior holdings in *Jenkins v. Anderson*[93] and *Fletcher v. Weir*,[94] which determined that the State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or post-arrest, is not unconstitutional.[95] The Court explained that the reasoning of *Doyle* and subsequent cases is that "it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that

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[87] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[88] See *Harms, supra* note 85.

[89] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[90] *Doyle, supra* note 87, 426 U.S. at 611.

[91] *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

[92] See *Harms, supra* note 85.

[93] *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

[94] *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).

[95] See *Harms, supra* note 85.

promise by using the silence to impeach his trial testimony."[96] So, in *Harms*, we declined the opportunity to expand the *Doyle* and *Wainwright* protections to bar any use by the State of a defendant's prearrest, pre-*Miranda* silence.[97]

In the present case, it is not clear when Huff was first advised of his *Miranda* rights. Huff was certainly advised of his rights when he was arraigned in district court. Before then, however, it is not clear that he was advised of his rights at all. The record suggests that at the very least, he was not advised of his rights before the sheriff's deputy transported him from the hospital to jail. Lozo testified in minute-to-minute detail about his interaction with Huff at the scene of the accident, but never said that he advised Huff of his *Miranda* rights. And Levisay expressly denied reading *Miranda* warnings to Huff at any time.

In that respect, this case is functionally indistinguishable from *Fletcher*, in which the Court treated the defendant's silence as pre-*Miranda* where the record did not indicate that he had received any *Miranda* warnings after his arrest.[98] In other words, the Court held in *Fletcher* that a silent record was fatal to the defendant's *Doyle* claim.[99] The same is true here. The testimony at issue was, pursuant to the court's limiting instruction, admitted solely for the purpose of explaining why field sobriety tests were not conducted. Given no evidence that *Miranda* warnings had been given at the time of Huff's remark and the limited purpose for which the evidence was admitted, it is clear that no *Doyle* violation occurred.

[25,26] We also find no merit to the contention that the testimony was unfairly prejudicial. Under rule 403, relevant

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[96] *Wainwright, supra* note 91, 474 U.S. at 292.

[97] See *Harms, supra* note 85.

[98] *Fletcher, supra* note 94.

[99] See, *id.*; *Branch v. Secretary, Fla. Dept. of Corrections*, 638 F.3d 1353 (11th Cir. 2011); *Folston v. Allsbrook*, 691 F.2d 184 (4th Cir. 1982); *Coleman v. State*, 111 Nev. 657, 895 P.2d 653 (1995); *People v Cetlinski*, 435 Mich. 742, 460 N.W.2d 534 (1990); *State v. Leecan*, 198 Conn. 517, 504 A.2d 480 (1986).

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[100] But only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.[101] And the exercise of judicial discretion is implicit in determinations of prejudice under rule 403, so a trial court's decision under that rule will not be reversed absent an abuse of discretion.[102]

In this case, it was evident from the pretrial proceedings that Huff intended to challenge the State's failure to perform field sobriety tests. We note, as an aside, that it is highly questionable whether Huff's invocation of his right to counsel (or his right to remain silent) would have legally precluded the administration of field sobriety tests or a preliminary breath test.[103] Nonetheless, it was appropriate to permit Lozo to testify as to Huff's invocation of his constitutional right to counsel for the limited purpose of explaining one of the reasons why Lozo did not perform field sobriety tests. The jury was instructed to consider the evidence only for that purpose, and we presume that the jury followed the instructions it was given in arriving at its verdict.[104]

[27] We have said that 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.[105] No such prejudice has been shown here. Finding no reversible error in the legal determinations upon which the court's overruling of Huff's motion for mistrial was based, we also find no abuse of discretion in overruling the motion. Huff's assignment of error is without merit.

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[100] See § 27-403.

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

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

[103] See, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988).

[104] See *id.*

[105] See *Daly, supra* note 101.

SUFFICIENCY OF EVIDENCE OF WITNESS TAMPERING

[28] Huff was convicted of tampering with a witness in violation of § 28-919(1), which provides:

> (1) A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:
>
> (a) Testify or inform falsely;
>
> (b) Withhold any testimony, information, document, or thing;
>
> (c) Elude legal process summoning him or her to testify or supply evidence; or
>
> (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

Huff's conviction was based on the evidence that after the accident, he tried to persuade Markwardt to say that he, not Huff, had been driving. Huff argues that this evidence was insufficient to sustain the conviction. 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.[106]

Huff argues that the "element missing" in his witness tampering conviction is proof that Huff believed that an official proceeding or investigation of a criminal or civil matter was pending or about to be instituted.[107] But Markwardt testified that Huff tried to persuade him to say he had been driving, because Huff did not want to "take the fall" for the accident. Those remarks clearly imply an awareness that potentially serious consequences could result from what had happened. Markwardt's testimony certainly supported Huff's conviction for violating § 28-919(1).

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

[107] Brief for appellant at 28. See § 28-919(1).

Huff's primary contention seems to be that Markwardt was not a credible witness. But the credibility and weight of witness testimony are for the trier of fact, and we do not reassess witness credibility on appellate review.[108] There was sufficient evidence in this case for the trier of fact to find Huff guilty of witness tampering.

Foundational Testimony

Huff's sixth assignment of error is based on a foundational objection he made to Nipper's testimony regarding his opinion about determining Huff's blood alcohol level. When asked by the court to be more specific about his objection, Huff's counsel invoked *Daubert*/*Schafersman*[109] principles in addition to "general foundation." The court explained that Huff would need to articulate what part of Nipper's methodology was suspect. The court said it wanted Huff to advise the State concerning "what he thinks is missing so that we can get to the point of whether or not I'm going to let the witness testify or not." The court explained that it did not want to waste the jury's time, noting that had the objection been raised before, it could have been handled at a pretrial hearing. Huff reasserted *Daubert*/*Schafersman*, but did not object to the court's instruction to specifically explain the grounds for his foundational objections. After Nipper's foundational testimony, Huff's *Daubert*/*Schafersman* objection was overruled.

[29] Huff now asserts that the court erred in handling Huff's objection in the way it did. Huff contends that his "substantial legal right . . . to have a fair and meaningful adversarial proceeding was quashed by the trial judge directing [his] attorney to instruct State's counsel on how to properly question the State's expert."[110] Huff concedes that he did not object at trial on that basis, but contends the court committed plain error. Plain error is error of such a nature that to leave it uncorrected

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[108] See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[109] 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).

[110] Brief for appellant at 31.

would result in damage to the integrity, reputation, or fairness of the judicial process.[111]

[30,31] We find no plain error on this issue, primarily because we do not interpret the record in the way that Huff suggests. Rather, in our view, the district court was simply requiring Huff to make a specific foundational objection, as he was required to do. Under the principles set forth in *Daubert* and *Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[112] But to sufficiently call specialized knowledge into question under *Daubert* and *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.[113] The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.[114]

[32] Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert* and *Schafersman* should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *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, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.[115]

In this case, Huff did none of those things. The court would not have abused its discretion had it simply overruled Huff's objection for being insufficiently timely or specific. Instead, the court demanded that Huff make his objection with more specificity, so that the State could address the basis of Huff's

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

[112] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[113] *Id.*

[114] *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[115] *Casillas, supra* note 112.

objection and the court could determine the admissibility of Nipper's opinion without wasting the jury's time. Contrary to Huff's argument, the court did not direct his counsel to "instruct or educate the prosecutor [on] what was necessary to lay the proper foundation for the State's expert witness's opinion"[116]—rather, the court instructed Huff on what was necessary to make a proper objection to that opinion and, in so doing, inform the State as to the basis for Huff's objection.

[33] A trial court has broad discretion in determining how to perform its gatekeeper function.[117] In this case, the court did not abuse its discretion, much less commit plain error, in requiring Huff to make his foundational objection with the required specificity. There is no principle of due process that requires a court or party to guess at the basis for a general foundational objection. Therefore, we find Huff's assignment of error to be without merit.

Lesser-Included Offense Instruction on Motor Vehicle Homicide

[34] As noted above, motor vehicle homicide is a Class I misdemeanor, unless the predicate act is, among other things, DUI, in which case it is a Class III felony. Huff argues that the jury in this case should have been instructed on the predicate act of speeding, in addition to DUI. Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision.[118]

Huff's argument is based on *Beck v. Alabama*,[119] in which the U.S. Supreme Court explained the rationale for requiring an instruction on a lesser-included offense in a death penalty case when the evidence supports such an instruction. The Court explained that

> "if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if

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[116] Brief for appellant at 33.

[117] *Daly, supra* note 101.

[118] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[119] *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

> no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[120]

Huff argues that the jury could have concluded that he was not under the influence of alcohol at the time of the accident, but had been speeding. And, he claims, the jury was not given an option that would be consistent with that finding.

But *Beck* is not applicable in this case. We note that it is quite questionable, given the evidence, whether any rational trier of fact could have found that Huff was not under the influence of alcohol. That aside, when the jury instructions are considered as a whole, it is apparent that the jury was not confronted with the "all or nothing" dilemma that the Court held was impermissible in *Beck*.[121]

Instead of being instructed on "misdemeanor motor vehicle homicide"[122] as a lesser-included offense, the jury in this case was instructed on manslaughter as a lesser-included offense. The predicate act for the manslaughter instruction was speeding. And the jury was instructed that it should proceed to the manslaughter charge only if it acquitted Huff of motor vehicle homicide. Instead, he was found guilty of motor vehicle homicide. We presume that the jury followed the step instruction and did not consider the manslaughter offense after finding that Huff was guilty of motor vehicle homicide.[123] And the manslaughter instruction gave the jury an alternative had it concluded that Huff was not guilty of DUI, but guilty of speeding as the unlawful act that caused Warner's death, so

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[120] *Id.*, 447 U.S. at 634 (emphasis in original).

[121] See *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[122] See brief for appellant at 35.

[123] See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

the "all or nothing" dilemma addressed in *Beck* was not present here.

[35] 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.[124] Huff has not done so here. We need not determine whether, in an appropriate case, a defendant might be entitled to an instruction based on a lesser degree of motor vehicle homicide because, in this case, Huff was clearly not prejudiced by the denial.

Excessive Sentences

[36] Finally, Huff argues that his sentences are excessive. When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.[125] Huff suggests that his sentences are not "'within'" the statutory limits because they are at the maximum—so, Huff claims, the sentencing is "at its limit, not within it. To sentence in such a manner is an abuse of discretion."[126]

[37] Huff seems to be suggesting that a maximum sentence is, per se, an abuse of discretion. That suggestion is plainly without merit. A sentence at the maximum limit is still within that limit—it is only if the sentence *exceeds* the statutory limit that it becomes "excessive" as a matter of law.[127] We have often said that the Legislature declares the law and public policy by defining crimes and fixing their punishment and that the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.[128] We would be ignoring that principle were we to conclude that the end of the legislatively established statutory range was somehow "out of bounds" as a possible sentence.

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[124] *Miller, supra* note 118.

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

[126] Brief for appellant at 38.

[127] See *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

[128] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

[38] Huff also argues that the "nature of the offense here is accidental"[129] and that because Huff did not intend to harm anyone, the sentences are excessive. 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.[130] So, the fact that Huff may not have specifically intended to harm anyone is a relevant consideration in sentencing.

But in addition to the circumstances underlying this case, the presentence report establishes a substantial foundation for the sentences imposed. Huff has a long criminal history, including reckless driving, possession of drug paraphernalia, several assaults, disturbing the peace, resisting arrest, attempted sexual assault, multiple DUI convictions, several instances of driving under suspension, and many other traffic violations. And a review of the presentence report suggests that Huff has been unwilling to accept responsibility for his conduct and less than remorseful about its effects.

Given the evidence, it is apparent that the district court did not abuse its discretion at sentencing.

CONCLUSION

For the foregoing reasons, we find merit to two of Huff's assignments of error. First, we conclude that unlawful act manslaughter is a lesser-included offense of motor vehicle homicide, and second, we conclude that prior convictions for DUI cannot be used pursuant to §§ 60-6,197.02 and 60-6,197.03 to enhance a defendant's conviction for refusing a chemical test. But we find no merit to Huff's remaining assignments of error. Huff's convictions and sentences for motor vehicle homicide and witness tampering are affirmed. Huff's conviction and sentence for manslaughter are vacated. And finally, while Huff's conviction for refusing a chemical test is affirmed,

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[129] Brief for appellant at 38.

[130] *Erickson, supra* note 123.

the sentence is vacated, and the district court is directed on remand to resentence Huff on that conviction consistent with this opinion.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

TERI A. LATHAM, APPELLANT, V. SUSAN RAE SCHWERDTFEGER, APPELLEE.

802 N.W.2d 66

Filed August 26, 2011. No. S-10-742.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
5. **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.
6. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests.
7. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
8. **Parent and Child.** The primary determination in an in loco parentis analysis is whether the person seeking in loco parentis status assumed the obligations incident to a parental relationship.
9. **Parent and Child: Intent.** The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred.

10. **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.

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

Tyler C. Block and Elizabeth Stuht Borchers, of Marks, Clare & Richards, for appellant.

Angela Dunne Tiritilli and Susan A. Koenig, of Koenig & Tiritilli, P.C., L.L.O., for appellee.

Kelle Westland, of Raynor, Rensch & Pfeiffer, for amicus curiae National Center for Lesbian Rights.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Teri A. Latham, and appellee, Susan Rae Schwerdtfeger, were in a relationship from 1985 until 2006. After discussing having a child, Schwerdtfeger became pregnant by in vitro fertilization. In January 2001, Schwerdtfeger gave birth to P.S. Latham, Schwerdtfeger, and the minor child lived together from 2001 until 2006, when the parties separated and Latham moved out of the home. Latham continued to have visitation with P.S. until 2009. Visitation was thereafter reduced for reasons in dispute.

After visitation stopped, Latham brought an action in the district court for Douglas County seeking custody and visitation. Latham alleged that she had standing based on the doctrine of in loco parentis. Schwerdtfeger moved for summary judgment. In its order of dismissal filed July 2, 2010, the district court concluded that "the *in loco parentis* doctrine does not apply" and dismissed the case with prejudice. Latham appeals. We conclude that the district court erred when it concluded that the doctrine of in loco parentis did not apply to these facts.

We further determine based on essentially undisputed facts that Latham has standing to seek custody and visitation of P.S. and that there are genuine issues of material fact whether Latham should be granted custody and/or visitation of P.S. We reverse the order granting summary judgment in favor of Schwerdtfeger and the order dismissing Latham's complaint, and we remand the cause for further proceedings.

STATEMENT OF FACTS

Latham and Schwerdtfeger met in college and moved in together in 1985. At that time, the parties began sharing their finances. After several years of living together, the parties discussed having a child. They ruled out adoption, and instead, it was decided that Schwerdtfeger would be the birth parent of the child. The parties chose a sperm donor, and after several unsuccessful attempts at artificial insemination, Schwerdtfeger underwent in vitro fertilization, which was successful. The cost of these procedures was shared by both parties.

Both parties attended doctors' appointments, and both parties were present at the birth of P.S. The parties are not married. Latham took maternity leave to care for Schwerdtfeger and the baby.

After the birth, Latham continued her role as coparent, helping to raise the minor child and supporting him both emotionally and financially. Latham claims that P.S. identified her as "Mom" and that she would assist P.S. in getting ready for school, was involved in disciplining P.S., took P.S. to medical appointments, and helped him with his homework.

In 2005, Latham and Schwerdtfeger separated, and Latham moved out of the family home in 2006. Latham claims that even though she was not living in the home, she continued her role as coparent to the minor child. Latham states that in 2006, Schwerdtfeger was cooperative in allowing her to see P.S. and she spent one-on-one time parenting P.S. three to five times per week at her home and at Schwerdtfeger's home. Latham states that she continued to take P.S. to medical appointments and support him financially and that Schwerdtfeger and she shared finances through the summer of 2007.

Schwerdtfeger claims that after Latham moved out, Latham primarily saw P.S. on Thursday afternoons after school until dinnertime. Schwerdtfeger further states that since the closing of the combined checking account in 2007, Latham has not contributed monthly financial support for P.S., stating that Latham does not pay for the minor child's medical expenses or educational expenses. Latham does not pay child support. Both parties agree that after Latham moved out of the family home, there was no set parenting schedule agreed upon by the parties.

Latham claims that beginning in 2007, Schwerdtfeger began to arbitrarily cut down on Latham's parenting time with P.S. Latham claims that she saw P.S. only two times per week but that she continued to attend many of P.S.' activities outside of her scheduled parenting time with him, continued to support him emotionally and financially, and participated in discipline.

Schwerdtfeger stated that in 2008 and 2009, P.S. spent a total of four overnights with Latham. Schwerdtfeger stated that Latham did not attend parent-teacher conferences for P.S. in 2007, 2008, or 2009 and that she attended only one parent-teacher conference for P.S.' preschool class. Schwerdtfeger further stated that the only time Latham took P.S. to the doctor since she moved out of the residence was on one occasion in 2007, at which time she took P.S. to the doctor at Schwerdtfeger's request.

Latham stated that beginning in October 2009, Schwerdtfeger significantly restricted Latham's parenting time, and that since October 2009, Latham has been able to spend in-person parenting time with P.S. on only three occasions. Latham contends that she has continued to try to reach out to P.S. Schwerdtfeger stated that P.S. does not miss Latham and does not want to spend time with her.

On December 14, 2009, Latham filed a complaint for custody and visitation in the district court for Douglas County. On January 7, 2010, Latham filed a motion for parenting time. On February 12, Schwerdtfeger filed a motion for summary judgment. On February 26, a hearing was held on the motion for summary judgment. After the hearing, the court overruled the motion from the bench. The court awarded Latham telephonic

parenting time with P.S. for 30 minutes, three times per week. The court ordered the parties to submit briefs on the issue of the in loco parentis status of Latham and scheduled an in camera interview with P.S. The court conducted the interview with P.S. on March 23.

On July 2, 2010, the court filed an order of dismissal. In its order, the district court determined that "the *in loco parentis* doctrine does not apply" to Latham and that "there is no genuine issue [as] to a material fact as related to" Latham's standing. The district court reversed its prior ruling, granted Schwerdtfeger's motion for summary judgment, and ordered that Latham's complaint for custody and visitation "should be dismissed with prejudice." Latham appeals.

ASSIGNMENTS OF ERROR

Latham claims, restated and summarized, the district court erred when it determined that the doctrine of in loco parentis does not apply, that there were no genuine issues of material fact, and that Latham lacked standing to seek custody and visitation of the minor child.

STANDARD OF REVIEW

[1] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

[2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010).

ANALYSIS

Standing.

Latham claims the district court erred when it concluded that the doctrine of in loco parentis did not apply, that there

were no genuine issues of material fact, and that Latham lacked standing to seek custody and visitation of the minor child.

[3-6] 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. *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011). Under the doctrine of standing, a court may decline to determine the 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. *Id*. 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. *Id*. To have standing, a litigant must assert the litigant's own rights and interests. See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

One court has explained that "[i]n the area of child custody, principles of standing have been applied with particular scrupulousness . . . ." *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 86, 682 A.2d 1314, 1318-19 (1996). It has been further observed that "'[t]he *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. . . .'" *T.B. v. L.R.M.*, 567 Pa. 222, 230, 786 A.2d 913, 917 (2001). Thus, as explained below, any argument that a nonparent cannot seek custody or visitation because to do so would interfere with a parent's rights to parent is unavailing where the evidence shows that the primary consideration, the best interests of the child, are served by recognizing the standing of a nonparent to seek custody or visitation. *Id.* See *Bethany v. Jones*, 2011 Ark. 67, 378 S.W.3d 731 (2011). See, also, e.g., *State on behalf of Combs v. O'Neal*, 11 Neb. App. 890, 662 N.W.2d 231 (2003).

No Statutory Basis for Standing.

We have recognized that a child has a "'right to be raised and nurtured by a biological or adoptive parent. . . .'" *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)). As a corollary, a biological or adoptive parent has a right to seek custody and visitation of his or her minor child. Latham is neither a biological nor an adoptive parent. Accordingly, we must ascertain what authority, if any, affords Latham a basis to seek custody and visitation of the minor child. We look initially for statutory authority as a basis for standing.

In Nebraska, various statutes establish a means for seeking custody and visitation of a minor child. These statutes include dissolution actions pursuant to Neb. Rev. Stat. §§ 42-341 to 42-381 (Reissue 2008 & Cum. Supp. 2010); paternity actions pursuant to Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2008); juvenile proceedings pursuant to Neb. Rev. Stat. §§ 43-245 to 43-2,130 (Reissue 2008 & Supp. 2009); guardianship proceedings pursuant to Neb. Rev. Stat. §§ 30-2601 to 30-2616 (Reissue 2008 & Cum. Supp. 2010); adoption proceedings pursuant to Neb. Rev. Stat. §§ 43-101 to 43-165 (Reissue 2008 & Cum. Supp. 2010); and actions under the Uniform Child Custody Jurisdiction and Enforcement Act, Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2008 & Cum. Supp. 2010).

Latham conceded at oral argument that she did not have standing pursuant to any of the above-referenced provisions. After reviewing these statutory authorities, we agree with Latham that there is no explicit statutory basis to support her claim of standing. Accordingly, we examine Nebraska common law to determine whether there is a basis for Latham's standing.

Common-Law Right to Standing Based on the Doctrine of In Loco Parentis.

In her complaint for custody and visitation, Latham alleged that she was in loco parentis to P.S. However, the district court concluded that the in loco parentis doctrine did not apply and dismissed the case. Latham challenges this ruling on appeal. We find merit to this assignment of error. Contrary to the district court's conclusion, we conclude that the doctrine of in

loco parentis applies and that Latham has demonstrated standing to seek custody and visitation.

Although Latham is neither a biological nor an adoptive parent of P.S., and although we have concluded no statutory authority directly confers standing on Latham, a review of our jurisprudence indicates that the Legislature did not intend that statutory authority be the exclusive basis of obtaining court-ordered visitation. As explained below, we have long applied the common-law doctrine of in loco parentis to afford rights to nonparents where the exercise of those rights is in the best interests of the child. We conclude that the doctrine of in loco parentis applies to the facts of this case.

[7] We have explained the doctrine of in loco parentis, stating that

> a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.

Weinand v. Weinand, 260 Neb. 146, 152-53, 616 N.W.2d 1, 6 (2000) (emphasis omitted).

In *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991), we determined that the doctrine of in loco parentis, although not enumerated in the statutes, is a proper consideration when determining stepparent visitation with due consideration to the best interests of the child. Similarly, in *Weinand v. Weinand, supra*, we explained that in the absence of a statute, child support may properly be imposed in cases where a stepparent has voluntarily taken the child into his or her home and acted in loco parentis. In *State on behalf of Combs v. O'Neal*, 11 Neb. App. 890, 622 N.W.2d 231 (2003), the Nebraska Court of Appeals affirmed an order granting custody of a minor to the grandmother based on the doctrine of in loco parentis, notwithstanding a claim of parental preference urged by the biological father.

Other courts have applied similar reasoning and determined that standing exists and custody and visitation may be

considered although not explicitly provided for in statutes. See, e.g., *T.B. v. L.R.M.*, 567 Pa. 222, 230, 786 A.2d 913, 917-18 (2001) (where nonparent invoked common-law doctrine of in loco parentis, court rejected "contention that [nonparent] lacks standing because the statutory scheme does not encompass former partners or paramours of biological parents"); *In re Parentage of L.B.*, 155 Wash. 2d 679, 706-07, 122 P.3d 161, 176 (2005) (stating "state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations"); *Custody of H.S.H.-K.*, 193 Wis. 2d 649, 682-83, 533 N.W.2d 419, 431 (1995) (explaining "[i]t is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directives set forth in the statutes"). Thus, in the absence of direct statutory authority, but with due regard for existing statutory directives, we must consider whether Latham has standing to seek custody and visitation of the minor child under our jurisprudence applying the doctrine of in loco parentis.

As noted, Nebraska appellate courts have applied the doctrine of in loco parentis in the cases of stepparents and grandparents. See, e.g., *Weinand v. Weinand, supra*; *Hickenbottom v. Hickenbottom, supra*; *State on behalf of Combs v. O'Neal, supra*. Because we have not used the doctrine in a case such as the one presently before us, we turn to other jurisdictions that have applied the doctrine in cases similar to the one under consideration in which a nonbiological parent seeks custody and visitation and examine the reasoning of these courts. See *Mullins v. Picklesimer*, 317 S.W.3d 569, 575 (Ky. 2010) (stating "[s]everal of our sister states have found that the nonparent has standing to seek custody and visitation of the child when the child was conceived by artificial insemination with the intent that the child would be co-parented by the parent and her partner") (cases collected). As other courts have done, we have also considered scholarly articles in this area. See *A.C. v. C.B.*, 113 N.M. 581, 829 P.2d 660 (N.M. App. 1992) (articles collected).

The courts that have applied the doctrine of in loco parentis in cases such as ours have looked to the purpose of the doctrine and noted that the focus of an in loco parentis analysis must be on the relationship between the child and the party seeking in loco parentis status. It has been stated that, simply put, the focus of the doctrine of in loco parentis "should be on what, if any, bond has formed between the child and the nonparent." *Bethany v. Jones*, 2011 Ark. 67, 11, 378 S.W.3d 731, 737 (2011).

In *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 88, 682 A.2d 1314, 1319-20 (1996), the court explained:

> The in loco parentis basis for standing recognizes the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objection.

The court in *J.A.L.* went on to state that when the doctrine of in loco parentis is viewed in the context of standing principles in general, its purpose is to ensure that actions are brought only by those with a genuine substantial interest. Accordingly, the doctrine must be applied flexibly and is dependent upon the particular facts of each case. *Id.* Noting that because "a wide spectrum of arrangements [have filled] the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child." *Id.* at 89-90, 682 A.2d at 1320. In *J.A.L.*, the court concluded that based on the relationship

between the nonbiological parent and the child, the doctrine of in loco parentis conferred standing on the nonbiological parent seeking partial custody, and the cause was remanded for a full hearing on whether awarding partial custody in favor of the individual with in loco parentis status was in the best interests of the minor child.

In *Bethany v. Jones, supra*, the Arkansas Supreme Court determined that the doctrine of in loco parentis applied because the focus of the in loco parentis analysis is on the relationship between the nonparent adult and the child, not on the relationship between the biological parent and the nonparent adult. Therefore, the court in *Bethany* determined that it was obligated to look at the relationship between the party seeking standing based on in loco parentis status and the child to determine if such relationship met the definition of in loco parentis.

Similarly, in *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), the Wisconsin Supreme Court, in a case not relying explicitly on the doctrine of in loco parentis but instead looking to whether a parent-like relationship existed, determined that a trial court may determine whether visitation with the nonbiological parent is in the best interests of a child, if the individual could establish that she had a parent-like relationship with the child and that there was a triggering event by which the biological parent substantially interfered with the parent-like relationship.

[8] We agree with the reasoning of these courts and conclude, contrary to the district court, that the doctrine of in loco parentis applies to this case. Because the purpose of the doctrine of in loco parentis is to serve the best interests of the child, it is necessary to assess the relationship established between the child and the individual seeking in loco parentis status. The primary determination in an in loco parentis analysis is whether the person seeking in loco parentis status assumed the obligations incident to a parental relationship. Application of the doctrine protects the family from allowing intervention by individuals who have not established an intimate relationship with the child while at the same time affording rights to a person who has established an intimate parent-like relationship

with a child, the termination of which would not be in the best interests of the child. See *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 682 A.2d 1314 (1996).

The district court erred when it concluded that the doctrine of in loco parentis did not apply to this case. The undisputed facts show that Latham has rights which are entitled to consideration and has standing based on the doctrine of in loco parentis. We reverse the order of dismissal, which was based on the incorrect conclusions that the doctrine of in loco parentis did not apply and that Latham lacked standing.

Application of the Law to This Case.

Having concluded that the doctrine of in loco parentis is applicable to the standing analysis in this case and that Latham has standing, we examine the record made at the summary judgment hearing to determine whether Latham is entitled to custody or visitation as one who stands in loco parentis. If Latham can establish that she has met the standard our jurisprudence has set forth for granting relief to one who stands in loco parentis, there is no reason to exclude this case from the benefits of the doctrine afforded to stepparents and grandparents who have created similar relationships with a minor child. We determine that there are genuine issues of material fact which preclude entry of summary judgment and that the district court erred when it granted summary judgment in favor of Schwerdtfeger. We reverse the order granting summary judgment in favor of Schwerdtfeger.

In its consideration of the merits of the custody and visitation issue, the district court indicated in its remarks that although before 2006, the parties could have been considered to be in a coparenting relationship, as of 2006, at the time of the termination of the relationship between the parties, Latham could not be considered by the court as assuming all the obligations incident to the parental relationship and a parent who was discharging those obligations. Therefore, the court indicated that, even if the doctrine of in loco parentis applied, Latham did not have in loco parentis status with P.S. at the time of the hearing. On the record presented, we believe that this determination is premature and that there are genuine issues of

material fact regarding Latham's continuing relationship with P.S., all of which bear on whether custody and/or visitation by Latham is in the best interests of P.S.

[9,10] In *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000), we stated that the assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred. Further, 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. *Freedom Fin. Group v. Wooley*, 280 Neb. 825, 792 N.W.2d 134 (2010).

Bearing these principles in mind, and viewing the facts of this case in a light most favorable to Latham, we are persuaded that Latham has raised genuine issues of material fact for trial concerning her continuing relationship with the minor child and what outcome will best serve the child's interests. In reviewing the district court's discussion of this case, it appears that the district court focused on the relationship between the parties and the end of that relationship, rather than placing the emphasis on the relationship between the minor child and Latham and, thus, the best interests of P.S.

The facts taken in a light most favorable to Latham show that she was involved in the decision to conceive the minor child, was present at his birth, spent the first 4 years of his life in the home with him, and took part in parental duties such as feeding, clothing, and disciplining him. When the parties separated, the facts of Latham's involvement and relationship with the minor child become less clear. But viewing the facts in this record in a light most favorable to Latham, for at least 1½ years after the separation, she had regular visits with the minor child three to five times per week and participated in his extracurricular activities. Latham and Schwerdtfeger shared their finances through the summer of 2007. Therefore, Latham continued to assist in supporting P.S. financially until that time. It appears that Latham's visitations with P.S. diminished in 2007 and 2008 and that Latham had, on average, visitation with P.S. two times a week. Recently, visitation between Latham and P.S. has evidently become nonexistent. The amount of

visitation Latham has been afforded does not appear to reflect a lack of desire on her part to be an active part of P.S.' life; rather, that fact appears to be the result of the relationship between the parties and a result of Schwerdtfeger's apparent decision to end Latham's visitation with P.S.

The relationship between Latham and Schwerdtfeger, however, is not the deciding factor. The record is clear that Schwerdtfeger consented to Latham's performance of parental duties. Schwerdtfeger encouraged Latham to assume the status of a parent and acquiesced as Latham carried out day-to-day care of P.S. Latham did not assume a parenting role against the wishes of Schwerdtfeger. It has been observed that "a biological parent's rights do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." *T.B. v. L.R.M.*, 567 Pa. 222, 232, 786 A.2d 913, 919 (2001).

There are material questions of fact concerning the amount of time Latham spent with P.S. and the nature and extent of the relationship between Latham and P.S. after Latham and Schwerdtfeger separated. Whether and to what extent Latham's participation in P.S.' life are in his best interests must await trial.

CONCLUSION

The primary issue in this appeal is one of standing based on the well-established common-law doctrine of in loco parentis. A determination of standing simply implies that a party has a substantial interest in the subject matter of the litigation and that the interest is direct, immediate, and not a remote consequence. We conclude that Latham has standing based on the doctrine of in loco parentis and that the district court erred when it concluded that the doctrine of in loco parentis did not apply to this case. Our opinion does not speak to Latham's chance of success on the merits, but it merely affords her the opportunity to fully litigate the issues. Latham has made a meritorious claim of standing to seek enforcement of her claimed right to custody and visitation of P.S.

The district court erred when it concluded that the doctrine of in loco parentis did not apply and dismissed the case. Latham has standing to seek custody and visitation of P.S., but there remain genuine issues of material fact bearing on whether she should be granted relief and whether the relief she seeks is in the best interests of P.S. Accordingly, we reverse the ruling granting summary judgment in favor of Schwerdtfeger and the order of dismissal, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
KARNELL D. BURTON, APPELLANT.
802 N.W.2d 127

Filed September 2, 2011. No. S-10-143.

1. **Pleadings.** Deciding to grant or deny an amendment to a pleading is a matter entrusted to the discretion of the trial court.
2. **Motions for Mistrial.** Deciding whether to grant a motion for mistrial is a matter entrusted to the discretion of the trial court.
3. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.
4. **Sentences.** Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 2008) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
7. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.
8. **Speedy Trial: Waiver.** It is incumbent upon a defendant to file a timely motion for discharge in order to avoid the waiver provided for by Neb. Rev. Stat. § 29-1209 (Reissue 2008).

9. ____: ____. A defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before trial begins.
10. **Rules of Evidence: Witnesses: Prior Statements.** The rule against offering extrinsic evidence of a prior inconsistent statement of a witness does not apply to admissions of a party-opponent.
11. **Evidence: Prior Statements.** A statement is admissible as substantive evidence if it is offered against a party and is the party's own statement.
12. **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.
13. **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.
14. **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.
15. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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 sentencing 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, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Thomas C. Riley, Douglas 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.

GERRARD, J.

The defendant, Karnell D. Burton, was convicted of manslaughter, attempted second degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony. He appeals, claiming that his statutory right to a speedy trial

was violated, that the State committed misconduct during closing statements, that the court erred in excluding evidence that two of the State's witnesses belonged to a gang, and that the sentences imposed were excessive. But we affirm Burton's convictions and sentences.

I. BACKGROUND

Because the issues presented on appeal are relatively narrow, a detailed recitation of all the evidence presented at trial is unnecessary. Rather, it will be more helpful to relate a general summary of the evidence, followed below by a more detailed examination of the facts relevant to each issue.

This case arises out of the shootings of Timothy Thomas and his cousin Marshall Turner, which left Thomas dead and Turner seriously wounded. Generally, the State accused Burton and his alleged accomplice, Thunder Collins, of shooting Thomas and Turner in an attempt to steal cocaine from them. In connection with those shootings, Burton was charged with first degree murder, attempted second degree murder, first degree assault, and three counts of use of a deadly weapon to commit a felony.

The State's evidence at trial, taken in the light most favorable to the State,[1] established that Collins, Turner, and Thomas had been engaged in transporting cocaine from Los Angeles, California, to sell in Omaha, Nebraska. On the trip that culminated in the shootings at issue in this case, Turner and Thomas had driven to Omaha from California in a sports utility vehicle (SUV), accompanied by Turner's girlfriend and another man, Darryl Reed. The cocaine they were transporting had been hidden in the body of the SUV.

Collins contacted his friend Ahmad Johnson, who testified at trial that Collins asked him to help Collins "get these guys." Collins told Johnson that they needed a secure location to get the drugs out of the SUV. Johnson asked his friend Karl Patterson whether they could use Patterson's automotive repair shop. Patterson refused, but, according to Johnson, agreed to give Collins a gun. Collins and Johnson then tried to contact

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

Burton, but failed. So, Collins told Turner and Thomas to follow Collins in their SUV to Johnson's house, to use Johnson's garage to remove the drugs from the SUV.

Burton called Collins back, and Collins told him to come to Johnson's house, so he did. Johnson took the gun that they had gotten from Patterson and placed it in the kitchen. Burton and Johnson were in the house talking when Collins came in and asked for a gun Burton had brought with him, which was smaller. Johnson said he told Burton to "watch [Collins'] back," then went outside and sat in his car, listening to music.

Turner and Thomas were still in the garage, and Turner was watching Thomas work to remove the drugs from the SUV, when Turner was suddenly shot in the neck. Turner fell to the ground and crawled under the SUV. When he got up, he saw Burton pointing a gun at him and Collins holding Thomas by the hair. Turner tried to get between Collins and Thomas, so Burton shot Turner in the buttocks. Collins then shot Thomas in the head. Burton went to help Collins move Thomas' body, and Turner heard Burton say, "Let me make sure this nigger dead." Another shot was fired, grazing Turner's head. Turner heard Collins and Burton go out the back door of the garage, so he got into the SUV, drove it through the closed garage door, and fled.

Burton was convicted of manslaughter, attempted second degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony, and he was sentenced to a total of 80 to 130 years' imprisonment. He appeals.

II. ASSIGNMENTS OF ERROR

Burton assigns that the district court (1) violated his statutory right to a speedy trial when it granted the State's motion to file an amended information which added the charges of first degree assault and use of a deadly weapon to commit a felony, over his objection; (2) committed reversible error when it denied his motion for mistrial based on prosecutorial misconduct during the State's rebuttal in final argument; (3) committed reversible error when it refused to allow him to present evidence that two of the State's witnesses, Reed and Turner, were

members of a violent street gang; and (4) abused its discretion by imposing excessive sentences.

III. STANDARD OF REVIEW

[1-5] Deciding to grant or deny an amendment to a pleading,[2] deciding whether to grant a motion for mistrial,[3] determining the relevancy of evidence,[4] and imposing a sentence within statutory limits,[5] are all matters entrusted to the discretion of the trial court. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[6]

IV. ANALYSIS

1. Speedy Trial

(a) Background

Burton was initially charged on November 10, 2008, with four counts: first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. About 3 months before trial was scheduled to begin, the State moved for leave to file an amended information, adding a charge of first degree assault and an additional charge of use of a deadly weapon to commit a felony, both arising out of the same set of facts as the original charges. Burton objected, arguing that the "six-month statutory requirement for speedy trial would be, in its spirit, violated." Burton argued that while he had waived his statutory speedy trial right with respect to the charges that were already pending, he had not waived it with respect to the charges the State was proposing to add. But over Burton's objection, the motion for leave to file an amended information was sustained, and the amended information was filed on July 28, 2009.

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[2] See *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

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

[4] See *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

[5] See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[6] *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

(b) Analysis

[6,7] Neb. Rev. Stat. § 29-1207 (Reissue 2008) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.[7] And if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to absolute discharge from the offense charged.[8]

Burton argues that his statutory right to a speedy trial was violated in this case. Burton concedes that the statutory right to a speedy trial can be waived[9] and that he waived his speedy trial right with respect to the charges originally brought against him. But, he contends, that waiver was not effective against the charges that were added before trial—the first degree assault charge and the associated weapons charge.

[8,9] However, Burton never filed a motion to discharge those counts. And Neb. Rev. Stat. § 29-1209 (Reissue 2008) clearly provides that the "[f]ailure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." We have explained that it is incumbent upon a defendant to file a timely motion for discharge in order to avoid the waiver provided for by § 29-1209[10] and that a defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before trial begins.[11]

Burton's appellate brief characterizes the question presented as whether he was required to file a notice of appeal within 30 days of the court's order granting the State's leave to amend, as he would have been required to do had a motion to discharge been made and overruled.[12] We agree that Burton

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[7] *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

[8] See, Neb. Rev. Stat. § 29-1208 (Reissue 2008); *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

[9] See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[10] *State v. Kearns*, 245 Neb. 728, 514 N.W.2d 844 (1994), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

[11] See *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007).

[12] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

could not have appealed from the order granting leave to file an amended information. But that is not precisely the question. Rather, given the specific provision of § 29-1209, the question is whether Burton waived his speedy trial right by not moving for discharge.

Obviously, pursuant to § 29-1209, the answer is that he did. Burton contends that the objection to the amended information was not a motion to discharge, "because the complained[-]of additional counts were not pending and there was nothing from which he could be 'discharged.'"[13] That may have been the case, but there was nothing preventing Burton from making his motion to discharge after the amended information was filed.

Burton argues at length that procedural problems would ensue if a defendant were required to appeal when a speedy trial claim was presented with respect to some, but not all, of the charges pending. But we are not faced in this appeal with whether a defendant whose motion to discharge is overruled with respect to some but not all of the charges should be required to appeal, or what effect that would have on the charges that remained. Instead, the only question is whether Burton had to file a motion to discharge to preserve his speedy trial claim. And § 29-1209 answers that question.

Burton waived any violation of his right to speedy trial by not moving for discharge before trial. His first assignment of error is without merit.

2. Prosecutorial Misconduct

(a) Background

Burton had been taken into police custody at the scene of the crime and gave a statement to police that was not admitted into evidence at trial. But, when Burton testified at trial, his statement was used as the basis for impeachment on cross-examination.

Turner and Johnson testified at trial, and their accounts of events are essentially set forth above—that Turner and Thomas were in the garage at Johnson's house when Collins and Burton

[13] Brief for appellant at 22.

came into the garage and attacked them. Specifically, Turner said that Collins shot him, then Burton shot at him two more times, while Collins killed Thomas.

Burton gave a different account. Burton testified at trial that he and Johnson had both been in the kitchen at Johnson's house, when they heard a scuffle in the garage and the sound of a gunshot. Burton said that he grabbed a gun off the stove and that he and Johnson both ran into the garage. According to Burton, he shot Turner in the buttocks because Collins, fighting with Turner and Thomas, had said that Turner had a gun. Burton said that after he shot Turner in the buttocks, Collins took the gun from him and Burton left the garage. Burton said he did not know whether Johnson also left the garage. Then, Burton heard more gunshots, and was leaving when he saw the SUV crash through the garage door and speed away.

But on cross-examination, Burton admitted initially telling police that neither he nor Johnson had been in the garage at all. Then, eventually, Burton had admitted to police that he had shot Turner. Specifically, Burton did not deny telling police that he and Johnson had been in the garage watching the removal of the drugs, then gone into the kitchen, where he had been given a gun to take back into the garage. Burton admitted telling police, contrary to his trial testimony, that he and Collins had been in the garage, but not Johnson. Nor did Burton deny telling police that, contrary to his trial testimony, he had been present when Collins shot Turner and Thomas and that Collins had shot both men before Burton shot Turner.

Burton's responses to the State's impeachment were somewhat evasive, and it was not always clear whether Burton was admitting the statements he made to police or simply claiming not to recall whether or not he had made them. Most of the time, Burton simply did not "deny" making the statements with which he was confronted by the State. But at various other points, Burton seemed to concede at least making those statements to police, although he claimed that he had been lying to them at the time. Some examples of these colloquies will illustrate the ambiguity:

> [Prosecutor:] Now, there was some testimony that you've been asked about, you were there . . . when . . .

Turner [was asked] about saying to take it and just keep it; is that correct?

[Burton:] I didn't hear it.

Q. You didn't hear any of that?

A. No.

Q. Didn't you, in fact, tell the police that you did hear him begging in the garage to just take it, just leave us alone and take it?

A. I could have said it.

Q. Okay. So —

A. I don't deny I said it.

. . . .

Q. . . . Did you hear . . . Turner at the time saying to just take it, just leave us alone?

A. No.

Q. You never heard that?

A. No.

Q. And if you told the police that . . . then that would be mistaken? You didn't say that?

A. I probably did say it.

. . . .

Q. And isn't it true that in that same conversation that when Officer Spencer is talking to you about that, that based on the tape, you say that the purpose was to scare them and jack them?

A. I don't recall it.

Q. Once again, do you deny saying that on the tape?

A. No, I don't deny saying it.

Q. Okay. So this is, once again, a little different about what you actually knew before you went into the garage, is that correct, from what you said today?

A. I did know. I was making it up.

Q. Once again, that's all made up here, too, with Officer Spencer's reporting; is that right?

A. It's not made up. I said it, but it is made up.

Q. I appreciate the difference as well, sir. You're right. You made it up but you certainly said it?

A. Yes.

. . . .

Q. Do you recall telling Officer Spencer that while you were in the garage you heard [Collins] say, Yeah, here it is — referring to the drugs — and give it up?

A. No, I don't remember that.

Q. Okay. Do you recall — Once again, if you said it to Officer Spencer — are you denying you said that to Officer Spencer?

A. I'm not denying it. I just don't recall it, sir.

Q. But if you said that to Officer Spencer — or if you said that to Officer Spencer and he reported that, you're not denying that; correct?

A. No, I'm not denying it.

Q. And that's different from today as well. You actually were in there to hear . . . Collins say that; correct? Those two statements are different?

A. I made it up, sir.

. . . .

Q. Do you remember saying this to Officer Spencer: You stated that [Collins] begins to shoot at which point Burton states that he shoots and then gets scared and runs out of the back of the garage. Did you say that to Officer Spencer?

A. I could have. I don't deny it, though.

Q. Once again, you don't deny it if he reported it; is that right?

A. Yes.

Q. So, in fact, that's different from you walking in and just shooting. You actually said to Officer Spencer that you saw . . . Collins shoot first; correct?

A. Yes.

. . . .

Q. Well, at the time that you — time that you were inside, you were asked by Officer Spencer — once again, he asked you who shot at which time, and you told him that [Collins] fired the first shot, hitting the dark-skinned male; [Collins] fired the second shot, shooting the guy with the ponytail; and you claim you fired a third shot, which hit the dark-skinned guy. Do you recall saying that?

A. I don't remember saying it.

Q. You don't deny it, though. Is that fair to say?

A. No, I don't deny it.

Q. So, once again, that indicates, with what you're saying to Officer Spencer, that you were in there knowing what . . . Collins was doing in this shooting. That's what that sounds like; correct?

A. Yes.

. . . .

Q. Well, certainly if you were — if one or two shots had already been fired and the two victims were scrambling or scuffling, being physical, isn't it — based on what you told Officer Spencer, isn't it likely that they were scuffling or scrambling because they had just been shot at?

A. I don't know.

Q. Okay. Although you told Officer Spencer that you saw [Collins] shoot at both of them?

A. I told you that was a lie.

Q. But here's my question, sir: Although you told Officer Spencer that you saw [Collins] shoot at both of them, that wouldn't be a reason for a scuffle. Maybe trying to get away?

A. Yeah, I told you it was a lie, so I don't know.

This ambiguity led to some confusion during closing statements. Defense counsel conceded, during his closing statement, that Burton had initially lied to police. But, he argued, so had Johnson and Turner. Defense counsel contended that Burton was more credible, because he had quickly acknowledged his involvement and was "[t]he only one that takes any responsibility at all from the first day."

The State replied to that in its rebuttal statement, remarking that "the defense counsel wants to talk a little bit about day one and what [Burton] said on day one. Well, let's talk about what [Burton] said on day one . . . ." The State argued that unlike Burton's testimony at trial, Burton's initial statement to police had mirrored the statements that Turner was making to police at the same time in the hospital where he was being treated. The State's argument, essentially, was that Burton's

trial testimony was not credible, but that Turner's testimony was credible, because the statements that Turner and Burton had given to police just after the shootings were far more consistent with each other.

Burton objected, asserting that there was "no evidence as to what the statement was other than the testimony from [Burton]." So, Burton argued, the State was making "improper rebuttal." The State contended that it had "asked these questions of [Burton] at the time he was on the stand and went through his entire statement," so it was in the record. Essentially, the State contended that Burton had admitted making the statements. Burton's counsel replied that Burton had "said he didn't remember and he doesn't deny he said those things" but that the State could not "come up here and say here's what the statement was," because the statement itself was not in evidence.

The court agreed that while the State could point out inconsistency between Burton's testimony and his statement to police, the State could not refer to parts of the statement to police that were not in evidence. The State continued its rebuttal. Then, after another reference by the State to the consistency of Burton's statement to police with Turner's, Burton reasserted his objection and moved for a mistrial. Although the court cautioned the State that "you need to stay away from the body of the statement that's not in," the motion for mistrial was overruled.

(b) Analysis

Burton's argument is twofold: First, he contends that his statements to police were not in evidence, and second, he contends that his statements can be used only for impeachment, not as substantive evidence. Burton concludes, therefore, that the State's rebuttal was improper to the extent that the State's argument relied on the substance of Burton's statement.

We begin with Burton's second point: Even assuming, for the moment, that Burton's statement to police was available only for impeachment, Burton has not clearly explained what was improper about the State's argument. Burton contends that the impropriety was in using it to show that Turner's testimony was credible, as opposed to showing that Burton's was

incredible. But it is hard to separate the two. The fundamental issue at trial was whether the jury should believe Burton or believe Johnson and Turner. The credibility of each witness was not being judged in a vacuum, and it was hardly improper for the State to point out that Burton's statement to police was more consistent with Turner's statements than with Burton's own trial testimony. That this would have the effect of bolstering Turner's credibility at the expense of Burton's was simply a result of the context of this trial, not any impropriety in the argument. In short, in this case, it would have been hard to make any argument about the credibility of any of the witnesses that did not implicate the credibility of the others.

[10,11] But more fundamentally, it is not clear upon what legal basis Burton contends that his statement to police was not available as substantive evidence. The rule against offering extrinsic evidence of a prior inconsistent statement of a witness does not apply to admissions of a party-opponent, and a statement is admissible as substantive evidence if it is offered against a party and is the party's own statement.[14] The question is really whether Burton's statements to police were in evidence through his testimony—in other words, not whether evidence of Burton's statements to police was admissible, but whether such evidence was even offered at all. Burton argues that it was not.

But evidence of Burton's statements to police was offered through Burton's own testimony, and although his testimony was not always clear, he implicitly acknowledged that the statements with which he was confronted were things he had actually said to police. We have said, in the context of impeachment, that the trial court has "considerable discretion" in determining whether testimony is inconsistent with prior statements and that a court may find inconsistency in evasive answers, inability to recall, silence, or changes of position.[15] The same

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[14] See Neb. Evid. R. 613(2) and 801(4)(b)(i), Neb. Rev. Stat. §§ 27-613(2) and 27-801(4)(b)(i) (Reissue 2008).

[15] See *State v. Marco*, 220 Neb. 96, 100, 368 N.W.2d 470, 473 (1985). See, also, e.g., *McAlinney v. Marion Merrell Dow, Inc.*, 992 F.2d 839 (8th Cir. 1993); *United States v. Rogers*, 549 F.2d 490 (8th Cir. 1976).

discretion applies here, where the issue was not whether Burton denied the prior statements, but whether he admitted them. The trial court's considerable discretion extended to determining whether Burton's testimony was sufficiently affirmative to constitute admissions that he actually made the statements to police about which he was cross-examined.

As noted above, Burton was evasive when confronted with his alleged statements to police. But Burton concedes that, at the very least, he did not deny making those statements. And eventually, he at least implicitly acknowledged them. Burton was trying to do two contradictory things during cross-examination: "not deny" making the statements to police, then also assert that he had been lying when he made them. But in making the second assertion, he contradicted the first, and tacitly admitted that the statements had been made. It was Burton's decision to play cat and mouse with the State during cross-examination, but it was the court's job to decide who won. It would certainly not be an abuse of discretion to conclude that Burton's rather carefully worded "non-denials" were, in fact, acknowledgments. Nor would it be an abuse of discretion to conclude that, when Burton's entire testimony is considered, he effectively acknowledged giving the police the account of events with which he was confronted on cross-examination. And it was certainly not an abuse of discretion not to grant a mistrial.

[12,13] 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.[16] 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.[17] Here, no admonition was requested, nor has any prejudice been shown, particularly given the state of the record and our standard of review. We conclude that the court did not abuse

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

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

its discretion in overruling Burton's motion for mistrial. His second assignment of error is without merit.

3. Gang Membership Evidence

(a) Background

The State filed a motion in limine for an order precluding Burton from adducing evidence that, among other things, any witness had been a member of a street gang. The State argued at the pretrial hearing on the motion that such evidence should be excluded under Neb. Evid. R. 401 and 404.[18] Burton persuaded the court to wait and hear the State's evidence at trial before making a decision on the motion. But the court cautioned Burton that he should not bring the issue up before the jury without first approaching the bench and making an offer of proof, because the court "want[ed] to know the relevancy before it goes in front of the jury."

Reed testified at trial, and although he acknowledged that he was a drug dealer, he neither testified to nor was asked about gang membership, and no offer of proof was made in that regard. Turner also acknowledged that he was a drug dealer and, on cross-examination, was asked about the tattoo on his right arm. The State objected to the question based on relevance, and the objection was sustained. Outside the presence of the jury, Turner explained that the tattoo represented the 52 Hoover Crips. But, Turner said, his drug dealing was not related to gang membership.

Burton made an offer of proof, arguing that Turner's gang ties went to his credibility and background. And, Burton argued, it was unlikely that members of the 52 Hoover Crips would transport cocaine from California without firearms or protection, so Burton asserted that Turner's gang membership was also relevant to the possible source of the guns used in the killing. And because Burton was not a gang member, but Collins allegedly was (although Burton conceded there was no evidence of that), Burton argued that Turner's gang membership went to show the participants' ties to one another.

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[18] Neb. Rev. Stat. §§ 27-401 and 27-404 (Reissue 2008).

The State objected on several grounds, including Neb. Evid. R. 401, 404, 607, 608, and 609.[19] Burton agreed to withdraw the question without a ruling from the court and to provide the court later that day with what he promised would be relevant case law. The next day, after reviewing Burton's submission, the court sustained the State's motion in limine, based on relevance. The court noted that there was nothing to preclude Burton from arguing "that the witness was a drug dealer, that drug dealers are bad guys, that — you know, that whole thing. You're perfectly — you got a lot of latitude there, you just . . . don't get to say gang."

Later, Burton also made an offer of proof with respect to a statement Turner had made to police shortly after the shooting, in which he said that the shooting would not have happened to him in Los Angeles because, as a member of the 52 Hoover Crips, he was respected. The court refused the offer of proof, declining to change its ruling on the motion in limine.

(b) Analysis

Although the State objected on several grounds, the primary issue is whether the proffered evidence was relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[20] Here, Burton's argument on appeal is primarily that Turner's and Reed's gang affiliation would have tended to show that Turner or Thomas, not Burton, brought guns to the scene of the crime.

We are not persuaded by this argument. To begin with, there is no basis in the record to conclude that gang members are substantially more likely (as opposed to drug dealers generally) to be carrying weapons. Nor is it clear how Burton would have been prejudiced in that regard. Burton argues that he "was trying to prove the possibility that one of the two guns involved in the shooting was brought to the scene by Turner

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[19] §§ 27-401 and 27-404; Neb. Rev. Stat. §§ 27-607 to 27-609 (Reissue 2008).

[20] Rule 401, § 27-401.

or Thomas."[21] In other words, Burton wanted to suggest that, contrary to Johnson's testimony, he had not brought a gun to the scene. But the issue to which that might have been relevant was Burton's premeditation—and Burton was acquitted of first degree murder. Burton was convicted of manslaughter, attempted second degree murder, first degree assault, and two weapons charges, and his failure to bring his own gun to the scene would not mitigate his guilt on any of these counts.

Burton also argues that the gang membership evidence was relevant to establish the relationship of Turner, Thomas, Reed, and Collins. But, as noted above, no offer of proof was made with respect to Reed or Collins. That leaves Turner and Thomas, who were *actually* related, because they were cousins. And the drug-dealing conspiracy was well explained. Burton also argues that if Collins was aware of Turner's and Thomas' gang membership, he would have told Burton, and that would have heightened Burton's apprehension and strengthened his argument that he fired on Turner in defense of Collins. However, that argument depends not only on Turner's gang membership, but upon Collins' knowledge of it, Burton's knowledge of it, and Burton's fear of it—none of which were established by Burton's offer of proof.

In short, if Burton wanted to argue that it was unlikely that Turner and Thomas, as drug dealers, were unarmed, he could have done so. And given that Burton's offer of proof was limited to Turner, his remaining arguments for how the evidence was relevant are purely speculative and depend on other evidence that he neither adduced nor offered to prove. The district court did not abuse its discretion in concluding that evidence of gang membership was not relevant. Burton's third assignment of error is without merit.

4. Excessive Sentences

(a) Background

The jury found Burton guilty of attempted second degree murder and first degree assault, and corresponding weapons

[21] Brief for appellant at 29.

charges. The jury did not find Burton guilty of murder, instead finding that he committed the lesser-included offense of manslaughter and a corresponding weapons charge. The court granted Burton's motion for judgment notwithstanding the verdict on that weapons charge, because the underlying offense was unintentional.[22]

At sentencing, the court acknowledged Burton's relative youth and lack of a particularly substantial criminal record. But, the court explained, even if Burton's testimony were believed, "you hear that scuffle, and you grab your gun and you run out there. Out of some misplaced sense of loyalty for a guy that you hardly know, you're willing to shoot at someone you don't know." And, the court noted, Turner easily could have died. So, the court concluded, "there were any number of times in that process . . . that you could have turned back, and you didn't. And as a result, I have to weight [sic] the fact that one person died and one person was very seriously injured."

Burton was sentenced on each count as follows: 20 to 20 years' imprisonment for manslaughter, 20 to 40 years' imprisonment for attempted second degree murder, 20 to 30 years' imprisonment for first degree assault, and 10 to 20 years' imprisonment for each of the two weapons convictions. All the sentences were to be served consecutively, resulting in a total sentence of 80 to 130 years' imprisonment.

(b) Analysis

[14] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[23] All of the sentences imposed upon Burton were within the statutory limits,[24] and he does not contend otherwise.

Rather, Burton argues that he was only 20 years old at the time of the offense and that although he had some prior felony arrests, he had no felony convictions. And Burton argues that

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[22] See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

[23] *Erickson, supra* note 5.

[24] See Neb. Rev. Stat. §§ 28-105, 28-201, 28-304, 28-305, and 28-1205 (Reissue 2008).

there is no way of knowing whether the jury believed that he brought his own gun to the crime scene or perhaps believed he was acting in defense of Collins but found that the force he used was excessive. Burton suggests that "it is just as reasonable to believe the latter interpretation," in which case, the sentences are excessive.[25]

[15,16] But in imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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.[26] In imposing a sentence, a sentencing 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, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.[27]

The record, as set forth above, shows that the court appropriately considered these factors and was persuaded by the nature of the offenses, and the violence involved, to impose lengthy terms of imprisonment. The court did not abuse its discretion in doing so, and we find no merit to Burton's final assignment of error.

V. CONCLUSION

We find no merit to Burton's assignments of error and, for the foregoing reasons, affirm his convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

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[25] Brief for appellant at 34.

[26] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

[27] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

FREDERICK SKAGGS, APPELLANT, V. NEBRASKA STATE PATROL, AN AGENCY OF THE STATE OF NEBRASKA, APPELLEE.

804 N.W.2d 611

Filed September 2, 2011. No. S-10-348.

1. **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.
2. **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.
3. ____: ____: ____. 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.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. ____: ____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

D.C. Bradford and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

GERRARD, J.

This appeal involves a decision by the Nebraska State Patrol to require the petitioner-appellant, Frederick Skaggs, to register under the Nebraska Sex Offender Registration Act (SORA). After the State Patrol's decision, Skaggs requested a

determination of the applicability of SORA to him, a hearing was held, and a hearing officer determined that Skaggs was required to register. The State Patrol adopted the recommendation of the hearing officer in full, and Skaggs petitioned for judicial review of the State Patrol's decision, but the district court agreed that Skaggs was required to register as a sex offender. Though Skaggs argued before the hearing officer and the district court that SORA was unconstitutional as applied to him, the district court declined to address the issue, noting that Skaggs had failed to raise the issue in his petition for judicial review. Skaggs timely appeals. For the following reasons, we affirm the judgment of the district court.

BACKGROUND

In 1985, Skaggs was convicted in the State of California of attempted forcible rape, kidnapping, robbery, and the unlawful taking of a vehicle. In 1992, Skaggs was paroled from California to Nebraska. Though Skaggs was required to register as a sex offender in California before the transfer of his parole to Nebraska, Skaggs was not required to register in Nebraska in 1992, because Nebraska had not yet enacted a sex offender registry. Skaggs' parole records were not made part of the record here, because they were destroyed per the Nebraska Department of Correctional Services' recordkeeping policy. Skaggs lived and worked in Nebraska for several years following the transfer of his parole.

Skaggs went to Florida some time in 2003, but the parties dispute the extent to which he lived there. Skaggs was arrested in Florida three times during 2003 and 2004. Skaggs was placed on probation in Florida for a misdemeanor in 2004, and at that time, he had a Florida driver's license. At some point, the California Department of Justice contacted Florida authorities to inform them that Skaggs was a convicted sex offender, and on January 31, 2006, Skaggs was arrested for failing to register as a sex offender in the State of Florida. On April 18, Skaggs registered as a sex offender in Florida and signed a registration form which listed his permanent and temporary addresses as two different addresses in Florida. In October, Skaggs updated his address with the Florida sex offender registry to Nuevo

Vallarta, Mexico. But Skaggs then lived at an apartment in Omaha, Nebraska, from December 15, 2006, to July 31, 2007, and although his address after that time is unclear, it appears from the record that he was still in Omaha, and he was found living at another Omaha address in January 2008.

Skaggs was located because the Douglas County sheriff's office had been notified in October 2007 that Skaggs was a Florida-registered sex offender living in Omaha. On January 24, 2008, a Douglas County deputy sheriff arrested Skaggs for violating SORA by failing to register in Nebraska, and Skaggs was later notified by the State Patrol of his obligation to register as a Level 3 sex offender. Skaggs petitioned the State Patrol for a hearing and challenged whether SORA applied to him, challenged his classification as a Level 3 sex offender, and claimed that SORA was unconstitutional as applied to him.

A State Patrol hearing officer determined that Skaggs was required to register under Neb. Rev. Stat. § 29-4003(1)(b) (Reissue 2008). The hearing officer noted that § 29-4003(1)(d) might also require Skaggs to register, but did not make a final determination on that issue. The State Patrol adopted the recommendation of the hearing officer, and Skaggs petitioned for judicial review of the State Patrol's decision. On review, the district court determined that Skaggs' classification as a Level 3 offender was moot, as SORA had been amended on January 1, 2010, to remove the classification system. However, the court determined that Skaggs was still required to register as a sex offender, pursuant to § 29-4003(1)(b) (Reissue 2008). Though Skaggs argued that SORA was unconstitutional as applied to him, the court declined to address the issue, noting that Skaggs failed to raise the issue in his petition for judicial review, as required by Neb. Rev. Stat. § 84-917 (Cum. Supp. 2010). Skaggs appeals pursuant to the Administrative Procedure Act.[1]

ASSIGNMENTS OF ERROR

Skaggs assigns that (1) the State Patrol and the district court erred in determining SORA was applicable to Skaggs, (2) the

[1] See Neb. Rev. Stat. § 84-918 (Reissue 2008).

application of SORA to Skaggs is unconstitutional because it denies him his 14th Amendment right to travel freely between the several states, and (3) the district court erred in refusing to consider Skaggs' constitutional challenge.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

[2-5] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[3] 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.[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[5] An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.[6]

ANALYSIS

§ 29-4003

As a preliminary matter, we note that § 29-4003 has been amended twice since Skaggs received notice that he was required to register as a sex offender in Nebraska.[7] Both

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[2] *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.

[3] *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

[4] *Id.*

[5] *Id.*

[6] *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[7] See 2009 Neb. Laws, L.B. 97 and L.B. 285.

amendments took effect in May 2009.[8] (Section 29-4003 has since been amended again, effective August 27, 2011,[9] but that change is minor and does not affect our reasoning here.) At Skaggs' hearing, in September 2009, § 29-4003 (Cum. Supp. 2010) was in effect, but the hearing officer applied § 29-4003 (Reissue 2008). The district court, on judicial review, also applied § 29-4003 (Reissue 2008). On appeal, Skaggs contends that under § 29-4003 (Cum. Supp. 2010), SORA does not apply to him. The State concedes that the hearing officer and district court applied the wrong version of the statute, but argues that even under the amended statute, SORA still applies to Skaggs.

The State relies upon § 29-4003(1)(a)(iv) (Cum. Supp. 2010), which makes SORA applicable to anyone who, on or after January 1, 1997, "[e]nters the state and is required to register as a sex offender under the laws of another village, town, city, state, territory, commonwealth, or other jurisdiction of the United States." Skaggs makes two arguments in response: that he (1) did not "enter" Nebraska on or after January 1, 1997, and (2) was not required to register under the laws of California or Florida. We find no merit to either argument.

Skaggs argues that he did not "enter" Nebraska after 1997 because he entered the state in 1992, and Nebraska has been his permanent home from 1992 to the present. Though Skaggs admits that he lived in Florida for a period of time, he claims he never broke ties with Nebraska, as he voted and owned property in Nebraska.

Though Skaggs was present in Nebraska before 1997, it is undisputed that Skaggs left Nebraska in 2003 and was present in Florida for a substantial amount of time between 2003 and 2006. And Skaggs' Florida sex offender registration form indicated that both his temporary and permanent addresses were in Florida. The hearing officer determined that the evidence indicated that Skaggs left Nebraska in 2003 and then entered Nebraska in 2006 under the meaning of § 29-4003(1)(b) (Reissue 2008). We agree with that determination and find it

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[8] *Id.*

[9] See 2011 Neb. Laws, L.B. 61, § 2.

equally applicable under the language of § 29-4003(1)(a)(iv) (Cum. Supp. 2010).

[6] Skaggs claims that his permanent residence has remained in Nebraska since 1992, but we determine that § 29-4003(1)(a)(iv) (Cum. Supp. 2010) has no residency requirement. The plain language of the statute merely requires that Skaggs had entered the state after 1997. Evidence in the record certainly supports that Skaggs left Nebraska in 2003 and returned some time in 2006. Though Skaggs characterized his return to Nebraska as "re-entry,"[10] and not "entry" within the meaning of the statute, we find Skaggs' characterization meritless. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[11] The plain language of "[e]nters" within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010) is satisfied by Skaggs' return to Nebraska in 2006.

We also reject Skaggs' argument that he was not required to register in another state. Skaggs contends that he was not required to register in California, because California vacated his registration requirement when his parole was transferred to Nebraska. We note that the record contains a letter from the office of the Attorney General of California disagreeing with that assertion, stating that Skaggs' conviction requires "lifetime registration" in California. But more important, as noted above, Skaggs was indisputably registered as a sex offender in Florida. Skaggs' argument is a technical one: He contends that although he registered in Florida, he was not "required" to do so within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010)—instead, he claims that he did so "voluntarily" to avoid legal trouble in Florida, but was not actually "required" to do so under Florida law.[12]

We do not read § 29-4003(1)(a)(iv) (Cum. Supp. 2010) so narrowly. Skaggs was arrested in Florida and charged with

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[10] See brief for appellant at 15.

[11] See *In re Interest of Matthew P.*, 275 Neb. 189, 745 N.W.2d 574 (2008).

[12] Reply brief for appellant at 3-4.

failing to register. He was informed by Florida law enforcement that he was required to register, and he did so. We decline Skaggs' implicit invitation to parse Florida law and determine whether the conclusion of Florida authorities was correct under Florida law, nor are we persuaded that registrants would "voluntarily" register as sex offenders in the absence of a requirement that they do so. Instead, we find that a sex offender registrant's actual registration under another jurisdiction's law is conclusive evidence that the registrant was "required" to register within the meaning of § 29-4003(1)(a)(iv) (Cum. Supp. 2010). Skaggs was required to register as a sex offender in Florida.

In short, the evidence establishes beyond reasonable dispute that Skaggs was required to register as a sex offender in another state and entered Nebraska after January 1, 1997. Therefore, although our reasoning differs somewhat from that of the hearing officer and the district court, we agree with their conclusion that SORA applies to Skaggs.

Skaggs' Constitutional Claims

Skaggs contends that SORA's registration requirement is an unconstitutional violation of his 14th Amendment right to travel between the several states. However, Skaggs failed to raise his constitutional question in his petition for judicial review, as required by § 84-917(2)(b). The district court thus did not decide the 14th Amendment issue. However, Skaggs now argues that his failure to raise the issue in his petition for judicial review should not prevent appellate review of the constitutionality of SORA as applied to Skaggs under § 84-917(5)(b)(i), which reads: "If the court determines that the interest of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings." Though § 84-917(5)(b) indeed permits the district court to remand the case back to the agency for further proceedings, that is permissible only where it is necessary in the interest of justice to resolve an issue not raised before the agency. Here, the record reflects that Skaggs raised the constitutional issue during the agency hearing.

Section 84-917(5)(b)(i) permits the district court to review only matters which were not properly raised in the proceedings before the agency. And in any event, the question here is not whether the issue was not properly presented to the agency—it is whether the issue was properly presented *to the district court*. Section 84-917(2)(b) requires that a petition for judicial review set forth, among other things, "the petitioner's reasons for believing that relief should be granted" and "a request for relief, specifying the type and extent of the relief requested." An issue that has not been presented in the petition for judicial review has not been properly preserved for consideration by the district court.[13]

In other words, a party to an administrative appeal who wishes to raise an issue in district court, whether or not that issue was presented to the agency, must still present that issue to the court in its petition for judicial review. Skaggs did not. The district court thus did not err when it refused to address the issue of constitutionality, and because the issue was not properly preserved for judicial review, we too do not address the issue of whether SORA, as applied to Skaggs, was unconstitutional.

CONCLUSION

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

AFFIRMED.

MOORE, Judge, participating on briefs.
WRIGHT, J., not participating.

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[13] See, *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005); *Moore v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 8 Neb. App. 69, 589 N.W.2d 861 (1999).

STATE OF NEBRASKA, APPELLEE, V. RAAD S. ALMASAUDI, APPELLANT.

802 N.W.2d 110

Filed September 2, 2011. No. S-10-816.

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. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Convictions: Theft: Proof.** In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen.
5. **Intent: Circumstantial Evidence.** Knowledge, like intent, may be inferred from the circumstances surrounding the act.
6. **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.
7. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
8. **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.
9. **Theft: Value of Goods: Proof.** The statutory language of Neb. Rev. Stat. § 28-518(8) (Reissue 2008) requires only that some value be proved as an element of a theft offense, not that a particular threshold value be proved as an element of the offense.
10. **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.
11. ____: ____. Evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **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.
13. **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.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for a new trial.

Bernard J. Glaser, Jr., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Raad S. Almasaudi was charged with theft by receiving stolen property after various items of stolen property were found in his residence. A jury convicted Almasaudi of three counts of felony theft by receiving stolen property. Almasaudi appeals. For the following reasons, we reverse, and remand for a new trial.

II. BACKGROUND

Almasaudi was charged with three counts of theft by receiving stolen property pursuant to Neb. Rev. Stat. § 28-517 (Reissue 2008). Count I alleged that an item of stolen property was valued in excess of $1,500, a Class III felony; count II alleged that an item of stolen property was valued at $500 or more but not over $1,500, a Class IV felony; and count III alleged that an item of stolen property was valued in excess of $1,500, a Class III felony.[1] The property was allegedly stolen by Anthony Vandry and later purchased by Almasaudi. A jury convicted Almasaudi on all counts.

[1] See Neb. Rev. Stat. § 28-518(1) and (2) (Reissue 2008).

1. Motion in Limine

Almasaudi filed a pretrial motion in limine seeking to exclude, among other things, "any theft allegation or offense, or any other offense, including any convictions thereof, that may be alleged to have occurred at any time or date other than the date charged in the information," pursuant to Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 and 27-404 (Reissue 2008). Almasaudi also filed a "Motion to Disclose Rule 404(2) Evidence and to Determine Admissibility" under rule 404(2) and Neb. Evid. R. 103(3) and 104, Neb. Rev. Stat. §§ 27-103(3) and 27-104 (Reissue 2008). Thereafter, Almasaudi filed a supplemental motion seeking to exclude the admission of portions of videotaped interviews between law enforcement and Almasaudi and specific lines of the transcribed interviews.

At a hearing on the motions, the court received transcripts of the interviews between law enforcement and Almasaudi. Almasaudi sought to exclude statements made by Almasaudi and questions asked by law enforcement relating to items not charged in the information—specifically any reference to Almasaudi's purchasing gas at reduced prices from Vandry and Almasaudi's receipt of allegedly stolen property from Vandry that was not named in the information. The State argued that such evidence did not fall under rule 404, because it would be offered to show Almasaudi's knowledge that the charged items were stolen.

The court overruled Almasaudi's motion in limine. Regarding rule 404(2), the court stated: "This provision appears to be inapplicable here. It is not other wrongs or acts of [Almasaudi] that are involved, but the acts of a third person from whom [Almasaudi] allegedly obtained property. Such evidence is admissible to show knowledge or absence of mistake or accident." The court also stated that although the motion was overruled, it would provide a limiting instruction at trial. Prior to trial, Almasaudi received a continuing objection to the matters overruled in his motion in limine.

2. Evidence Adduced at Trial

Sgt. Michael Bassett of the Lincoln Police Department set up a sting operation to catch persons involved in a series

of thefts from vehicles at trailheads and parks in southwest Lincoln. Bassett observed Vandry and another person enter the "bait vehicle" and take various items. Vandry and the other person were arrested. During an interview following his arrest, Vandry informed law enforcement that stolen property could be found at Almasaudi's residence.

Bassett went to the residence where Almasaudi lived alone. Almasaudi consented to a search of his residence, and then participated in the search by explaining which items he had purchased from Vandry. Law enforcement seized, among other things, a garden tiller, a television and receiver, and a "four-wheeler" from the residence. Almasaudi admitted to purchasing all the items from Vandry, though he initially told police that he had purchased the television with his residence.

Almasaudi is originally from Iraq. He emigrated from Saudi Arabia to the United States in 1997. At that time, Almasaudi could not speak English, and presently, he cannot read English. Almasaudi's girlfriend testified that he communicates "[f]airly well" in English. Almasaudi testified that he had met Vandry in late January or early February 2009, 3 to 4 months before the property was seized from Almasaudi's residence.

Almasaudi testified that Vandry had told him Vandry had debts and needed money and that Almasaudi purchased various items from him. Almasaudi purchased the four-wheeler from Vandry for $2,000, the television set and receiver for $1,200, and the tiller for $150. Almasaudi testified that he bought these items from Vandry, along with a lawnmower, a snowblower, nail guns, an in-dash DVD player, and a bicycle, but that he did not know they were stolen. In total, Almasaudi spent approximately $4,000 purchasing these items from Vandry.

The tiller had been reported stolen by Kay Roberts. She purchased the tiller in the mid-1990's for around $1,800 to $2,000. Roberts testified that she recognized the tiller seized from Almasaudi's residence as the one taken from her home. She stated that the tiller was in good working condition when stolen, that it appeared to have remained in that condition, and that she would guess that the tiller was currently worth between $600 and $800.

The television and receiver had been reported stolen by Lindsey Emery. She recognized the items seized from Almasaudi's residence as those taken from her home. Emery testified that she had purchased the television and receiver in 2006 for approximately $2,400. She testified that she would have asked for $1,200 for the items were she to attempt to sell them.

The four-wheeler had been reported stolen by Michael Hicks. He testified that he recognized the four-wheeler as his own and that he had purchased it in 2007 for $5,000. Hicks testified that the four-wheeler was now damaged and that it would cost $700 to fix it. He also stated that he would try to sell the four-wheeler for $2,000 without fixing any damage.

The State offered into evidence DVD's of interviews between Almasaudi and Bassett, Officer David Moody, and Det. Timothy Kennett. The DVD's were the subject of Almasaudi's previously submitted motion in limine, but Almasaudi did not object when the DVD's were offered as exhibits at trial or when they were played for the jury. In the interviews, Almasaudi stated that Vandry would come to his residence with a Visa credit card and fill up Almasaudi's car with gas for $20. Almasaudi purchased gas in this manner six to eight times.

Regarding the stolen items seized, Almasaudi stated that initially, he believed the four-wheeler was stolen, but that Vandry presented him with a paper that he believed to be a bill of sale. Almasaudi told Kennett that everything he bought from Vandry was cheap, and when asked what he thought about that, he said, "I mean, it's stolen, I'm sure."

At the close of evidence, Almasaudi moved for a mistrial on the basis that the "404(2) evidence was improperly presented to the jury." The court overruled Almasaudi's motion, and stated that it did not think the evidence objected to in Almasaudi's motion in limine was "404 evidence" and that such evidence was relevant to show knowledge. However, the court did issue an oral limiting instruction. It stated:

> Members of the jury, you have heard statements by . . . Almasaudi during the interviews by police officers involving incidents that do not involve the specific charges in

> this case such as the use of credit cards by . . . Vandry and others and the purchase of other property by . . . Almasaudi from . . . Vandry. This evidence should be considered by you solely, if at all, to show . . . Almasaudi's knowledge or absence of mistake involving the property which is the subject of the charges in this case.

The jury was given a written limiting instruction which read: "During this trial I called your attention to certain evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other."

At the close of the State's evidence and at the close of trial, Almasaudi moved for a directed verdict. Almasaudi argued that the State had failed to establish Almasaudi's knowledge that the charged items were stolen, and had also failed to prove the value of those items. The court overruled both motions.

At the jury instruction conference, the State and Almasaudi offered different proposed instructions on the definition of "knowingly" as it is used in regard to § 28-517. The court accepted the State's proposed instruction over Almasaudi's objection and submitted the instruction as jury instruction No. 7. It read in part: "'Knowingly' is defined as having actual knowledge that an item is stolen or that the surrounding facts would lead a reasonable prudent person to believe an item is stolen." The jury returned a unanimous guilty verdict on all three counts. It specifically found that the property in count I had a value of $2,700, the property in count II had a value of $1,000, and the property in count III had a value of $600. The district court sentenced Almasaudi to 2 years of probation on each count to be served consecutively, and on each of the counts, Almasaudi was ordered to serve 160 days in county jail, with credit for time served of 69 days on count II. Almasaudi timely appeals.

III. ASSIGNMENTS OF ERROR

Almasaudi assigns, restated, that (1) the district court erred in admitting evidence of prior bad acts; (2) the district court erred in wrongly instructing the jury on the definition of

"knowingly"; (3) the evidence was insufficient to support a conviction of receiving stolen property having a value of $500 or more, count II in the information, because the State's evidence of value was speculative; (4) the evidence was insufficient to support a guilty verdict on all counts; and (5) the district court erred in refusing to direct a verdict in favor of Almasaudi.

IV. STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[2]

[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 such discretion a factor in determining admissibility.[3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[4] 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.[5]

V. ANALYSIS

1. Jury Instruction No. 7: Definition of "Knowingly"

Almasaudi argues that the term "knowing" in § 28-517 dictates a subjective standard and that the court's instruction defining "knowingly" was erroneous because it led the jury to apply an objective standard in this case. Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

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[2] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[3] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[4] *Id.*

[5] *Id.*

[6] *State v. Miller, supra* note 2.

[4] Section 28-517 of the Nebraska Criminal Code is based on the Model Penal Code § 223.6, 10A U.L.A. 561 (2001), and provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." In order for a defendant to be convicted of receiving stolen property, it must be found that the accused received, retained, or disposed of stolen property knowing or believing that it was stolen.[7] The central focus of the crime, therefore, is on *the accused's* knowledge or belief.[8] This focus imposes a subjective standard on the knowledge requirement of § 28-517.

[5] Knowledge, like intent, may be inferred from the circumstances surrounding the act.[9] For example, possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which the fact finder may reasonably draw the inference, but is not required to do so, and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.[10] The jury must still satisfy itself beyond a reasonable doubt that the defendant actually had the requisite knowledge or belief.[11]

The Model Penal Code and Commentaries § 223.6[12] states:

> Recent codes and proposals are sharply divided among three basic approaches to the question of required culpability for criminal receiving. About a third continue the requirement that the receiver "know" that the property

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[7] See § 28-517.

[8] *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992), *overruled on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[9] *Id.*

[10] See *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[11] See, *id.*; A.L.I., Model Penal Code and Commentaries § 223.6, comment 4(d) (1980).

[12] *Id.*, comment 4(a) at 238-39.

> in question is stolen property.[13] A slight plurality agree with the Model Code judgment that knowledge or belief "that it has probably been stolen" is the appropriate standard.[14] The remainder adopt the position taken by some older statutes[15] and penalize receiving with "reasonable grounds for believing the property stolen," thereby imposing liability for negligence.[16]

As noted by the Model Penal Code and Commentaries, Nebraska's criminal receiving statute, § 28-517, falls in the "slight plurality" mentioned above. Statutes falling in the plurality dictate a knowledge requirement similar to the element in § 28-517. They provide that a person is guilty of theft by receiving if the person intentionally receives stolen property "knowing that it has probably been stolen or believing that it

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[13] See, Cal. Penal Code § 496 (West 2010); Haw. Rev. Stat. § 708-830(7) (1993 & Cum. Supp. 2010); Ind. Code Ann. § 35-43-4-2(b) (LexisNexis 2009); Ky. Rev. Stat. Ann. § 514.110(1) (LexisNexis 2008 & Cum. Supp. 2011); Mont. Code Ann. § 45-6-301(3) (2007); N.Y. Penal Law §§ 165.40 to 165.54 (McKinney 2010); Tex. Penal Code Ann. § 31.03(b)(2) (West 2011); Va. Code Ann. § 18.2-108 (2004 & Cum. Supp. 2008); Wash. Rev. Code Ann. §§ 9A.56.140 to 9A.56.170 (2009).

[14] See, Ala. Code § 13A-8-16 (2006); Conn. Gen. Stat. Ann. § 53a-119(8) (West 2007); Del. Code. Ann. tit. 11, § 851 (2007 & Cum. Supp. 2010); Me. Rev. Stat. Ann. tit. 17-A, § 359(1) (1983 & Cum. Supp. 2004); Mass. Gen. Laws. Ann. ch. 266, § 60 (West 2008); Minn. Stat. Ann. § 609.53 (West 2009); Mo. Ann. Stat. § 570.080 (West 1999 & Cum. Supp. 2011); Neb. Rev. Stat. § 28-517; N.H. Rev. Stat. Ann. § 637:7(I) (2007); N.J. Stat. Ann. § 2C:20-7 (West 2005); N.M. Stat. Ann. § 30-16-11(A) (2004 & Cum. Supp. 2008); Okla. Stat. Ann. tit. 21, § 1713 (West 2002); 18 Pa. Cons. Stat. Ann. § 3925(a) (West 1983); S.D. Codified Laws § 22-30A-7 (2006); Utah Code Ann. § 76-6-408(1) (LexisNexis 2008 & Supp. 2011); W. Va. Code Ann. § 61-3-18 (LexisNexis 2005).

[15] See, e.g., Ala. Code § 13-3-55 (LexisNexis 1977) (repealed 1978); La. Rev. Stat. Ann. § 14:69 (1974); 18 Pa. Stat. Ann. § 4817 (West 1963) (repealed 1973).

[16] See, Ariz. Rev. Stat. Ann. § 13-1802(A)(5) (2010); Ark. Code Ann. § 5-36-106 (2006); Fla. Stat. Ann. § 812.019 (West 2006); Ga. Code Ann. § 16-8-7(a) (2007); 720 Ill. Comp. Stat. Ann. 5/16-1(a)(4) (LexisNexis 2008); Iowa Code Ann. § 714.1(4) (West 2003 & Cum. Supp. 2011); Ohio Rev. Code Ann. § 2913.51(A) (LexisNexis 2006); Or. Rev. Stat. § 164.095(1) (2007).

has probably been stolen";[17] "knowing that it has been acquired under circumstances amounting to theft, or believing that it has been so acquired";[18] "knowing that it has been stolen, or believing that it has probably been stolen";[19] and "knowing that it has been stolen, or believing that it has been stolen."[20] These statutes and § 28-517 impose a standard of culpability which prohibits an imposition of liability for the negligent receiving of stolen property.

In contrast, other jurisdictions provide that a person is guilty of criminal receiving when a person receives stolen property with "good reason to believe";[21] "under such circumstances as would reasonably induce him to believe";[22] "which he knows or should know";[23] with "reasonable cause to believe";[24] or having "good reason to know"[25] that the property was stolen. Such statutes impose a negligent, and thus objective, standard of liability. Because § 28-517 contains no such language, the imposition of a "reasonable prudent person" standard does not comport with our law.

When a subjective standard of knowledge is dictated by a criminal receiving statute, the requirement has long been analyzed in this manner:

> [The legislature] used the word "knowing," and defined the crime as the purchase of stolen property by one having knowledge of the theft. It might have denounced as a crime the receipt of stolen property under conditions

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[17] Conn. Gen. Stat. Ann. § 53a-119(8). See Me. Rev. Stat. Ann. tit. 17-A, § 359(1).

[18] Del. Code. Ann. tit. 11, § 851.

[19] N.H. Rev. Stat. Ann. § 637:7(I); 18 Pa. Cons. Stat. Ann. § 3925(a). See, N.J. Stat. Ann. § 2C:20-7; S.D. Codified Laws § 22-30A-7; Utah Code Ann. § 76-6-408(1).

[20] Mo. Ann. Stat. § 570.080; Neb. Rev. Stat. § 28-517. See N.M. Stat. Ann. § 30-16-11(A).

[21] Ark. Code Ann. § 5-36-106.

[22] 720 Ill. Comp. Stat. Ann. 5/16-1(a)(4).

[23] Ga. Code Ann. § 16-8-7(a). See Fla. Stat. Ann. § 812.019.

[24] Iowa Code Ann. § 714.1(4); Ohio Rev. Code Ann. § 2913.51(A).

[25] Or. Rev. Stat. § 164.095(1).

> sufficient to create a suspicion in the mind of a reasonable man, but it did not do so. The gist of the offense is the actual state of the defendant's mind when he purchases the property, and not what, under like circumstances, might be the state of mind of some other person; the standard by which guilty knowledge is to be imputed is the defendant's mental attitude, and not that of the imaginary average man. . . . Knowledge may be inferred from circumstances. Anything amounting to notice, whether such notice be direct or indirect, positive or inferential, will satisfy the statute. But, even so, the ultimate fact which the jury must find before a conviction is warranted is that the defendant had such knowledge; and knowledge is something more than a suspicion. Moreover, circumstances which would create a strong suspicion in the mind of one man might have little significance for another, and one is not to be convicted of a crime because he is of a less suspicious nature than the ordinary man, and where, therefore, he may have acted in entire good faith in the face of conditions which might have put another upon his guard.[26]

The model federal jury instruction for criminal receiving reflects the same:

> In deciding whether the defendant knew the property was stolen at the time of its sale or receipt, you must focus upon his actual knowledge at that time. Even if you find that a prudent person would have known that the property was stolen at the time of its sale or receipt, if you find that the defendant did not know, then you cannot find the defendant guilty.[27]

It is clear that § 28-517 and the Model Penal Code impose a subjective standard of knowledge or belief, as opposed to the objective standard imposed by those jurisdictions which require

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[26] *Peterson v. United States*, 213 F. 920, 922-23 (9th Cir. 1914) (interpreting Federal Penal Code of 1910).

[27] 3 Leonard B. Sand et al., Modern Federal Jury Instructions—Criminal, § 54-56 at 54-109 (2005).

only a showing of "reasonable grounds for believing the property stolen."

As stated above, the court accepted the State's proposed instruction over Almasaudi's objection and submitted the instruction as jury instruction No. 7. It read in part: "'Knowingly' is defined as having actual knowledge that an item is stolen or that the surrounding facts would lead a reasonable prudent person to believe an item is stolen." The State's proposed instruction imposed an objective standard and directed the jury to consider a "reasonable prudent person." Almasaudi argues that the instruction given is therefore contrary to law. We agree, and determine that the objective standard of a "reasonable prudent person" is contrary to our criminal receiving statute and relevant case law.

The instruction proposed by the State and given to the jury in this case is contrary to the requirement of subjective knowledge or belief as prescribed by statute. In a prosecution for receiving stolen property, the court must instruct the jury on the subjective standard of "knowing . . . or believing" as it is used in § 28-517.

[6,7] 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.[28] Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[29]

Jury instruction No. 7 allowed the jury to convict Almasaudi on a showing of objective, rather than subjective, knowledge or belief. This permitted the jury to convict Almasaudi on a much broader standard of liability than that which is contemplated by § 28-517. Therefore, we determine that Almasaudi was prejudiced by the instruction and that the judgment should be reversed. An instruction directing the jury to apply an objective standard to the knowledge requirement is contrary to law and fails to conform to the criminal code.

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

[29] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

2. Sufficiency of Evidence

[8] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Almasaudi's conviction. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[30] 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.[31] We find that Almasaudi's statements to the police and the circumstantial evidence against him were sufficient to sustain the verdict. We therefore reverse the conviction and remand the cause for a new trial.

3. Remaining Assignments of Error

Almasaudi also argues that the State did not properly establish the value of the stolen tiller to sustain the conviction on count II and that the district court erred in admitting evidence of "prior bad acts" in violation of rules 403 and 404(2). Although the foregoing determination resolves this appeal, we address these issues because they are likely to recur on remand.

(a) Valuation of Stolen Property

[9] Section 28-518(8) states: "In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." The statutory language of § 28-518(8) requires only that some value be proved as an element of a theft offense, not that a particular threshold value be proved as an element of the offense.[32]

> The plain language of § 28-518(8) requires that the State must prove, as an element of a theft offense, that the item stolen has at least some intrinsic value. The statute does not require that proof of a specific value must be presented in order for the conviction to be sustained, although the State must prove the *specific value of the*

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[30] See *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[31] See *id.*

[32] *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

> *stolen property* at the time of the theft beyond a reasonable doubt in order to obtain a conviction for any offense *greater than* a Class II misdemeanor.
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> . . . [W]hile § 28-518(8) now requires that intrinsic value be proved beyond a reasonable doubt as an element of the offense, proof of a specific value at the time of the theft is necessary only for gradation of the offense.[33]

It has long been the rule in this jurisdiction that the owner of chattels may testify as to their value in a criminal case.[34] Because the owner of the tiller testified to its value, we find that a rational trier of fact could have found that the tiller had some value. This is all that is required to support a conviction on a theft offense. Almasaudi's argument is therefore without merit.

(b) Rule 404(2) Evidence

Almasaudi asserts that the court erred in permitting the introduction of evidence of prior bad acts in violation of rules 403 and 404(2). As a threshold matter, we must determine whether Almasaudi's continuing objection preserved this issue for appeal. The failure to make a timely objection waives the right to assert prejudicial error on appeal.[35]

Almasaudi made a motion in limine seeking to exclude, among other things, "any theft allegation or offense, or any other offense, including any convictions thereof, that may be alleged to have occurred at any time or date other than the date charged in the information," pursuant to rules 403 and 404. Thereafter, Almasaudi filed a supplemental motion seeking to exclude the admission of portions of videotaped interviews between law enforcement and Almasaudi and specific lines of the transcribed interviews. These motions were overruled. The State offered the taped interviews for the purported purpose of establishing that Almasaudi had knowledge that the items he purchased from Vandry were stolen—because he received them at a cheap price, he engaged in other questionable transactions

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[33] *Id.* at 169, 638 N.W.2d at 863 (emphasis in original).

[34] *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982).

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

with Vandry to purchase gas, and he spent a large portion of his income on these items. Almasaudi did not specifically object when DVD copies of the interviews were offered into evidence or when they were played for the jury. The district court admitted the evidence at trial. Almasaudi argues its admission constituted error.

Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.[36] Prior to trial, Almasaudi made a continuing objection to "those matters that were overruled" on the motion in limine. The court granted Almasaudi a standing objection. The matters contained in the motion in limine and supplemental motion filed by Almasaudi included portions of the transcribed interviews and their corresponding video. We determine that Almasaudi's continuing objection to the matters overruled on his motions in limine preserved the issue for our review.

Almasaudi argues that the district court erred in admitting the taped interviews, because they contain evidence of prior bad acts inadmissible under rule 404(2). Almasaudi argues that the evidence was not admitted for a proper purpose. He does not take issue with the limiting instruction given by the court, nor does he assert that he was not sufficiently informed of the proper purpose for which the evidence was admitted. For the following reasons, we find Almasaudi's arguments to be without merit.

The district court was unclear as to whether the evidence was ruled admissible for a proper purpose under rule 404(2) or whether the evidence was admissible because it was not covered by rule 404. The court stated that it did not think that the evidence was "404 evidence." But it also stated that such evidence was relevant to show knowledge and gave a limiting instruction. On appeal, the State argues that the evidence is not

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[36] *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992).

part of rule 404(2) coverage, because it forms an integral part of the crimes charged.[37]

This court has recognized the rule that prior conduct which is inextricably intertwined with the charged crime is not considered extrinsic evidence of other crimes or bad acts and that, therefore, rule 404 does not apply.[38] Evidence of such acts is sometimes termed "'same transaction evidence.'"[39] We have applied this exception to rule 404 coverage in cases where the acts were inextricably intertwined with the charged offense and committed as part of a continuing crime to carry out the same objective,[40] in furtherance of the same crime spree,[41] and to conceal previous crimes,[42] and when the conduct was necessary to show a coherent picture of the facts of the crime charged.[43]

The evidence admitted in Almasaudi's case is significantly different from the evidence considered in cases where we have found rule 404 inapplicable. The evidence admitted regarding Almasaudi's previous dealings with Vandry is not "same transaction evidence." Such dealings are previous transactions separate and distinct from the transactions forming the charged conduct. Further, Almasaudi's previous dealings with Vandry are not necessary to show a coherent picture of the facts, nor do they form an integral part of the crimes charged. The previous dealings constitute unrelated acts that were not interwoven with the charged crimes. Accordingly, we determine the evidence falls under rule 404 coverage, and we address the admissibility of the evidence under rule 404(2).

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[37] See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[38] *Id.*

[39] See *U.S. v. Forcelle*, 86 F.3d 838, 841 n.1 (8th Cir. 1996).

[40] *Id.*

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

[42] See *id.*

[43] *State v. Baker, supra* note 3; *State v. Robinson*, *supra* note 41; *State v. Wisinski*, *supra* note 37; *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

Before the prosecution may offer evidence of other crimes, wrongs, or acts pursuant to rule 404(2), it must first prove to the trial court, out of the presence of the jury and by clear and convincing evidence, that the accused committed the crime, wrong, or act.[44] Almasaudi does not argue on appeal that the State failed to prove by clear and convincing evidence that he participated in prior dealings with Vandry. Therefore, we do not address this issue.

[10-13] 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.[45] But evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[46] 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.[47] 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.[48]

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[44] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[45] *State v. Baker, supra* note 3.

[46] See *id.*

[47] *Id.*

[48] *Id.*

A 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.[49] And any limiting instruction given upon receipt of such evidence shall likewise identify only those specific purposes for which the evidence was received.[50]

The court overruled Almasaudi's objection to the admission of the evidence and his motion for a mistrial related to the allegedly improper admission of the evidence. The State asserted the evidence was being offered for lack of mistake or knowledge that the property was stolen. The State also stated that it did not object to the court's giving a limiting instruction regarding the evidence.

The court issued the following oral limiting instruction:

> Members of the jury, you have heard statements by . . . Almasaudi during the interviews by police officers involving incidents that do not involve the specific charges in this case such as the use of credit cards by . . . Vandry and others and the purchase of other property by . . . Almasaudi from . . . Vandry. This evidence should be considered by you solely, if at all, to show . . . Almasaudi's knowledge or absence of mistake involving the property which is the subject of the charges in this case.

The jury was also given a written limiting instruction which read: "During this trial I called your attention to certain evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other."

Knowledge is an essential element of the crime of theft by receiving, and, as stated above, knowledge may be inferred from the circumstances surrounding the criminal act.[51] Normally, absence of mistake is not at issue unless the defendant claims

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[49] *State v. Sanchez, supra* note 44.

[50] *Id.*

[51] *State v. LaFreniere, supra* note 8.

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.[52] Almasaudi admitted he purchased the items from Vandry, but essentially argued that he did not know the items were stolen and that he unintentionally purchased stolen items.[53] Accordingly, both knowledge and absence of mistake were at issue below.

The evidence admitted focused on Almasaudi's relationship and dealings with Vandry. The evidence shows Almasaudi's knowledge of the pertinent facts surrounding his dealings with Vandry, all of which were closely related in time and character to the dealings which led to the charges brought against Almasaudi. Almasaudi had known Vandry only for a period of 3 months, and, during that time, Almasaudi took part in numerous transactions with Vandry. Almasaudi spent approximately $4,000 on the items he purchased. The transactions took place frequently over a short period of time. The record indicates that each item or service Almasaudi purchased from Vandry was acquired for far less consideration than its reasonable value. Each interaction between Almasaudi and Vandry informs the issue of whether Almasaudi knew he was purchasing stolen goods. And the taped interviews which were admitted deal directly with whether Almasaudi knew or believed the items to be stolen. The evidence of conduct relating to the prior dealings was substantially similar to the charged incidents and was probative of Almasaudi's knowledge and absence of mistake. We therefore conclude that the evidence of Almasaudi's relationship with Vandry and their prior dealings was relevant for a proper purpose under rule 404(2).

We next consider whether the probative value of such evidence was substantially outweighed by its potential for unfair prejudice. The incidents admitted into evidence all occurred

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[52] 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)); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[53] See *State v. Trotter, supra* note 52.

within a period of 3 months. As we noted in *State v. Floyd*,[54] such proximity in time suggests a higher probative value than if the incidents had been more remote in time. The evidence was relevant to show knowledge, an essential element of the crimes charged. And the record does not indicate that the taped interviews suggested a decision on an improper basis. We therefore conclude that the probative value of the evidence was not outweighed by the potential for unfair prejudice.

Limiting instructions were given to the jury regarding the admission of evidence relating to Almasaudi's prior dealings with Vandry. The instructions properly indicated that the evidence was to be considered to determine Almasaudi's knowledge regarding the property at issue in the case.

We conclude that the district court did not abuse its discretion in admitting evidence of Almasaudi's prior dealings with Vandry, because the evidence was admitted for the proper purposes of knowledge and absence of mistake. Because we determine the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice, we need not further address this issue in relation to Almasaudi's assignment of error regarding rules 403 and 404(2).

VI. CONCLUSION

For the foregoing reasons, we determine that Almasaudi was prejudiced by the court's erroneous instruction on the definition of "knowingly." Accordingly, we reverse the judgment of the district court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., participating on briefs.

WRIGHT, J., not participating.

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[54] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

STATE OF NEBRASKA, APPELLEE, V. LARRY WILLIAMS, APPELLANT.

802 N.W.2d 421

Filed September 2, 2011. No. S-10-929.

1. **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.
2. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
3. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
4. **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.
5. **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.
6. **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 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
7. **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.
8. **Trial: Evidence: Appeal and Error.** On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court.
9. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403.
10. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for a purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).
11. **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) (Cum. Supp. 2010), 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.

12. **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.
13. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
14. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
15. ____. 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.
16. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
17. **Sentences.** Under Neb. Rev. Stat. § 83-1,106 (Reissue 2008), an offender shall be given credit for time served as a result of the charges that led to the sentences; however, presentence credit is applied only once.

Appeal from the District Court for Buffalo County: WILLIAM T. WRIGHT, Judge. Affirmed as modified.

John H. Marsh, Deputy Buffalo County Public Defender, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Larry Williams appeals his convictions and sentences in the district court for Buffalo County for five counts of first degree sexual assault and one count of sexual assault of a child. Williams claims that the court erred when it overruled his motion for new trial and that the court imposed excessive sentences. We affirm Williams' convictions, and because we

find plain error in connection with the application of credit, we affirm Williams' sentences as modified.

STATEMENT OF FACTS

The charges against Williams arose from a relationship that Williams, who was born in July 1956, had with S.A., who was born in February 1987. Williams described the relationship as a "mentoring" relationship. Brief for appellant at 6. In his defense at trial, Williams denied that the relationship was romantic or sexual. However, S.A. testified that the relationship became sexual before she reached 16 years of age. The incidents charged were alleged to have occurred between February 25, 2001, and February 24, 2003, when S.A. was 14 and 15 years old. The following facts are based on trial testimony of S.A. and other witnesses:

S.A. moved to Ravenna, Nebraska, in the summer of 1998, prior to her sixth grade year, to live with her mother and stepfather. S.A. had trouble adjusting to her mother's new marriage, and the stepfather would sometimes be physically violent. S.A. began acting out physically and verbally. When arguments and tension in the family reached a certain point, S.A.'s mother called the police to defuse the situation.

As a police officer for the city of Ravenna, Williams sometimes responded to calls to S.A.'s house. The first time that S.A. recalled Williams' coming to the house was when she was in the sixth grade. Williams or another officer responded to calls to the house, but S.A.'s mother eventually began to specifically call for Williams to help deal with situations in the home, whether or not he was on duty. From S.A.'s sixth through eighth grade years, S.A. continued to have contact with Williams and he would talk to her about her family and school problems. When she was upset about circumstances at home, S.A. would sometimes go out walking, and if Williams was on patrol, he might see her and stop to check on her. At one point, S.A. began going to the police station to visit Williams.

During her ninth grade year, from 2001 to 2002, S.A. went to live with her father in Omaha, Nebraska, and later, Gretna, Nebraska. She returned to Ravenna for visits with her mother every other weekend. S.A. recalled that during one of her

weekend visits, Williams saw her walking around town and told her he would come to visit her. Williams later pulled his police car into the alley behind S.A.'s mother's house, and S.A. went out to sit in the car with him. They talked until it became dark. S.A. told Williams she was tired, and she laid her head on his shoulder. Williams put his arm around her shoulders and began to slowly move his hand down her shirt. He stuck his hand inside her shirt and cupped his hand around her breast. S.A. was shocked by the touch, and she eventually went back into the house and went to bed. S.A. was 14 years old at the time of the incident.

S.A. continued to see Williams when she returned to Ravenna for weekend visits. The two did not talk about the incident when he had touched her breast, but interactions between the two began to change in that he would sometimes hold her hand, and he kissed her once. At the end of her ninth grade year, S.A. moved back to Ravenna to live with her mother. One night during the summer of 2002, before S.A.'s sophomore year in high school, S.A. rode with Williams in his police car to the police department office located in the city hall. There, they started to kiss and hug, and eventually they had sexual intercourse. Before penetration, Williams asked S.A. if it was "okay," and she said that it was. S.A. was 15 years old at the time of the incident.

After school started in the fall of 2002, S.A. continued to see Williams and sometimes they would have sexual intercourse. S.A. specifically recalled four additional times they had sexual intercourse from the fall of 2002 until she turned 16 in February 2003. The incidents took place at various locations in Ravenna, including the city council chambers, the public swimming pool area, the shooting range, and Williams' police car when it was parked in a garage attached to the city hall.

In November 2004, Williams told S.A. that he wanted to end his relationship with her. S.A. was upset and asked her mother to arrange for her to see a counselor she had seen when she lived with her father. After a few sessions, S.A. told the counselor that she had had a sexual relationship with an older man and that the relationship had started when she was 16. In late December, S.A. called Williams and learned that he had

gotten married. After learning this, S.A. told her mother she was upset, and for the first time, S.A. told her mother about the sexual relationship with Williams. S.A.'s mother feared S.A. would hurt herself, and she therefore called the police to have S.A. hospitalized. S.A.'s mother told hospital personnel about S.A.'s relationship with Williams. A law enforcement investigation was begun that eventually led to the charges in this case.

On March 5, 2007, the district court for Buffalo County sustained a motion filed by the Buffalo County Attorney and, pursuant to Neb. Rev. Stat. § 23-1204.01 (Reissue 2007), appointed "the Nebraska Attorney General and his designated Assistant Attorneys General to serve as Special Deputy County Attorneys in all matters relating to the prosecution." The information and subsequent amended informations filed in this case were signed by persons who under oath identified themselves as special deputy county attorneys. The State initially filed an information charging Williams with one count of first degree sexual assault. On June 14, the State filed an amended information charging Williams with six counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and one count of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2004). The first degree sexual assaults were alleged to have occurred between February 25, 2002, and February 24, 2003, when S.A. was 15, and the sexual assault of a child was alleged to have occurred between February 25, 2001, and February 24, 2002, when S.A. was 14.

A jury trial was held October 1 through 4, 2007. At the conclusion of the trial, the jury announced that it was deadlocked and the court declared a mistrial. On November 16, Williams filed a plea in abatement asserting that the jury's announcement and the declaration of a mistrial occurred outside his presence and the presence of his counsel. On January 7, 2008, the court entered an order denying Williams' plea in abatement. Williams appealed the January 7 order, but, on August 4, 2008, in case No. A-08-067, the Nebraska Court of Appeals sustained the State's motion to dismiss the appeal for lack of jurisdiction.

Williams thereafter filed a plea in bar asserting that a retrial would violate his constitutional right not to be subjected to double jeopardy and specifically asserting that because the declaration of a mistrial was an abuse of discretion, a second prosecution was barred and the matter should be dismissed. The district court overruled the plea in bar and found that the declaration of a mistrial was supported by manifest necessity. Williams again appealed, and, on January 13, 2009, in case No. A-08-1220, the Court of Appeals summarily dismissed the appeal. We granted Williams' petition for further review of the dismissal. We concluded that the order overruling Williams' plea in bar was a final, appealable order that we had jurisdiction to review. We further concluded that although the district court erred when it did not have the parties and counsel present for the colloquy with the jury regarding the deadlock, the court did not abuse its discretion when it declared a mistrial. We finally concluded that because jeopardy did not terminate, retrial was not barred. See *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

Prior to a second trial, the State filed a second amended information in which it removed one of the six counts of first degree sexual assault alleged under § 28-319(1)(c) but added two counts of first degree sexual assault under § 28-319(1)(b), which were alleged to have occurred after S.A. turned 16 but at a time when Williams knew or should have known that she was incapable of resisting or appraising the nature of her conduct. Williams filed a motion to quash the two additional counts, asserting that adding the two counts evidenced prosecutorial vindictiveness which violated his due process rights. The court noted that Williams' only evidence of vindictiveness was the timing of the second amended information, which timing followed the mistrial in the first trial and Williams' filing of a plea to dismiss the charges against him on double jeopardy grounds. The court concluded that the facts did not give rise to a presumption of vindictiveness, and the court found "little to suggest that the motivation for the filing of the two amended charges was likely the result of vindictiveness for [Williams'] seeking a dismissal of the original charges." The court therefore overruled the motion to quash.

A second jury trial was held January 25 through 29, 2010. At the close of the State's case, Williams made a motion to dismiss, for lack of sufficient evidence, the two charges of first degree sexual assault under § 28-319(1)(b) that had been added in the second amended information. The district court sustained this motion. The court overruled Williams' additional motion for a mistrial of the remaining counts made on the basis that certain evidence admitted at trial related only to the two dismissed counts. When the trial resumed, the court told the jury that the two counts had been dismissed and instructed the jury that it must disregard the evidence and testimony related to such charges and to the relationship between Williams and S.A. after her 16th birthday. Williams then presented his defense. The day after deliberations began, the jury informed the court that it was deadlocked. The court declared a mistrial when the jury was still deadlocked after two additional hours of deliberations.

A third trial was held July 19 through 21, 2010, on the remaining five counts of first degree sexual assault and one count of sexual assault of a child. The jury found Williams guilty of all counts. The third trial gives rise to the instant appeal.

In support of his motion for new trial, Williams argued that his rights to due process were violated and that the prosecutors were guilty of misconduct when the State subjected him to a third trial. Williams argued that without the evidence regarding two additional counts of first degree sexual assault that were ultimately dismissed, the second jury might not have been deadlocked and that instead, he might have been acquitted of the remaining charges in the second trial. Williams also argued that the operative information in this case was defective, because the person who signed the information as a special deputy county attorney was not named in the order in which the court appointed the Attorney General and his assistants as special deputy county attorneys and there was nothing in the information to indicate that the person was an assistant attorney general. Williams also argued that the court made erroneous evidentiary rulings when it admitted a note that Williams wrote to S.A. into evidence. In the note, Williams wrote that he had problems with "Internal Affairs State Patrol" because

of "a girl leaving my apt. late at nights" and that he had been charged with "'Conduct unbecoming of a Police Officer'" but that he would "keep [S.A.'s] name out of it." The State offered the note into evidence during its cross-examination of Williams, who testified in his own defense. The court admitted the note into evidence over Williams' objections based on Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), regarding relevance and unfair prejudice, and Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2010), regarding other crimes, wrongs, or acts. The court instructed the jury that the evidence was received solely for the purpose of impeaching Williams' testimony and was not to be considered for any other purpose. Williams argued that the relevance of the note was outweighed by unfair prejudice, because the note was written when S.A. was over 16 years of age and after the time of the incidents charged in this third trial. The court overruled Williams' motion for new trial on all grounds.

The district court sentenced Williams to consecutive terms of imprisonment for 6 to 12 years for each of the five convictions for first degree sexual assault and to a term of probation for 5 years for sexual assault of a child. The probation sentence was ordered to be served consecutively to the prison sentences. The court also stated that Williams was entitled to credit against the five prison sentences for first degree sexual assault "in the amount of 45 days each count."

Williams appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Williams claims, restated, that the district court erred when it overruled his motion for new trial and specifically when it rejected his arguments to the effect that (1) he was denied due process because the informations were signed by persons who were not properly identified as the prosecuting authority, (2) prosecutorial misconduct and due process violations occurred because of the inclusion of two additional counts of first degree sexual assault and evidence related thereto in the second trial, and (3) the court erroneously admitted the note Williams wrote when S.A. was over 16 years of age into evidence because such evidence was not proper impeachment in that it was unfairly

prejudicial and it was improper evidence of uncharged misconduct. Williams also claims that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] 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. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

[2,3] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *Id.*

[4-6] 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. *Chavez, supra*. 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. *Chavez, supra.* 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. *Chavez, supra.*

[7] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

ANALYSIS

The Informations Properly Identified the Prosecuting Authorities.

Williams asserts, as the first basis for which the district court should have granted a new trial, that he was denied due process because the information and amended informations were signed by persons who were not properly identified as the prosecuting authorities. We conclude that the court did not abuse its discretion when it denied Williams' motion for new trial on such basis.

Williams argued in support of a new trial that the informations in this case were defective because the persons who signed them as special deputy county attorneys were not named in the order in which the court appointed the Attorney General and his assistants as special deputy county attorneys and were not identified in the information as assistant attorneys general. The district court, pursuant to § 23-1204.01, appointed "the Nebraska Attorney General and his designated Assistant Attorneys General to serve as Special Deputy County Attorneys in all matters relating to the prosecution." The first information and all three amended informations filed in this case were signed by persons who under oath identified themselves as special deputy county attorneys.

Williams relies on *Lower v. State*, 106 Neb. 666, 184 N.W. 174 (1921), in which this court concluded that an information was a nullity because it was signed by an assistant attorney general in his capacity as an assistant attorney general. This court reasoned that an assistant attorney general was not clothed with the power to act in his own name and instead was an agent of the Attorney General who must perform official acts in the name of the Attorney General.

Williams' reliance on *Lower* is misplaced. The import of *Lower* is that when an assistant attorney general performs official acts that are within the authority of the Attorney General, he or she must do so on behalf of and in the name of the Attorney General rather than in his or her own name. In the present case, the individuals who signed the informations did not do so as assistant attorneys general or on behalf of the Attorney General but instead did so pursuant to the district court's order appointing them as special deputy county attorneys. The appointment was made pursuant to § 23-1204.01, and the individuals identified themselves under oath as having been appointed as special deputy county attorneys. Such identification was sufficient to establish them as the proper prosecuting authorities.

Williams makes no argument that the persons who signed the informations were not assistant attorneys general who were appointed under the court's order. Instead, Williams asserts that they were not properly identified in the informations and that therefore, the informations were defective.

Williams' argument in this regard is without merit, and the district court did not abuse its discretion when it denied a new trial on this basis.

Additional Counts of First Degree Sexual Assault Were Dismissed Prior to the Third Trial in Which Williams Was Convicted, and No Evidence Related to Such Counts Was Admitted at That Trial.

Williams asserts, as the next basis for which the district court should have granted a new trial, that the inclusion of two additional counts of first degree sexual assault and evidence related thereto in his second trial amounted to prosecutorial misconduct and a due process violation. We conclude that the district court did not abuse its discretion when it denied a new trial on this basis.

After the first trial resulted in a deadlocked jury and a mistrial, the State filed a second amended information in which it added two counts of first degree sexual assault which were alleged to have occurred after S.A. turned 16 but at a time when Williams knew or should have known that she was incapable of resisting or appraising the nature of her conduct. The court denied Williams' motion to quash the two additional counts after rejecting his argument that adding the two counts evidenced prosecutorial vindictiveness and violated his due process rights. The court found "little to suggest that the motivation for the filing of the two amended charges was likely the result of vindictiveness for [Williams'] seeking a dismissal of the original charges." In the second trial, the State presented evidence relating to the two additional counts, but the court determined that the State had not presented sufficient evidence to support the counts and dismissed the two counts before the case was given to the jury. The second trial resulted in a deadlocked jury and a mistrial.

Williams' convictions and sentences resulted from a third trial. As noted, the two additional counts were dismissed before the third trial and the State did not present evidence which related to the dismissed counts. Nevertheless, Williams argues on appeal that the State should not have subjected him to a third trial, because the second trial included evidence regarding

the two additional counts. Williams did not raise this argument in the trial court. To the extent Williams argues that the district court erred when it overruled the motion to quash the two additional counts in the second trial, we note that Williams essentially got the remedy he sought in the motion to quash when the additional counts were dismissed in the second trial before they were submitted to the jury.

Williams also argues that he was harmed because he might have been acquitted in the second trial if there had not been evidence of the additional counts. We do not speculate as to the reasons the members of the deadlocked jury in the second trial came to their individual decisions or what decisions they might have reached if the evidence had not been presented. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009) (this court cannot speculate as to reason for jury's verdict). We do note, however, that the court in the second trial instructed the jury not to consider the evidence related to the additional counts. We further note that no evidence related to the additional counts was presented in the third trial at which the jury found Williams guilty.

We conclude that to the extent there was any error in the second trial with respect to the inclusion of the two additional counts, any such error was inapplicable to the third trial, because evidence related solely to the additional counts was not included in the third trial, from which Williams' convictions arose. We conclude that the district court did not abuse its discretion when it rejected this basis for a new trial.

The District Court Did Not Err When It Admitted the Note for Purposes of Impeaching Williams' Testimony.

Williams asserts, as the final basis for which the district court should have granted a new trial, that the court erroneously admitted the note he wrote when S.A. was over 16 years of age into evidence. He asserts that such evidence was not proper impeachment evidence because it was unfairly prejudicial and it was improper evidence of uncharged misconduct. We conclude that the district court did not abuse its discretion when it denied a new trial on this basis.

We note that the district court admitted the note only for purposes of impeachment of Williams' testimony in which he asserted that he never had a romantic or sexual relationship with S.A. The note contradicted such testimony. Prior to receipt of the note during the State's cross-examination of Williams, the court instructed the jury that the evidence was "offered solely for the purposes of attacking the credibility of the witness" and that the jury should not consider the evidence "as proof of the truth of anything."

[8] Williams' objections at trial to the admission of the note and the line of questioning regarding the note were based on rules 403 and 404(2). On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). We therefore consider Williams' arguments on appeal that the note was improper impeachment as arguments based on rules 403 and 404(2).

[9] Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The fact that evidence is prejudicial is not enough to require exclusion under rule 403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

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.

[10,11] 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. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011). 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. *Id*. 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. *Chavez, supra.*

In the present case, the note was not admitted for the purpose of proving Williams' character or to show that he acted in conformity therewith. Instead, the note was offered to impeach his testimony that he did not have a sexual or romantic relationship with S.A. The court instructed the jury that the evidence was admitted for the sole purpose of attacking Williams' credibility and that it should not be considered for other purposes. The probative value of the evidence was not outweighed by its potential for unfair prejudice. The note had probative value because it appeared to be inconsistent with Williams' testimony at trial and was therefore relevant to the jury's assessment of his credibility. The potential prejudice to Williams was minimized by the fact that the note was admitted during Williams' testimony, giving him the opportunity to explain the meaning of the note and his reasons for writing the note and leaving it for S.A.

We conclude that the district court did not abuse its discretion when it admitted the note into evidence and when it rejected this basis for a new trial.

The Court Did Not Impose Excessive Sentences.

Williams finally asserts that the district court imposed excessive sentences. We conclude that the sentences were within statutory limits and that the court did not abuse its discretion in sentencing Williams.

Williams was convicted of five counts of first degree sexual assault under § 28-319(1)(c) and one count of sexual assault of a child under § 28-320.01. First degree sexual assault is a Class II felony, see § 28-319(2), and sexual assault of a child is a Class IIIA felony, see § 28-320.01. The statutory sentencing range for a Class II felony is 1 to 50 years' imprisonment and for a Class IIIA felony is 0 to 5 years' imprisonment, a $10,000 fine, or both. Williams was sentenced to consecutive terms of imprisonment for 6 to 12 years for each of the five convictions for first degree sexual assault and to a term of probation for 5 years for sexual assault of a child, with the probation sentence ordered to be served consecutively to the prison sentences. Therefore, Williams' sentences were within statutory limits.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011). Williams argues that his combined sentences of 30 to 60 years' imprisonment were an abuse of discretion because he "had almost no criminal record whatsoever" and because he "had spent almost his entire adult lifetime in public service." Brief for appellant at 21. He notes that he had "a long history of law abiding conduct" which included time in public service in the military and as a law enforcement officer. *Id.* at 22. He further notes that his convictions all pertain to one victim and did not involve physical violence.

[12-15] 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. *Erickson, supra.* 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. *Id.*

The record of the sentencing hearing indicates that the court considered the factors listed above, including Williams' past criminal history, which the court recognized as being "minimal," and his record of law-abiding conduct. The court specifically noted Williams' "multiple years of service, both as a law enforcement officer and as a United States Army National Guard officer." While the court noted that "[m]uch of that service has been honorable," it further noted that "obviously, a significant portion of it was not." The court stated that Williams took advantage of his position as a law enforcement officer "in order to engage in an ongoing sexual relationship with a child who was obviously vulnerable, not only by reason of her age, but by reason of her circumstances, upbringing, and very probably emotional and other disturbances." The court emphasized that Williams had taken advantage of his position not just once but multiple times, as represented by the six incidents that resulted in the convictions in this case and additional uncharged incidents.

The court stated that its sentencing must reflect the multiple breaches of trust that led to the offenses for which Williams was convicted. The court also noted that Williams was "in need of intensive sex offender treatment and therapy" under circumstances that were controlled and highly structured, which indicated that a sentence of imprisonment was appropriate.

Our review of the record related to the sentencing indicates that the court considered proper, relevant factors, that it did not consider improper factors, and that the court had proper reasons for the sentences it imposed. We therefore conclude that the court did not abuse its discretion and did not impose excessive sentences.

The Court Committed Plain Error When It Applied the Credit for Time Served Against the Sentence for Each Count.

In its brief, the State claims that the district court committed plain error when it granted Williams credit for time served of 45 days against each of the five prison sentences for first

degree sexual assault. The State asserts that the court should have applied the credit against only one sentence. The State requests this court to modify the sentence to apply the 45-day credit against only the first sentence imposed and to strike the credits granted against the remaining sentences. We agree that the court committed plain error.

At the sentencing hearing, the court stated that Williams should be entitled to 45 days' credit for time served and that "[t]hat credit will be given on each count." In the journal entry on sentencing, the court ordered that Williams was entitled to credit for time served against the sentences of imprisonment "in the amount of 45 days each count." The presentence investigation report indicates that Williams served a total of 45 days prior to his sentencing.

[16] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[17] We note that Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

In *State v. Banes*, 268 Neb. 805, 811-12, 688 N.W.2d 594, 599 (2004), we stated that under § 83-1,106, "an offender shall be given credit for time served as a result of the charges that led to the sentences; however, presentence credit is applied only once." The Nebraska Court of Appeals has noted:

> Courts in other states, construing statutes similar to § 83-1,106, have uniformly held that "'when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed: an offender who receives consecutive sentences is entitled to credit against only the first sentence imposed, while an offender sentenced to concurrent terms in effect receives credit against each sentence.'"

State v. Sanchez, 2 Neb. App. 1008, 1012-13, 520 N.W.2d 33, 37 (1994) (quoting *Endell v. Johnson*, 738 P.2d 769 (Alaska App. 1987) (citations omitted)). See, also, *State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010) (citing *Endell, supra*, and indicating that time served should be credited against aggregate of minimum as well as aggregate of maximum of consecutive sentences imposed).

Instead of crediting time served against each count as the court did, the court in this case should have credited the 45 days served against only the first count, thereby crediting 45 days against the aggregate of the minimum and the aggregate of the maximum sentences imposed. We therefore modify the sentencing order to state that Williams is entitled to a credit for time served in the amount of 45 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment.

CONCLUSION

We conclude that the district court did not abuse its discretion when it denied Williams' motion for new trial on each of the bases asserted herein. We further conclude that the court did not impose excessive sentences, but we modify the sentencing order to state that Williams is entitled to a credit for time served in the amount of 45 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment.

AFFIRMED AS MODIFIED.

PROFESSIONAL FIREFIGHTERS ASSOCIATION OF OMAHA, LOCAL 385, AFL-CIO CLC, APPELLEE AND CROSS-APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

803 N.W.2d 17

Filed September 9, 2011. No. S-10-710.

1. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
4. **Commission of Industrial Relations: Jurisdiction.** In an appropriate case, the Commission of Industrial Relations may enter temporary orders affecting the wages or changing the hours or terms and conditions of employment of an employee pending the resolution of a labor dispute.
5. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
6. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
7. **Moot Question.** Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.
8. **Injunction.** The purpose of an injunction is the restraint of actions which have not yet been taken. Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.
9. **Declaratory Judgments: Moot Question.** A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
10. **Declaratory Judgments: Justiciable Issues.** At the time that a declaratory judgment is sought, there must be an actual justiciable issue.
11. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
12. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
13. **Moot Question: Public Officers and Employees: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature

of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Appeal dismissed.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellants.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

On December 21, 2009, the Commission of Industrial Relations (Commission) was presented with an industrial dispute between the Professional Firefighters Association of Omaha, Local 385 (Local 385), and the City of Omaha, Nebraska, and its fire chief, mayor, and individual city council members (collectively City). Prior to resolution of the industrial dispute, the Commission issued a status quo order on December 23, 2009, pursuant to Neb. Rev. Stat. § 48-816 (Reissue 2010). The status quo order required the City to adhere to the employment terms in place at that time, pending final determination of the issues encompassed by the industrial dispute. On January 7, 2010, Local 385 instituted proceedings in the district court for Douglas County and alleged that the City was in violation of the status quo order. The district court ultimately entered an order on June 17, finding that the City was in violation of the status quo order by failing to retain the required minimum number of fire personnel. The district court's order also determined that the City was not in violation of the status quo order by failing to maintain a specified number of fire captains, based on the Commission's previous determination that the issue was one of management prerogative. The City appeals the order of the district court, and Local 385 cross-appeals.

BACKGROUND

Local 385 and the City negotiated the terms of a 2007 collective bargaining agreement (CBA), the terms of which are at issue in this case. The minimum staffing agreement was provided in article 45 of the CBA. The CBA also stated that the City would staff a minimum of 657 sworn fire personnel pursuant to the "call-back" provisions dictated in article 46. Article 46, section 1, provided:

> The City shall call back from the list of employees who have voluntarily agreed to work trade time with the City to comply with the minimum staffing requirements of Article 45. With the exception to calling back such trade time volunteers, the City will be under no obligation for the below minimum staffing requirements as long as the total staffing levels meet or exceed . . . 657 sworn personnel, not including management or recruits in training, after December 31, 2006 . . . .

The CBA also provided that the City was required to assign a minimum of 39 paramedic captains and to staff a total of 150 captains, pursuant to the promotion procedure dictated in article 32. Article 32, section 9, paragraph 5, stated:

> The intent of the [promotion] procedures is to create a process whereby the minimum number of Captains in Suppression, Captains in any of the Bureaus, and Captain Paramedics always remains the same, to wit:
>
> 39 Paramedic Captains assigned to Medic Units
>
> 111 Captains assigned to Suppression Companies
>
> 25 Captains assigned to the Bureau
>
> These numbers will be adjusted based upon the number of Captains positions needed in the labor agreement in 2005, 2006, and 2007.

Under this provision and article 45, section 1, the City agreed to staff a combined minimum of 150 captains assigned to fire suppression and medic units. The CBA expired on December 29, 2007. The parties were unable to reach an agreement regarding terms and conditions of employment for the December 31, 2007, to December 29, 2008, contract year.

PROCEDURAL BACKGROUND

Local 385 invoked the jurisdiction of the Commission pursuant to Neb. Rev. Stat. § 48-818 (Reissue 2010), seeking resolution of the industrial dispute concerning wages and conditions of employment for the 2007-08 contract year. On December 23, 2008, the Commission issued its findings and order resolving the employment issues raised in Local 385's petition in case No. 1173. The order provided "Unit Staffing Requirements — Engine Companies and Truck Companies assigned and in-service all at the rate of 4 staff members."

Both parties timely filed requests for a posttrial conference pursuant to § 48-816(7)(d). Pursuant to this statute, the Commission's December 23, 2008, order was not made final pending completion of the posttrial conference. Following the conference, the Commission issued a final order in case No. 1173 on February 18, 2009, which established the terms of employment for the 2007-08 contract year. The order addressed the terms of employment raised in Local 385's original petition, including staffing requirements. It stated:

> The [City] requests the Commission to order that it is the prevalent practice to have no special requirements with regard to ambulance staffing. [Local 385] requests the Commission to keep the current practice in place where a Captain is staffed on ambulance. [I]t is clear that ambulances should be staffed with 2 employees. The remainder of the staffing requirements are management prerogative and will not be ordered.

The February 18 final order also addressed promotional placement and call-back pay. Regarding promotion procedures, the Commission ordered that "[p]romotional placement will be according to the current practice Omaha has in place." The final order does not address the call-back provision articulated in article 46 of the 2007 CBA. Nor does the final order indicate that the Commission interpreted the promotional or call-back provisions in the 2007 CBA to impose any staffing requirements. The final order further stated that "[a]ll other terms and conditions of employment for the 2007-2008 contract year

shall be as previously established by the agreement of the parties and by orders and findings of the Commission."

Prior to expiration of the 2009 contract year, the parties were again unable to reach an agreement regarding terms and conditions of employment. On December 21, 2009, Local 385 filed an industrial dispute with the Commission in case No. 1227, seeking resolution of the 2008-09 contract terms pursuant to § 48-818. At the same time that Local 385 filed its petition, it moved for a temporary order known as a status quo order pursuant to § 48-816. Following a hearing on the matter, the Commission sustained Local 385's motion. In its status quo order, issued December 23, the Commission noted that § 48-816 authorizes the Commission to make temporary orders necessary to preserve and protect the status of the parties pending final determination of the issues. In its order, the Commission did not explicitly state the terms and conditions protected by the status quo order. It stated: "The [City] shall not alter the employment status, wages, and terms and conditions of employment of the employees subject to the Petition herein and shall preserve and protect the status of the parties, property, and public interest involved, pending final determination of the issues raised by the Petition herein."

On January 7, 2010, in the district court for Douglas County, Local 385 filed a declaratory judgment action alleging that the City was in violation of the status quo order entered by the Commission and requesting injunctive relief. Local 385's petition maintained that the City was bound by the original, expired CBA as modified by the subsequent orders of the Commission. Local 385 claimed, among other things, that the City had violated the status quo order by failing to maintain a minimum of 657 fire personnel and by failing to promote captains to reach the level of 150 on suppression units. Local 385 requested that the court order the City to cease and desist from failing to call back and promote employees to fill vacancies.

The court issued an order on February 8, 2010, which found that the City had failed to comply with the status quo order in part. The court directed the City to take immediate steps to comply with the status quo order, but determined the City had acted in good faith "under certain budgetary constraints," and

no contempt finding was made at that time. However, the order stated that a finding of contempt would issue if the City failed to take the required action within 3 days of the order.

On May 7, 2010, Local 385 filed a "Further Application for Order to Show Cause and Notice of Hearing," in which Local 385 alleged that the City remained in violation of the status quo order and requested that the court hold the City in contempt. A hearing was held, and the court received evidence regarding the number of captains the City was required to staff, the required promotions to battalion chief, and the number of firefighters the City was required to staff. The court entered an order on June 17, from which the City ultimately appealed. The court found that the City was in violation of the status quo order. The court stated:

> There is no question that the City is not replacing the . . . CBA . . . personnel who have retired or otherwise left City employment. Regardless of the City's reasoned arguments on the issue, the City's failure to maintain 657 positions is a material breach of the City's obligation under the status quo order.

The court determined, however, that the City was not required to staff 150 captains to medic units and fire suppression. To make this determination, the district court interpreted the terms of the 2007 CBA in conjunction with the modifications and extensions imposed by the December 23, 2008, findings and order and the February 18, 2009, final order issued by the Commission in case No. 1173. Specifically, the court relied on the February 18 final order issued by the Commission, which determined that the City was required to staff ambulances with two employees, but that the remainder of the staffing requirements is management prerogative. The district court found that the Commission's order eliminated the requirement that the City staff 39 medic unit captains. Therefore, pursuant to the Commission's modifications of the term, the City was required to staff only 111 captains, not 150. The court stated:

> The City argues that the lack of requirement that a captain be a part of a medic unit eliminates the need for the total number of captains as agreed to in the CBA. The [Commission's] amendment of the captain requirement on

> a medic unit compels the conclusion that the total number of captains may be reduced from the obligation of 150 in suppression companies and medic units to 111 in suppression companies.

The City timely appealed the court's finding that it violated the status quo order. Local 385 cross-appealed the finding that the City is not required to staff a minimum of 150 captains assigned to fire suppression.

During the pendency of this appeal, the Commission oversaw further proceedings to resolve the parties' industrial dispute regarding the 2008-09 contract year, filed in December 2009, case No. 1227. On January 4, 2011, the Commission entered its findings and order in the case. Both parties again filed requests for a posttrial conference pursuant to § 48-816(7)(d). The parties' requests to amend the January 4 findings and order were sustained in part, and overruled in part. The Commission issued its final order in case No. 1227 on February 17, 2011. The final order made extensive findings regarding wages and employment terms and conditions for the 2008-09 contract year. However, the Commission declined to make any findings or order any terms with regard to minimum staffing requirements. The final order states:

> Staffing proposed bargaining topics such as "daily staffing", "staffing by rank", and "overall staffing" are management prerogatives as stated previously in the Commission's Findings and Order, issued on January 4, 2011. The Commission does not have jurisdiction over management prerogatives. *Nebraska Dept. of Roads Emp. Ass'n v. Dept. of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973); *IBEW v. City of Fairbury*, 6 CIR 205 (1982). The Commission cannot order any change because the Commission lacks the authority to do so. "Daily staffing", "staffing by rank", and "overall staffing" determinations are management prerogatives, properly within the City of Omaha's prerogative to make changes accordingly.

Neither the findings and order issued January 4, 2011, nor the final order issued February 17 appear to address any staffing requirements implied by the promotion and call-back procedures provided in the 2007 CBA. The final order also states

that "[a]ll other terms and conditions of employment for the 2008-2009 contract year shall be as previously established by the agreement of the parties and by orders and findings of the Commission." Following the resolution of the industrial dispute, the City filed a "Suggestion of Mootness" in this court, to which Local 385 filed an objection.

ASSIGNMENTS OF ERROR

The City assigns that the district court erred in determining that the City violated the status quo order entered by the Commission when the City failed to maintain a total of 657 sworn fire personnel. Local 385 cross-appeals, and assigns that the district court erred in determining that the City did not violate the status quo order when the City failed to maintain a minimum of 150 captains assigned to fire suppression.

STANDARD OF REVIEW

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

ANALYSIS

The City argues that upon the filing of the final order on February 17, 2011, the wages and terms and conditions of employment at issue in this case were fully established by the Commission and that the condition detailed in the temporary status quo order has been met, as there has been a final determination of the issues. As a result, upon entry of the final order, the City asserts that the status quo order was dissolved and that any issues as to its application or compliance have been rendered moot.

Pendency of Status Quo Order

[4] Before we address the issue of mootness, it is necessary to discuss the temporary nature of status quo orders issued by

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[1] *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[2] *Id.*

[3] *Id.*

the Commission. The Commission entered the status quo order pursuant to authority granted by § 48-816(1). It states, in relevant part:

> The [C]ommission shall have power and authority upon its own initiative or upon request of a party to the dispute to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties, property, and public interest involved pending final determination of the issues.

In *Transport Workers v. Transit Auth. of Omaha*,[4] this court determined whether the Commission has the authority to enter a temporary status quo order similar to the order at issue in the present case. We noted that "reducing employees' wages or changing the hours or terms and conditions of employment during an industrial dispute might interfere with or coerce employees attempting to exercise their right to bargain" under the Industrial Relations Act (Act).[5] We held that the Commission has the authority to enter a temporary order to avoid such interference.[6]

In *Transport Workers*, we recognized that the Act does not give the Commission any authority to compel a governmental employer to enter into a contract if the governmental employer chooses not to do so.[7] But the Commission does have the authority to extend the terms and conditions of an expired contract to effectuate good faith negotiation:

> [E]ven though the [Commission] cannot compel the governmental employer to enter into a contract, it is clear that the [Commission] can enter a final order setting wages, hours, and terms and conditions of employment which are binding upon the employer, and which, in every sense, is therefore a contract, though none may formally exist between the parties. [W]hile the bargaining agreement

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

[5] *Id.* at 459, 344 N.W.2d at 462.

[6] See *id.*

[7] See Neb. Rev. Stat. § 48-810.01 (Reissue 2010).

> between the parties may have expired, the employment contract between the parties goes on.[8]

Section 48-816(1) grants the Commission discretionary authority, when it appears appropriate, to order that the status quo of the parties be retained *until the dispute is resolved*.[9] This court has interpreted status quo orders as a means to preserve the collective bargaining position of the employees engaged in a pending industrial dispute.[10] Such authority fulfills the public policy of the Act to ensure the uninterrupted and continued functioning and operation of governmental services. The language of § 48-816 is plain, and it specifically limits temporary orders issued by the Commission to the pendency of the dispute. Status quo orders are therefore binding on the parties only until the dispute has been resolved.

Mootness

[5-7] We must determine whether the resolution of the industrial dispute between Local 385 and the City has rendered this appeal concerning the Commission's status quo order moot. Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[11] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[12] Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.[13]

The June 17, 2010, order of the Douglas County District Court, which found the City in violation of the status quo

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[8] *Transport Workers v. Transit Auth. of Omaha, supra* note 4, 216 Neb. at 460, 344 N.W.2d at 463.

[9] *Id.*

[10] *Id.*

[11] *Wetovick v. County of Nance, supra* note 1.

[12] *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[13] *Wetovick v. County of Nance, supra* note 1.

order, is the *only* order that has been appealed by either party. The only issues before us concern the City's alleged violations of temporary terms imposed by the status quo order. As noted above, the Commission's February 17, 2011, order resolved the industrial dispute and dissolved the status quo order. The February 17 order displaced the temporary conditions and terms protected by the status quo order and effectively established the terms and conditions of employment for the 2008-09 contract year.

The issues determined by the February 17, 2011, final order are not before us on appeal, as it was entered while the present appeal was pending. As neither party appealed the February 17 order, this court has no authority to determine the appropriateness of the Commission's resolution of the industrial dispute or the conditions and terms of employment established by the February 17 order. Presumably, following the February 17 final order, the 2008-09 contract terms have been further amended for the 2009-10 and 2010-11 contract years by agreement or by order of the Commission. Accordingly, this appeal does not concern the conditions and terms of employment that now affect the parties.

Nevertheless, Local 385 argues that the instant case has not been rendered moot, because the alleged violations of the status quo order implicate other provisions of the 2007 CBA which remain in place. In particular, Local 385 refers to the rights of bargaining unit members to the benefits of promotion and rehire or recall as established under article 12 of the 2007 CBA. Under article 12, section 3, employees who have been laid off are eligible for reemployment for a period of 7 years. Local 385 contends that the City was required to hire additional personnel and that the failure to do so stripped the employees that would have been hired of rehire rights. Local 385 asserts that even if such employees were laid off following the February 17, 2011, order, they would still be entitled to a right of rehire.

Local 385's petition requested both injunctive and declaratory relief. Local 385 sought to enjoin the City from failing to maintain a minimum number of captains and firefighters. And they sought a declaration of the City's obligations and Local 385's rights under the status quo order.

[8] As to the request for injunctive relief, the issue has been rendered moot by the February 17, 2011, final order. The purpose of an injunction is the restraint of actions which have not yet been taken.[14] We have said that remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.[15] The purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief.[16] An injunction is not used for the purpose of punishment or to compel persons to do right but merely to prevent them from doing wrong.[17] Accordingly, rights already lost and wrongs already perpetrated cannot be corrected by an injunction.[18]

[9-11] The inability of the court to grant the injunction sought does not, by itself, render the declaratory action moot as well.[19] As in any other lawsuit, a declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.[20] At the time that the declaratory judgment is sought, there must be an actual justiciable issue.[21] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[22]

[12] According to Local 385, a declaration that the City violated the status quo order presents a justiciable issue because

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[14] *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

[15] See *Rath v. City of Sutton, supra* note 12.

[16] *Id.* (citing *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999)).

[17] *Id.*

[18] *Id.*

[19] *Id.* (citing *Koenig v. Southeast Community College, supra* note 14).

[20] *Id.* (citing *Putnam v. Fortenberry, supra* note 16).

[21] *Id.*

[22] *Id.*

it can then seek to recover backpay and other lost benefits for Local 385 employees who had rights to rehire and promotion that were not honored by the City during the pendency of the status quo order. In essence, Local 385 seeks an advisory opinion which it can use for further action that it may or may not take in the future, apparently to recover damages which were neither claimed nor proved below. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[23]

In *Koenig v. Southeast Community College*,[24] this court faced a situation in which the plaintiffs brought an action to enjoin the closure of a community college campus and the relocation of its programs to another campus. At the time the action was brought, the resolutions of the college board of governors had been implemented only to a small degree. By the time the appeal was submitted to this court, the closing and relocation at issue had been completely accomplished. We ultimately determined:

> At this stage of the litigation, judicial enforcement of any decree attempting to eliminate the reallocations, renovations, installations, expenditures, and transfer would be impossible. A declaratory judgment could no more prohibit what has taken place than could an injunction. The case is moot as to declaratory judgment as well as to injunction.[25]

Similarly, in the present case, the declaratory judgment Local 385 seeks would suffer from the same infirmities as an injunction. A declaration of the City's obligations under the status quo order would not undo what has already been done. Since the City's alleged violations of the temporary status quo order, that status quo order has expired and the parties have proceeded to bargain over new terms in subsequent contracts. Current staffing decisions have likely been made based on

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[23] *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

[24] *Koenig v. Southeast Community College, supra* note 14.

[25] *Id.* at 926, 438 N.W.2d at 795.

terms and conditions that are not before us on this appeal. The parties' employment relationship and bargaining positions have continued to change and evolve with the passage of time and changes in circumstance. Thus, the question before us does not rest on existing facts or rights—the issues presented are no longer alive. Local 385's request for declaratory judgment is also moot.

We note that in its arguments on appeal, Local 385 makes some references to possible damages. When properly pled and proved, claims for damages for harm caused by past practices are not generally moot.[26] But Local 385 did not seek damages for the City's alleged violations. In order to be entitled to damages, Local 385 was required to specifically request such relief in its petitions.[27]

Of course, given the temporary nature of the status quo order and the fact that terms were subsequently amended upon expiration of that order, even if Local 385 had requested monetary damages, establishing such relief would have likely proved tenuous. While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.[28]

In this case, a determination of which employees, if any, were entitled to monetary damages would require a number of assumptions—that all personnel in place during the pendency of the status quo order retained their employment and rank; that no employee was fired, moved, or died; and that each employee that might have been rehired or promoted was at that time able, willing, and available to take the job. Also, awarding such relief would necessitate an interpretation of subsequent terms and conditions of employment and their many possible implications for the obligations imposed by the status quo order. As previously noted, the current employment terms are

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[26] See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[27] See, *Rath v. City of Sutton, supra* note 12; *Alexander v. School Dist. No. 17*, 197 Neb. 251, 248 N.W.2d 335 (1976).

[28] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

not part of the record in this case. No court could prohibit what has already taken place, and the limited issues presented here are insufficient to allow any court to restore the situation as it existed at the time the status quo order was issued. This appeal is moot.

Public Interest Exception

Local 385 argues that even if this court should agree that the matter is moot, it should still be reviewed, because it involves a matter affecting the public interest and because other rights and liabilities may be affected by its determination. Local 385 first contends that a decision of mootness would be detrimental to the purpose of § 48-816 and Neb. Rev. Stat. § 48-819.01 (Reissue 2010).

Section 48-819.01 states:

> Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of the . . . Act, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in such act, the [C]ommission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the [C]ommission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

Local 385 asserts that if the City is allowed to engage in conduct in violation of the status quo order entered by the Commission by simply suggesting that the matter is moot after the Commission enters its order resolving the dispute, the whole process of allowing protections under the temporary order provisions of the Act has been nullified.

Local 385 is not without redress, however, and correctly notes that the Commission has the authority to enter orders necessary to provide adequate remedies for any injury proved before it under such circumstances. The Commission's authority under § 48-819.01 has no bearing on the instant case. Local 385 did not bring an action under this provision, and it is therefore inapposite to our justiciability analysis.

[13] Local 385 next claims that the public interest exception to the mootness doctrine should apply. The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem.[29] Were we to reach the merits of the instant appeal, it would require an analysis of complex factors which are unique to this case. Such factors would include the proper interpretation of the minimum staffing, promotion, and call-back provisions of the original CBA; an interpretation of those terms as modified by each subsequent order issued by the Commission; a determination of which terms were encompassed by the status quo order; and a finding of whether the actions of the City amounted to a violation of those terms. It is unlikely that we will be presented with a similar factual situation. Accordingly, there is no likelihood of recurrence of the same or a similar problem, and we decline to apply the public interest exception to the mootness doctrine.

CONCLUSION

For the foregoing reasons, we conclude that the instant appeal is moot. Accordingly, the appeal is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating.

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[29] *Stoetzel & Sons v. City of Hastings*, 265 Neb. 637, 658 N.W.2d 636 (2003).

CHAD A. HOFFERBER, APPELLEE AND CROSS-APPELLANT, V. HASTINGS UTILITIES AND EMC INSURANCE, APPELLANTS AND CROSS-APPELLEES.

803 N.W.2d 1

Filed September 9, 2011. No. S-10-894.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only

upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **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.
3. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction and venue are not synonymous and interchangeable functions in litigation.
4. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
5. **Venue: Words and Phrases.** Venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
6. **Venue.** Venue is ordinarily not jurisdictional.
7. **Venue: Waiver.** Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law.
8. **Jurisdiction.** Litigants cannot confer jurisdiction on a judicial tribunal by acquiescence or consent.
9. **Workers' Compensation: Jurisdiction: Venue.** Neb. Rev. Stat. § 48-177 (Reissue 2010) is not jurisdictional; it simply specifies the venue for hearing the cause.
10. **Workers' Compensation: Jurisdiction: Statutes.** The Workers' Compensation Court, as a statutorily created court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.
11. **Workers' Compensation: Intent.** Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010) is intended to prevent an employee's refusal to improve his or her medical condition or earning capacity from causing an employer to pay more workers' compensation benefits than it should.
12. **Workers' Compensation: Proof.** Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010) only authorizes the complete termination of a claimant's right to benefits under the Nebraska Workers' Compensation Act if evidence is presented to support a finding that had the employee availed himself or herself of the benefits offered, the employee would no longer be disabled.
13. **Workers' Compensation.** Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010) cannot be used solely to punish or coerce an injured worker. There must be evidence to support a finding that the worker's disability would have been reduced had the worker cooperated with medical treatment or vocational rehabilitation.
14. **Trial: Judges: Presumptions.** It is presumed in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
15. **Workers' Compensation.** Neb. Rev. Stat. § 48-162.01(7) (Reissue 2010) is intended to permit the compensation court to modify rehabilitation plans in response to changed circumstances following the entry of the initial plan. It does not apply to situations in which a worker has refused to cooperate with treatment or rehabilitation.

Appeal from the Workers' Compensation Court. Affirmed.

Dallas D. Jones, Amanda A. Dutton, and Andrea A. Ordonez, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Dirk V. Block and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

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

GERRARD, J.

Hastings Utilities and its workers' compensation insurance carrier, EMC Insurance (collectively EMC), appeal from a decision of the Workers' Compensation Court refusing to dismiss Chad A. Hofferber's petition for benefits under the Nebraska Workers' Compensation Act (the Act).[1] The primary issues presented in this appeal relate to the scope of the Workers' Compensation Court's authority to modify, suspend, or terminate a claimant's right to benefits as punishment for the claimant's uncooperative or contemptuous conduct.

I. BACKGROUND

On October 3, 2000, Hofferber was injured in an accident in Adams County, Nebraska, arising out of and in the course of his employment with Hastings Utilities. On March 7, 2002, Hofferber filed a petition in the Workers' Compensation Court alleging that he had stepped on a manhole cover and sustained injuries to "his left foot and left side and urological injuries; abdominal injuries and severe and profound emotional injuries."[2] On April 17, 2003, the parties filed a stipulation and joint motion to dismiss, in which they agreed that Hofferber had sustained compensable injuries and was entitled to temporary total disability benefits and reasonable and necessary medical expenses. The court dismissed the cause without prejudice.

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[1] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010).

[2] See, generally, *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

Hofferber had been evaluated at the Mayo Clinic in Minnesota after his accident, where it had been recommended that he see a particular surgical specialist in Boston, Massachusetts. The surgeon concluded, after examining Hofferber, that he was a candidate for revascularization surgery. Hofferber had the surgery in December 2003, and it was successful, but Hofferber still suffered from chronic pain, which the surgeon diagnosed as neuropathic. The surgeon treated the condition with steroids and recommended that Hofferber follow up with a pain management program closer to home.

Hofferber asked that he be sent back to the Mayo Clinic for pain management. A program at the University of Nebraska Medical Center had also been considered, but Hofferber reported having had a bad experience there shortly after his accident. After some missed appointments due to illness, Hofferber was reevaluated at the Mayo Clinic on March 14, 2005. After several different treatment options were discussed, including a pelvic CT scan, Hofferber's physician at the Mayo Clinic ultimately recommended another steroid injection and approved Hofferber to begin a 3-week Mayo Clinic pain rehabilitation program.

But Hofferber failed to schedule the injection, expressing concern about getting an injection from the Mayo Clinic instead of his surgeon. Hofferber's surgeon had apparently suggested that another physician might not be comfortable performing an injection in close proximity to the site of the revascularization surgery. When an appointment at the Mayo Clinic was scheduled for Hofferber in October 2005, he notified his medical case manager that he could not keep the appointment because of an infection. Hofferber also expressed his concern about the injection and asked what had happened to the recommendation of a CT scan.

At this point, concerned about Hofferber's periodic difficulty in keeping appointments at the Mayo Clinic and with his surgeon, EMC requested a signed medical release form to obtain medical records substantiating Hofferber's reasons for not keeping his Mayo Clinic appointment. EMC stopped Hofferber's weekly benefit payments until the signed release was provided. The evidence also suggests that Hofferber had

stopped his psychiatric treatment in 2003, although it is not clear whether EMC might have stopped funding it.

In addition to the recommended Mayo Clinic treatment, Hofferber's surgeon wanted to see Hofferber for an annual followup appointment, which EMC authorized. Hofferber did not pursue either opportunity, although EMC encouraged him to do so despite Hofferber's continuing refusal to provide EMC with a release.

On December 20, 2006, Hofferber filed a pro se petition in the Workers' Compensation Court, alleging that he was owed past-due benefits and penalties, unpaid medical and legal expenses, vocational rehabilitation, and future medical treatment. EMC propounded interrogatories and requests for production, seeking, as relevant, information about Hofferber's medical treatment and any outstanding medical bills. But in a telephone conversation on February 7, 2007, Hofferber told EMC's counsel that he would not answer those discovery requests. According to EMC's counsel, Hofferber also said he would not submit to a deposition. Hofferber did not reply to EMC's discovery requests and called EMC's counsel and left a profane voice mail message.

During the same time period, Hofferber's medical case manager repeatedly contacted Hofferber on EMC's behalf, offering to assist Hofferber in arranging resumption of medical treatment. In response, Hofferber left profane voice mail messages for his case manager.

On March 20, 2007, EMC filed a motion to compel Hofferber to respond to its interrogatories and requests for production, appear for a scheduled deposition, and avail himself of the medical treatment furnished by EMC. A hearing was held before a trial court of the Workers' Compensation Court, at which Hofferber appeared and complained about EMC's refusal to pay his benefits. Hofferber also suggested that EMC had refused to pay medical bills. It appears from the statements of counsel that there may have been disagreement about whether some medical expenses, such as those relating to illnesses and infections, were causally related to Hofferber's compensable injury, although it is unclear because the disputed bills are not in the record.

EMC's counsel explained that EMC was willing to pay for any expenses that were the result of the accident, but that part of the reason for its discovery requests was to obtain information about those expenses. And Hofferber was told that if he resumed his recommended medical treatment, his disability benefits would be resumed.

The trial court directed Hofferber from the bench to comply with EMC's discovery requests. The court also entered an April 2, 2007, written order directing Hofferber to avail himself of the medical treatment being offered. On April 26, EMC filed a motion to dismiss Hofferber's petition, alleging that he had failed to respond to its discovery requests.

On June 1, 2007, counsel entered an appearance on Hofferber's behalf, and EMC's motion to dismiss was set for a hearing before the trial court on June 27. But the hearing was delayed several times, for reasons that are not apparent from the record. The hearing had been scheduled for December 19 when, on November 19, Hofferber's counsel filed a motion to withdraw, alleging that communications with Hofferber had broken down and that Hofferber wanted counsel fired. EMC's counsel e-mailed Hofferber to inform him of the hearing on the motion to withdraw, and Hofferber sent a profane reply.

In the meantime, after another missed appointment, Hofferber had returned to the Mayo Clinic in June and July 2007. Recommendations on Hofferber's pain management were deferred until his recurring infections could be resolved. Followup appointments were scheduled for September, but were canceled when Hofferber was unable to make travel arrangements in time. Hofferber also failed to make a scheduled trip to follow up with his surgeon. Hofferber had been asked by the Mayo Clinic to get bacterial cultures of his infections, but did not do so. Hofferber made one return visit to the Mayo Clinic in September, but did not see most of the doctors there with whom consultation had been recommended. In December, EMC decided not to send Hofferber any more advance payments for travel expenses. In January 2008, a certified letter to Hofferber from his medical case manager, offering to schedule a pain rehabilitation program, was returned unopened, marked "Refused."

On January 29, 2008, EMC filed an amended motion to dismiss, which came on for hearing before the trial court on February 6. Hofferber did not appear, despite several attempts by the court and counsel to reach him. EMC argued at the hearing that Hofferber was not making any medical progress because he was not following up with scheduled appointments. EMC also noted that Hofferber either had "inappropriate conduct and vulgar communications" with EMC's counsel and his case manager, or refused to communicate at all.

Although it is not entirely clear from the record, counsel's argument at the hearing seems to suggest that EMC may have resumed payment of Hofferber's temporary total disability benefits. A letter from Hofferber's surgeon was also submitted, suggesting that Hofferber's other medical problems were interfering with his being seen by the surgeon. And the record suggests that Hofferber had complied with EMC's discovery requests to some extent, although EMC complained that some of the material provided was unclear and could not be clarified because Hofferber refused to communicate with counsel.

EMC contended that Hofferber had not complied with the court's orders to return to medical treatment or comply with discovery, so the matter should simply be dismissed. In a written order filed February 29, 2008, the trial court found that the conduct of EMC's counsel and Hofferber's case manager had been reasonable and that Hofferber's conduct had been unacceptable. But the court declined to dismiss the case. Instead, the court ordered Hofferber to refrain from any abusive communications with EMC's counsel, his medical case manager, or other employees of EMC. The court ordered Hofferber to take whatever steps were necessary to enroll in the Mayo Clinic pain rehabilitation program. EMC's counsel was ordered to report any abusive conduct by Hofferber, and EMC was ordered to continue paying indemnity benefits.

EMC notified Hofferber's medical case manager of the court's order, so Hofferber's case manager e-mailed him offering to assist in coordinating his care. Hofferber sent two replies within a few minutes of one another; the first told the case manager to stop e-mailing him, and the second was profane.

On March 12, 2008, EMC filed a request for a show cause hearing based on Hofferber's violation of the February 29 order. EMC asked the court to dismiss Hofferber's pending petition with prejudice and terminate all of Hofferber's benefits, including indemnity and medical care. The trial court, acting sua sponte, transferred venue to Omaha, Nebraska, and scheduled the show cause hearing at the Douglas County Courthouse. The record suggests that this was done out of security concerns, because security at the Douglas County Courthouse was more stringent than security at the State Capitol in Lincoln, Nebraska.

Notice of the hearing was served on Hofferber, but he did not appear or contact the court. The trial court found that Hofferber had violated the February 29, 2008, order by sending abusive e-mails to his medical case manager and unreasonably refusing to avail himself of the medical care that had been provided. In an order filed March 28, 2008, the court determined that

> [t]he remedy given to this Court for contempt and for unreasonably refusing to cooperate by [Hofferber] is to terminate benefits and dismiss [Hofferber's] petition. It is therefore, the finding of this Court that [EMC's] responsibility under the . . . Act for payments for indemnity benefits or medical care should be terminated, and [Hofferber's] Petition filed in this court on December 20, 2006, should be dismissed.

A year passed. On April 9, 2009, the Adams County Court appointed a guardian and conservator for Hofferber, having found clear and convincing evidence that Hofferber was an incapacitated person who lacked "sufficient understanding or capacity to make or communicate responsible decisions concerning himself, including those decisions concerning his own health, safety and financial needs."[3] On September 10, Hofferber, through his guardian and conservator, filed a "Further Petition" in the Workers' Compensation Court, seeking reinstatement of his benefits. The petition alleged that Hofferber remained temporarily and totally disabled, that he had resumed medical treatment for his work-related injuries, and that his guardian

[3] See Neb. Rev. Stat. § 30-2601 (Reissue 2008).

and conservator could give the consent or approval necessary to facilitate further medical care.

EMC filed a motion to dismiss the "Further Petition," alleging that the trial court's March 28, 2008, order terminating Hofferber's benefits was final and that the Workers' Compensation Court lacked jurisdiction over Hofferber's request for further benefits. In response, Hofferber argued that the March 28 order was void because the hearing had been held in Douglas County instead of "the county in which the accident occurred," as required by § 48-177. Hofferber also argued that the March 28 order did not specifically say that the dismissal of Hofferber's petition was "with prejudice," so a further petition was permitted, and that the Act only permits suspension of benefits as a sanction, not a final order extinguishing a claim.

On January 20, 2010, the trial court entered an order vacating the March 28, 2008, order. The court agreed with Hofferber that venue for the hearing that resulted in the March 28 order had been improper. The court reasoned that because Hofferber did not appear for the hearing or take part in it, he could not be said to have waived any objection to venue. So, the court concluded, the March 28 order was a nullity and the motion to show cause originally filed by EMC on March 12 remained pending for disposition.

EMC appealed to a review panel, which found that the trial court had erred in concluding that venue for the March 28, 2008, hearing was improper. The review panel held that § 48-177 applied only to a trial on the merits, not each and every hearing the Workers' Compensation Court might be required to hold in every case. And the review panel found that the trial court had appropriately exercised its inherent power in transferring venue to Douglas County due to Hofferber's abusive behavior.

But the review panel also found that the trial court did not have authority under the Act to terminate Hofferber's right to future benefits. The review panel found no authority for a trial judge of the Workers' Compensation Court to vacate a prior order and held that although the Workers' Compensation Court has the inherent power to punish for contempt of court,

the Workers' Compensation Court cannot dismiss a claim with prejudice in order to punish contemptuous behavior. The review panel noted that the March 28, 2008, order did not specify that Hofferber's petition had been dismissed "with prejudice" and found that to the extent the order could be read as dismissing future liability, the trial court lacked authority to enter it.

Based on that reasoning, the review panel affirmed the trial court's overruling of EMC's motion to dismiss Hofferber's petition. EMC appeals, and Hofferber cross-appeals.

II. ASSIGNMENTS OF ERROR

EMC assigns, as consolidated and restated, that the review panel erred in (1) determining that the trial court lacked authority to terminate its obligation to pay further benefits, (2) vacating the trial court's March 28, 2008, order, and (3) failing to find that the trial court lacked jurisdiction over Hofferber's "Further Petition."

Hofferber assigns, as consolidated and restated, that the review panel erred in concluding the trial court's March 28, 2008, order was not void for lack of jurisdictional venue.

III. STANDARD OF REVIEW

[1] A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[4]

IV. ANALYSIS

1. Venue

[2] Before addressing EMC's appeal, we address Hofferber's cross-appeal, because (at least according to Hofferber) it implicates jurisdictional issues. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle

[4] § 48-185.

jurisdictional issues presented by a case.[5] Hofferber relies on § 48-177, which provides in relevant part that when a petition or motion is filed in the Workers' Compensation Court, a judge of the court will be assigned to hear the cause

> in the county in which the accident occurred, except [that a case to be tried in a county with a population of 4,000 or less and without adequate facilities may be tried in any adjoining county,[6]] and except that, upon the written stipulation of the parties, filed with the compensation court at least fourteen days before the date of hearing, the cause may be heard in any other county in the state.

Hofferber contends that pursuant to § 48-177, because his accident occurred in Adams County, Douglas County was an improper venue for the hearing on EMC's motion to dismiss and, therefore, the court lacked jurisdiction to rule on the motion. But the issue raised by Hofferber is not jurisdictional.

[3-7] "Jurisdiction" and "venue" are not synonymous and interchangeable functions in litigation.[7] Jurisdiction is the inherent power or authority to decide a case.[8] Venue, however, is the place of trial of an action—the site where the power to adjudicate is to be exercised.[9] Venue is ordinarily not jurisdictional.[10] Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law.[11] That is important here because no objection was made to the Douglas County hearing, nor was any appeal taken from the ruling on the order. If § 48-177 related to jurisdiction, Hofferber might

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[5] *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

[6] See Neb. Rev. Stat. § 25-412.02 (Reissue 2008).

[7] *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988). See, also, *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[8] See, *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988); *Blitzkie, supra* note 7.

[9] See *id.*

[10] *Blitzkie, supra* note 7.

[11] *In re Interest of Adams, supra* note 8. See, also, *Anderson, supra* note 7; *Krajicek v. Gale*, 267 Neb. 623, 677 N.W.2d 488 (2004); *Blitzkie, supra* note 7.

be able to collaterally attack the resulting order as void.[12] But if § 48-177 is simply a venue statute, then the order is not void, and not subject to collateral attack on that basis.[13]

[8] And § 48-177 is clearly a venue statute. In *In re Interest of Adams*,[14] we addressed a similar argument in the context of a statute which provided that a petition for the commitment of a mentally ill dangerous person should be filed with the clerk of the district court where the person is found, except that a district judge of that court could authorize the petition to be filed in another judicial district if there was good cause to do so. We reasoned that the statute could not be jurisdictional, because if it was, then the procedure permitting the cause to be transferred to another district would be tantamount to conferring jurisdiction on another tribunal which lacked it.[15] And, we noted, litigants cannot confer jurisdiction on a judicial tribunal by acquiescence or consent.[16] So, we concluded that the statute at issue was a venue statute and was not jurisdictional.[17]

[9] The same reasoning applies here. By its terms, § 48-177 permits a workers' compensation claim to be tried in another county if the facilities are inadequate in the county of the accident or merely by the stipulation of the parties. And litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.[18] Section 48-177, therefore, cannot be jurisdictional; it simply specifies the venue for hearing the cause, which is an objection that can be waived.[19]

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[12] See *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001).

[13] See *Lewin v. Lewin*, 174 Neb. 596, 119 N.W.2d 96 (1962).

[14] *In re Interest of Adams, supra* note 8.

[15] See *id.*

[16] See *id.*

[17] See *id.* See, also, *Anderson, supra* note 7; *Blitzkie, supra* note 7; *McCall v. Hamilton County Farmers Telephone Ass'n*, 135 Neb. 70, 280 N.W. 254 (1938).

[18] *Honda Cars of Bellevue v. American Honda Motor Co.*, 261 Neb. 923, 628 N.W.2d 661 (2001); *In re Interest of Adams, supra* note 8.

[19] See *McCall, supra* note 17.

Hofferber relies on *Gracey v. Zwonechek*,[20] in which we held that a provision of the Nebraska Rules of the Road[21] requiring administrative license revocations to be heard "'in the county in which the arrest occurred or in any other county agreed to by the parties'" had been violated by a videoconference and teleconference held by hearing officers located in Lancaster County instead of the counties of the arrests.[22] We recognize how *Gracey* might be pertinent, and even persuasive, if we were addressing the merits of Hofferber's claim that venue was improper. But we are addressing whether Hofferber preserved that claim, and on that point, *Gracey* is plainly distinguishable, because in *Gracey*, the appellants objected to venue at their hearings and appealed from the resulting orders. In fact, we noted in *Gracey* that

> [t]he argument made by the appellants has been raised before this court on several prior occasions; however, we have not yet had the opportunity to address it. In *Muir v. Nebraska Dept. of Motor Vehicles*,[23] we held that § 60-6,205(6)(a) is a venue statute and that generalized objections to the method by which the hearing was being conducted were not proper objections to venue. . . . In both *Davis*[24] and *Reiter*,[25] we did not reach the substantive merits of the defendants' arguments because the defendants failed to properly object to the venue of their hearings and because their subsequent participation in the hearings acted as a waiver of any objection they may have had.[26]

But we found that in *Gracey*, the appellants had properly raised the issue, so we addressed it on the merits.

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[20] *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002).

[21] See Neb. Rev. Stat. §§ 60-601 to 60-6,379 (Reissue 2010).

[22] *Gracey, supra* note 20, 263 Neb. at 799, 643 N.W.2d at 384.

[23] *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000).

[24] *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002).

[25] *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002).

[26] *Gracey, supra* note 20, 263 Neb. at 799, 643 N.W.2d at 384.

In this case, obviously, Hofferber had notice of the Douglas County hearing, but did not object to its venue. We need not determine if his failure to appear or participate was a "waiver" of the issue, because no appeal was taken from the resulting order, so the only relevant question is whether the order was void for lack of jurisdiction. It was not. Because the court was not deprived of jurisdiction by the venue, and no appeal was taken, the order was a final adjudication not subject to Hofferber's collateral attack.[27] Because § 48-177 is a venue statute that relates to procedure and not jurisdiction, the fact that the cause was tried in a county other than that declared by § 48-177 does not go to jurisdiction so as to invalidate the judgment.[28] The court had jurisdiction over the matter and the power to render a judgment binding on the parties.[29]

Therefore, we find that the trial court erred in concluding that the March 28, 2008, order was "a nullity." It may have been entered in error, but it was entered by a court with jurisdiction to enter it, and no appeal was taken. Nor did the court have the authority to vacate its own judgment,[30] although we note that trial judges of the Workers' Compensation Court were recently given the authority to substantively modify or change their rulings within 14 days of entry.[31] We need not, and do not, address whether the review panel's restrictive interpretation of § 48-177 was correct, and we note that pursuant to L.B. 151, § 9, that issue would be one of last impression. Although we do not endorse the review panel's reasoning, we agree with the review panel's ultimate conclusion that the trial court erred in vacating the March 28 order. And, therefore, we find no merit to Hofferber's assignment of error on cross-appeal.

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[27] See *Lewin, supra* note 13. See, also, §§ 48-170 and 48-178.

[28] See, *id.*; 77 Am. Jur. 2d *Venue* § 45 (2006), citing *United States v. Hvoslef*, 237 U.S. 1, 35 S. Ct. 459, 59 L. Ed. 813 (1915).

[29] See *id.*

[30] See, *Dougherty v. Swift-Eckrich*, 251 Neb. 333, 557 N.W.2d 31 (1996); *McKay v. Hershey Food Corp.*, 16 Neb. App. 79, 740 N.W.2d 378 (2007).

[31] See 2011 Neb. Laws, L.B. 151, § 11.

2. Authority to Terminate Benefits

[10] Generally, EMC argues that the review panel erred in concluding that its motion to dismiss should be overruled. EMC contends the March 28, 2008, order was final and that it conclusively terminated Hofferber's right to any benefits resulting from his accident. Hofferber, on the other hand, relies upon the familiar proposition that the Workers' Compensation Court, as a statutorily created court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in the statute.[32] Hofferber contends, among other things, that the Act did not afford the trial court authority to dismiss his petition with prejudice.

Whether the trial court had such authority, however, depends to great extent on the underlying basis for terminating Hofferber's benefits. In this case, at issue were Hofferber's alleged failure to comply with discovery requests, his failure to avail himself of provided medical treatment, and his violation of the court's order to refrain from abusive conduct. We examine each in turn.

(a) Discovery Requests

We note, at the outset, that Hofferber's alleged failure to cooperate with EMC's discovery requests did not ultimately play a role in the dismissal of his petition. As noted above, the record suggests that Hofferber eventually did comply with EMC's discovery requests to some extent and the trial court's March 28, 2008, order did not find a discovery violation as a basis for dismissing Hofferber's petition. But examining the court's authority to enforce discovery provides a useful contrast to its enforcement authority in other respects, so it merits a brief examination regardless.

The Workers' Compensation Court's authority to enforce compliance with reasonable discovery is as broad as that of any trial court in Nebraska, which can include dismissing a petition.[33] In the examination of any witness and in requiring

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[32] See, *Burnham v. Pacesetter Corp.*, 280 Neb. 707, 789 N.W.2d 913 (2010); *Dougherty, supra* note 30; § 48-179.

[33] See, *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

the production of books, papers, and other evidence, the compensation court has all the powers of a judge, magistrate, or other officer in the taking of depositions or the examination of witnesses, including the power to enforce orders by commitment for refusal to answer or for the disobedience of any such order.[34] And pursuant to the Workers' Compensation Court's rulemaking authority,[35] it has adopted the Nebraska Rules of Discovery in Civil Cases,[36] which permit the court to sanction noncompliance with a discovery order by, among other things, dismissing the action or rendering a default judgment.[37]

But, as noted above, the trial court did not find noncompliance with discovery in its March 28, 2008, order, nor would the record seem to support such a finding. Instead, the court relied on Hofferber's failure to avail himself of medical treatment and noncompliance with its order to refrain from abusive conduct.

(b) Failure to Cooperate With Medical Treatment

Compared to its power to enforce discovery, the compensation court's authority to deal with a worker's failure to cooperate with medical treatment (or vocational rehabilitation) is constrained. The Act provides that a worker who unreasonably refuses to cooperate with an employer's medical examination may be deprived of benefits during the continuance of such refusal.[38] But that provision is not at issue here. Instead, EMC relies upon § 48-162.01(7), which provides in relevant part that if an injured employee, without reasonable cause,

> refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her . . . the compensation court or judge

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[34] § 48-162(1).

[35] See § 48-163(1).

[36] See Workers' Comp. Ct. R. of Proc. 4 (2009).

[37] Neb. Ct. R. Disc. § 6-337(b)(2)(C).

[38] See, § 48-134; *Hale v. Vickers, Inc.*, 10 Neb. App. 627, 635 N.W.2d 458 (2001).

> thereof may suspend, reduce, or limit the compensation otherwise payable under the . . . Act.

That language, however, does not expressly provide that the court has the authority to permanently terminate an injured employee's right to benefits under the Act. Instead, § 48-162.01(7) should be read in pari materia with the effectively identical language of § 48-120(2)(c), which provides that "the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the . . . Act" when an "injured employee unreasonably refuses or neglects to avail himself or herself of medical or surgical treatment furnished by the employer," so that "the employer is not liable for an aggravation of such injury due to such refusal and neglect." The obvious intent of this provision is to make sure that an employer is not liable for extra benefits when an employee's conduct makes his or her condition worse.[39]

[11] Section 48-162.01(7) reflects the same principle, except it applies when an employee's conduct prevents his or her condition from improving. It is apparent that § 48-162.01(7) is intended to prevent an employee's refusal to improve his or her medical condition or earning capacity from causing an employer to pay more workers' compensation benefits than it should. In other words, the relevant language of §§ 48-120(2)(c) and 48-162.01(7) is intended to be remedial, not punitive—it is intended not to punish a worker for being uncooperative, but simply to make sure that the consequences of a worker's failure to cooperate are not unfairly borne by an employer.

So, for instance, in *Lowe v. Drivers Mgmt., Inc.*,[40] we rejected an employer's argument that an employee's refusal to participate in vocational rehabilitation warranted a reduction in the employee's benefits following a modification proceeding, because the employer had not presented evidence that had the employee participated in vocational rehabilitation, it would have prevented him from becoming permanently totally disabled. We reasoned that the employer had, among other things,

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[39] See *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991).

[40] *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

failed to demonstrate that "had [the employee] participated in the court-ordered job placement services, he would have been employed at the time of the modification hearing."[41] Thus, we concluded that the employer "did not offer evidence upon which a trial judge should 'suspend, reduce, or limit the compensation otherwise payable'" pursuant to § 48-162.01(7).[42] The evidence that the employer *should* have presented was evidence that the employee's condition would have been different had he availed himself of the benefits he had been offered.

[12,13] In other words, given the purpose of the statute, and the general rule that the Act should be construed to accomplish its beneficent purposes,[43] § 48-162.01(7) can only be read to authorize the complete termination of a claimant's right to benefits under the Act if evidence is presented to support a finding that had the employee availed himself or herself of the benefits offered, the employee would no longer be disabled. The statute cannot be used solely to punish or coerce an injured worker. There must be evidence to support a finding that the worker's disability would have been reduced had the worker cooperated with medical treatment or vocational rehabilitation.

When that principle is applied in this case, it is evident that such a finding was not made. No evidence was presented that would have supported such a finding, nor was it even argued that Hofferber's disability would have been reduced had he participated in medical treatment. (While that might seem logical, it is uncertain given the severity of Hofferber's injuries, and a court cannot speculate as to what might have been in the absence of any evidence to that effect.[44]) Instead, it appears that EMC was urging the court to use § 48-162.01(7) coercively, to either compel Hofferber to accept treatment or relieve EMC of the burden of dealing with him. But that purpose is not authorized by § 48-162.01(7).

[14] We note, as did the review panel, that the trial court's order did not explicitly state that Hofferber's petition for

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[41] *Id.* at 741-42, 743 N.W.2d at 91.

[42] *Id.* at 742, 743 N.W.2d at 91.

[43] See *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[44] See *Lowe, supra* note 40.

benefits was to be terminated with prejudice, and like the review panel, we are reluctant to read such a serious consequence into language that does not clearly express it. We presume in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.[45] So, given our conclusion that dismissal with prejudice would have been unwarranted on the arguments and evidence presented, we must assume that the court acted within its authority and did not intend to permanently terminate Hofferber's right to receive benefits. We agree with the review panel that the trial court's order did not dismiss Hofferber's petition with prejudice based on his failure to obtain medical treatment and that even if it had, the dismissal would have been beyond the court's authority.

EMC also relies on another provision of § 48-162.01(7), which states that the compensation court "may also modify a previous finding, order, award, or judgment relating to physical, medical, or vocational rehabilitation services as necessary in order to accomplish the goal of restoring the injured employee to gainful and suitable employment, or as otherwise required in the interest of justice." EMC seizes upon the phrase "as otherwise required in the interest of justice" and contends that the court could and did dismiss Hofferber's petition with prejudice because justice required it.

We find no merit to EMC's reading of the statute. The language relied upon by EMC was enacted in response to this court's decision in *Dougherty v. Swift-Eckrich*,[46] in which we held that the Workers' Compensation Court did not have authority to extend the completion date that its original award had specified for a worker's vocational rehabilitation. We had reasoned that the original award had become final and that the Act did not authorize the court to correct an error in the original award.[47] In response, the Legislature amended § 48-162.01(7) to permit the Workers' Compensation Court to

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[45] *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[46] *Dougherty, supra* note 30.

[47] See *id.*

modify previously awarded physical, medical, or vocational rehabilitation services.[48]

[15] In other words, the provision at issue is simply intended to permit the compensation court to modify rehabilitation plans in response to changed circumstances following the entry of the initial plan.[49] The statute cannot be read, in light of the more specific provisions of §§ 48-120(2)(c) and 48-162.01(7), to apply to situations in which a worker has refused to cooperate with treatment or rehabilitation. And even if it could be read to apply to such situations, it only permits the court to modify previously entered awards—not to preclude benefits from being sought or awarded in the future.[50]

In short, § 48-162.01(7) provides no basis for EMC's argument that Hofferber's "Further Petition" was barred.

(c) Contempt of Court

Finally, we turn to the Workers' Compensation Court's authority to hold a party in contempt. Hofferber relies on our decision in *Burnham v. Pacesetter Corp.*[51] for the proposition that the Workers' Compensation Court does not have authority to hold a party in contempt.

We concede that *Burnham* provides some support for Hofferber's argument. In *Burnham*, the claimant was attempting to collect unpaid benefits and argued that the Workers' Compensation Court had the authority to enforce a judgment it had entered against his employer and insurer to compel them to pay him and hold them in contempt for failing to follow that order. But we agreed with the compensation court that the claimant's remedy was in district court, finding that the compensation court did not have authority to enforce the collection of its award or "to issue contempt citations."[52] We reasoned

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[48] See, 1997 Neb. Laws, L.B. 128, § 4; Business and Labor Committee, 95th Leg., 1st Sess. (Jan. 27, 1997); *McKay, supra* note 30.

[49] See *McKay, supra* note 30.

[50] See *id.*

[51] See *Burnham, supra* note 32.

[52] *Id.* at 711, 789 N.W.2d at 916.

that the court did not have inherent authority to remedy violations of its orders, including finding a party in contempt, and that the Act did not vest the court with the authority to issue contempt orders.[53]

And we were correct on both of those points: the Act does not vest the court with contempt authority, nor does it have inherent contempt authority. But in *Burnham*, we did not discuss Neb. Rev. Stat. § 25-2121 (Reissue 2008), which provides that "[e]very court of record shall have power to punish by fine and imprisonment . . . persons guilty of" contemptuous conduct. And in *Bituminous Casualty Corp. v. Deyle*,[54] we explained at length, in the context of the Uniform Declaratory Judgments Act,[55] that the Workers' Compensation Court is a "'court of record.'"

In particular, we noted that

> "[t]he old definition of a court of record given by Blackstone is 'that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the record of the court and are of such high and supereminent authority that their truth is not to be called in question.'"[56]

We also noted that a "'court of record'" is one whose proceedings are perpetuated in writing, duly recorded by some authorized person. So, we held that "a court which is required by law to keep a permanent and written memorialization of determinations made in proceedings brought to obtain a judicial resolution of a question is a 'court of record.'"[57]

Applying that holding, we noted that the Workers' Compensation Court is charged by statute with keeping a full and true record of its proceedings[58] and that the clerk of the

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[53] See *Burnham, supra* note 32.

[54] *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 549, 451 N.W.2d 910, 918 (1990).

[55] See Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008).

[56] *Deyle, supra* note 54, 234 Neb. at 549, 451 N.W.2d at 918.

[57] *Id.*

[58] See § 48-167.

Workers' Compensation Court is charged with that duty.[59] So, we concluded that "the Nebraska Workers' Compensation Court is a 'court of record' and, as such, has the authority to enter a declaratory judgment pursuant to the Uniform Declaratory Judgments Act."[60]

There is no discernible basis for distinguishing § 25-2121. It is more accurate to read *Burnham* as addressing the Workers' Compensation Court's authority to enter orders in aid of execution, rather than general contempt citations under § 25-2121. But we need not resolve any possible inconsistency in this case, because even if § 25-2121 applies, it would not provide the Workers' Compensation Court with authority to dismiss an action, with or without prejudice, as a sanction for contempt.

As noted above, § 25-2121 permits a court of record to punish contempt "by fine and imprisonment." While a court of general jurisdiction may also sanction a contemnor by dismissing an action, that power is derived from a court's inherent authority to impose sanctions *in addition to* what is listed in § 25-2121.[61] And the Workers' Compensation Court does not have inherent contempt authority. So, even if § 25-2121 empowers the Workers' Compensation Court to punish contempt, the court could do so only by fine or imprisonment—not dismissal of a petition.

To summarize: While the compensation court can dismiss a petition based upon discovery violations, no such violations were found in this case. And the compensation court is not authorized to dismiss a petition as a sanction for a party's conduct either because an injured worker failed to cooperate with treatment or rehabilitation or as an exercise of contempt authority. So, neither of the grounds that actually were found in this case for the March 28, 2008, order dismissing Hofferber's petition would have empowered the compensation court to dismiss his petition with prejudice and bar him from reasserting a right to benefits.

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[59] See § 48-157.

[60] *Deyle, supra* note 54, 234 Neb. at 550, 451 N.W.2d at 918.

[61] See *Tyler v. Heywood*, 258 Neb. 901, 607 N.W.2d 186 (2000).

To the extent the Workers' Compensation Court has authority to foreclose an injured worker's right to benefits under the Act, that authority was not (and could not have been) appropriately exercised in this case. And as we understand EMC's arguments, all of its assignments of error rest on the premise that the court's March 28, 2008, order *could* and *did* dismiss Hofferber's petition with prejudice. We find no merit to that premise, so we correspondingly find no merit to EMC's assignments of error.

V. CONCLUSION

We find no merit to Hofferber's argument on cross-appeal that the trial court lacked jurisdiction to enter the March 28, 2008, order in an improper venue. But we also find no merit to EMC's arguments that the March 28 order effectively dismissed Hofferber's claim for benefits with prejudice. Therefore, we affirm the judgment of the review panel remanding the cause to the trial court for further proceedings.

AFFIRMED.

WRIGHT, J., not participating.

TOM KIPLINGER ET AL., APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA DEPARTMENT OF NATURAL RESOURCES ET AL., APPELLEES AND CROSS-APPELLANTS, AND SCOTT OLSON ET AL., APPELLEES.

803 N.W.2d 28

Filed September 16, 2011. No. S-10-296.

1. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **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.
4. **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.

5. ____. The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
6. **Judgments: Actions: Parties.** In the context of whether a prior judgment has preclusive effect with respect to a subsequent action, privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.
7. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
8. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
9. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
10. **Taxation: Property: Valuation.** Generally, a property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.
11. ____: ____: ____. Property taxes, by their very nature, target the value of that which is being taxed.
12. **Taxation.** An excise tax is imposed upon the performance of an act.
13. ____. A tax imposed upon the doing of an act, including a business or license tax, is an excise tax and not a property tax.
14. **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.
15. ____: ____. 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.
16. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors 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.
17. **Special Legislation: Words and Phrases.** A "closed class" is one that limits the application of the law to a present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development.
18. **Statutes: Special Legislation.** In deciding whether a statute legitimately classifies, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation.
19. **Constitutional Law: Taxation: Public Purpose.** A tax levy does not equal a commutation merely because the taxing district is broadened to reflect the actual benefits to the public. So long as all taxpayers receive the benefit of the taxes

they remit, the taxing district passes constitutional muster without offending the prohibition against commutation.

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

Jeanelle R. Lust and Katherine S. Vogel, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellees Nebraska Department of Natural Resources and its director.

Donald G. Blankenau and Thomas R. Wilmoth, of Blankenau Wilmoth, L.L.P., for appellees Upper Republican Natural Resources District, Middle Republican Natural Resources District, and Lower Republican Natural Resources District.

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

STEPHAN, J.

In *Garey v. Nebraska Dept. of Nat. Resources*,[1] we held that a property tax levy authorized by L.B. 701, enacted in 2007,[2] was a property tax for a state purpose and therefore unconstitutional, in violation of Neb. Const. art. VIII, § 1A. In this case, we are presented with the question of whether an occupation tax authorized by L.B. 701 violates the same constitutional provision or, alternatively, the constitutional prohibitions of special legislation[3] and commutation of taxes.[4] The landowners who commenced this action appeal from an order of the district court for Lancaster County upholding the constitutionality of the occupation tax. We affirm.

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[1] *Garey v. Nebraska Dept. of Nat. Resources*, 277 Neb. 149, 759 N.W.2d 919 (2009).

[2] 2007 Neb. Laws, L.B. 701.

[3] Neb. Const. art. III, § 18.

[4] Neb. Const. art. VIII, § 4.

I. BACKGROUND

1. Republican River Compact

The states of Colorado, Kansas, and Nebraska, and the United States are signatories to the Republican River Compact (Compact), which was authorized by federal legislation in 1943 and ratified by the legislatures of the three states.[5]

As we stated in *Garey*, the primary purposes of the Compact are to

> "provide for the most efficient use of the waters of the Republican River Basin . . . for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the [b]asin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods."[6]

Under the terms of the Compact, each signatory state is allotted a specific number of acre-feet of water per year from designated sources for "beneficial consumptive use."[7] Pursuant to this allocation, Nebraska receives 49 percent of the annual water supply, Kansas receives 40 percent, and Colorado receives the remaining 11 percent.

On December 15, 2002, representatives of the three signatory states entered into a stipulation to settle litigation initiated by Kansas in the U.S. Supreme Court regarding their respective rights under the Compact. Nebraska's Governor and Attorney General sent letters to water users in the Upper, Middle, and Lower Republican Natural Resources Districts (Republican NRD's) advising of the settlement and stating that the Republican NRD's would be developing management plans to address water allocation and usage.

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[5] See, Pub. L. No. 78-60, 57 Stat. 86 (1943); 2A Neb. Rev. Stat. appx. § 1-106 (Reissue 2008). Colo. Rev. Stat. Ann. § 37-67-101 (West 2004); Kan. Stat. Ann. § 82a-518 (1997).

[6] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 151, 759 N.W.2d at 922, quoting § 1-106, art. I.

[7] § 1-106, art. IV.

2. L.B. 701

On May 1, 2007, L.B. 701 was enacted with an emergency clause. According to its introducer, L.B. 701 was "designed to address the water problem in the Republican River Basin" and "[p]rovide a way to guarantee that Nebraska stays in compliance with the . . . Compact . . . with Kansas on an annual basis."[8] As originally enacted and in effect on the dates relevant to this action, L.B. 701 authorized a natural resources district "with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin" to issue "river-flow enhancement bonds."[9] The proceeds of these bonds could be used only for specified purposes, including acquisition of water rights, acquisition or administration and management of canals and other works, vegetation management, and augmentation of riverflows.[10] Riverflow enhancement bonds authorized by L.B. 701 are payable from three funding sources: "(a) funds granted to [an issuing natural resources] district by the state or federal government for one or more qualified projects, (b) the occupation tax authorized by section 2-3226.05, or (c) the levy authorized by section 2-3225."[11] In a press release announcing the enactment of L.B. 701, the Governor's office stated that the legislation would "'help our state make substantial progress in our goal of achieving sustainable water use throughout Nebraska,'" and further, that L.B. 701 "'addresses both our short-term issues in the Republican River Basin and creates a framework for addressing our long-term water challenges.'"[12]

In May and June 2007, the Republican NRD's entered into an "Interlocal Cooperation Agreement" to create the Republican

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[8] Introducer's Statement of Intent, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. (Feb. 28, 2007).

[9] Neb. Rev. Stat. § 2-3226.01(1) (Cum. Supp. 2008).

[10] See Neb. Rev. Stat. § 2-3226.04 (Reissue 2007).

[11] § 2-3226.01(1).

[12] Press Release, Office of the Governor, Governor Heineman Signs Landmark Water Legislation Into Law (May 1, 2007), http://www.governor.nebraska.gov/news/2007_05/01_landmark.html (last visited Sept. 9, 2011).

River Basin Coalition. The purpose of the coalition was to take actions necessary to ensure that the Republican NRD's remained in compliance with the Compact and to "specifically act within the authorities granted by LB 701."

3. *Garey v. Nebraska Dept. of Nat. Resources*

Garey involved a constitutional challenge to the property tax levy authorized by L.B. 701 as codified at Neb. Rev. Stat. § 2-3225(1)(d) (Cum. Supp. 2008). Under that statute, a natural resources district "with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin" was authorized to "annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district." The use of the proceeds of this levy was restricted to repayment of riverflow enhancement bonds and repayment of funds disbursed by the Department of Natural Resources from the Water Contingency Cash Fund created by L.B. 701.[13]

The nine individual plaintiffs in *Garey* were residents and taxpayers of the Republican NRD's. The defendants included the Department of Natural Resources and its acting director, the Republican NRD's, and various other governmental officials and entities responsible for collection of property taxes in the counties situated within the Republican NRD's. The *Garey* plaintiffs challenged the levy authorized under § 2-3225(1)(d) on three grounds. They claimed that it constituted a property tax levy for state purposes, in violation of Neb. Const. art. VIII, § 1A; that it resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4; and that the statute authorizing the levy constituted special legislation, in violation of Neb. Const. art. III, § 18.

The district court rejected the first two claims, but concluded that the statutory authorization of the levy constituted special legislation, in violation of Neb. Const. art. III, § 18. The defendants appealed, contending that the district court

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[13] See § 2-3225(1)(d) and Neb. Rev. Stat. §§ 2-3226.07 and 2-3226.08 (Cum. Supp. 2008).

erred in determining that the statute which authorized the levy constituted special legislation. Plaintiffs cross-appealed, contending that the district court erred in not concluding that the challenged levy was not an unconstitutional property tax for state purposes and a commutation of taxes. We found merit in one issue raised on cross-appeal and concluded on the bases of the legislative history and plain language of L.B. 701 that "the controlling and predominant purpose behind the property tax provision in § 11(1)(d) of L.B. 701 is for the purpose of maintaining compliance with the Compact, which we conclude is a state purpose."[14] Based upon the severability clause included in L.B. 701, we severed the offending provision and affirmed the judgment of the district court, albeit on different reasoning. We specifically noted that our decision had "no bearing on the remaining provisions of L.B. 701" and that because of our resolution of the case, we did not reach or consider "the remaining assignments of error."[15]

4. Current Action

This case presents a constitutional challenge to the occupation tax levied pursuant to L.B. 701 as codified at Neb. Rev. Stat. § 2-3226.05 (Cum. Supp. 2008). The statute provides in pertinent part:

> (1) The district may levy an occupation tax upon the activity of irrigation of agricultural lands within such district on an annual basis, not to exceed ten dollars per irrigated acre, the proceeds of which may be used for the purpose of repaying principal and interest on any bonds or refunding bonds issued pursuant to section 2-3226.01 for one or more projects under section 2-3226.04 or for the repayment of financial assistance received by the district pursuant to section 2-3226.07.
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> (2) Acres classified by the county assessor as irrigated shall be subject to such district's occupation tax unless, on or before July 1, 2007, and on or before March 1 in

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[14] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 160, 759 N.W.2d at 928.

[15] *Id.* at 161, 759 N.W.2d at 928.

each subsequent year, the record owner certifies to the district the nonirrigation status of such acres.

In 2007, the boards of the Republican NRD's voted to levy the occupation tax authorized by § 2-3226.05. This resulted in the taxation of the appellant landowners, who are residents and taxpayers of natural resources districts in the Republican River basin who have ownership interests in agricultural land situated in various counties within the boundaries of the Republican NRD's which is assessed as irrigated. In August 2008, the landowners' representatives made written requests to the boards of the Republican NRD's to cease levying the occupation tax and to refund any taxes paid, on the grounds that the occupation tax was unconstitutional and illegal.

Unsuccessful in this effort, the landowners brought this action for declaratory and injunctive relief seeking to have the occupation tax declared unconstitutional and its levy and collection enjoined. The appellees, defendants below, include the Department of Natural Resources and its director, the Republican NRD's, the state Property Tax Administrator, and a number of county officials responsible for imposing and collecting the occupation tax in the various counties where the tax has been levied.

The landowners alleged in their complaint that the occupation tax was in fact a "'property tax for state purposes'" prohibited by Neb. Const. art. VIII, § 1A; that the occupation tax resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4; and that § 2-3226.05 was special legislation in violation of Neb. Const. art. III, § 18, because it created two closed classes—the Republican NRD's, to which it granted the privilege of levying the occupation tax, and Nebraska irrigators outside the Republican NRD's who were exempted from the occupation tax. They further alleged that the judgment of the district court in *Garey* collaterally estopped the named defendants from relitigating the issue of whether L.B. 701 created an unconstitutional, closed class consisting of the Republican NRD's.

The county officials filed answers generally denying the allegation that the occupation tax was unconstitutional and asserting certain affirmative defenses. Upon stipulation of the

parties, the action was stayed pending our resolution of the appeal in *Garey*. When the stay was lifted, the Department of Natural Resources and its director, the state Property Tax Administrator, and the Republican NRD's filed a motion to dismiss, which was overruled by the district court. Those parties then filed an answer generally denying that the occupation tax was unconstitutional and asserting various affirmative defenses.

The case proceeded to trial on stipulated facts. In addition to the facts summarized above, the parties stipulated to the maximum ground water allocations per acre permitted under the former and current integrated management plans of the Republican NRD's, and various factors which affect the availability of both ground water and surface water for irrigation. The parties further stipulated that the Department of Natural Resources had proposed options for amending the integrated management plans of the Republican NRD's for dry years. Also, the parties stipulated that land within various irrigation districts which is classified as "irrigated" had not received surface water for irrigation during some or all of the preceding 10-year period; that there are lands within each of those irrigation districts which have supplemental ground water wells available during years when surface water was not received; that the Republican River Basin in Nebraska has been determined by the State to be "fully appropriated" and, as such, no new surface water rights will be granted so long as such determination remains in place; and that each of the Republican NRD's named as defendants has placed a moratorium on the drilling of new irrigation wells within its jurisdiction.

The district court entered an order on March 12, 2010, upholding the constitutionality of the occupation tax. The court determined that the occupation tax was not a property tax, but, rather, an excise tax levied "'upon the activity of irrigation,'" and therefore did not violate Neb. Const. art. VIII, § 1A. The court rejected the landowners' claim that the occupation tax resulted in a commutation of taxes in violation of Neb. Const. art. VIII, § 4, after it concluded that any funds raised from the imposition of the occupation tax would benefit the taxpayers of the Republican NRD's rather than divert taxes raised by

the Republican NRD's to the sole use and benefit of another district. Finally, the court rejected the claim that § 2-3226.05 was special legislation in violation of Neb. Const. art. III, § 18, concluding that the landowners had not met their burden of proving that the statute created a closed class. In reaching this conclusion, the court first rejected the defendants' argument that the provision of Neb. Const. art. III, § 18, prohibiting legislation "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever" does not apply to political subdivisions such as natural resources districts.

The landowners appealed from this order, and the Department of Natural Resources, its director, and the Republican NRD's (hereinafter appellees) have cross-appealed. We moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

The landowners assign, renumbered and restated, that the district court erred in (1) concluding that the appellees were not collaterally estopped by the district court's judgment in *Garey* from litigating whether the occupation tax permitted under § 2-3226.05 based on the classification of districts found in § 2-3226.01(1) was unconstitutional special legislation under Neb. Const. art. III, § 18; (2) concluding that the occupation tax permitted under § 2-3226.05 based on the classification of districts found in § 2-3226.01(1) was not unconstitutional special legislation under Neb. Const. art. III, § 18; (3) concluding that the occupation tax permitted under § 2-3226.05 was not a property tax for state purposes in violation of Neb. Const. art. VIII, § 1A; and (4) concluding that the occupation tax permitted under § 2-3226.05 was not a commutation of taxes in violation of Neb. Const. art. VIII, § 4.

In their cross-appeal, the appellees assign, restated, that the district court erred in (1) concluding that the landowners' claims in this action were not barred by the doctrine of res judicata or claim preclusion, because the landowners failed to raise constitutional objections to the occupation tax at the earliest practical opportunity when they challenged the property tax provisions of L.B. 701 in *Garey*, and (2) concluding that the

provision of Neb. Const. art. III, § 18, prohibiting legislation "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever" applies to natural resources districts.

III. STANDARD OF REVIEW

[1,2] The applicability of the doctrines of res judicata and collateral estoppel is a question of law.[16] On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[17]

[3] Whether a statute is constitutional is also a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[18]

IV. ANALYSIS

This case, like *Garey*, is concerned with the language of § 2-3226.01(1) as originally enacted in 2007. The parties note in their briefs that in 2010, the Legislature amended § 2-3226.01(1), effective July 15, 2010,[19] and that this action involves only the validity of occupation taxes levied and collected through that date.

1. Res Judicata

[4,5] We first address the potentially dispositive issue raised by the cross-appeal of whether, under the doctrine of res judicata, this action is barred by the final judgment in *Garey.* 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

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[16] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[17] *Id.*

[18] *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010); *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1.

[19] 2010 Neb. Laws, L.B. 862, § 1.

involved in both actions.[20] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[21]

Garey was a final judgment on the merits by a court of competent jurisdiction. The defendants in that case were essentially the same persons and entities as the defendants in this case. But only three of the plaintiffs in *Garey* are named as plaintiffs in this case. Six of the *Garey* plaintiffs are not parties to this case, and 88 of the landowners in this case were not plaintiffs in *Garey.* While acknowledging that there is not an identity of plaintiffs in the two cases, appellees argue that for purposes of application of the doctrine of res judicata, the landowners who brought this action are in privity with the *Garey* plaintiffs.

[6] In the context of whether a prior judgment has preclusive effect with respect to a subsequent action, privity requires, at a minimum, a substantial identity between the issues in controversy and a showing that the parties in the two actions are really and substantially in interest the same.[22] Appellees argue on cross-appeal that because all the landowners who brought this action were subject to the property tax challenged in *Garey*, they are in privity with the *Garey* plaintiffs. But the landowners argue that because occupation tax applies only to land which is classified as irrigated, the occupation tax is levied against a small subset of the real estate subject to the property tax challenged in *Garey*.

We agree that because of this distinction, the plaintiffs in the two cases are not "really and substantially in interest the same" and are therefore not in privity.[23] The plaintiffs in *Garey* shared the trait of being residents of the Republican NRD's whose land would be subject to the property tax imposed by L.B. 701, while the landowners in this case shared the trait of

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[20] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008); *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[21] *Id.*

[22] See, *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008); *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

[23] See *id.*

being residents of the Republican NRD's whose land is "agricultural land assessed as irrigated" that would be subject to the occupation tax. While the three persons who were plaintiffs in each case would be subject to the occupation tax, it is unknown whether the other plaintiffs in *Garey* owned land that would be subject to the occupation tax. Different interests appear to bind the group of plaintiffs in each case.

We are aware that in *Nolles v. State Com. Reorganization School Dist.*,[24] the Eighth Circuit Court of Appeals concluded that if presented with the issue, that court would "consider the doctrine of virtual representation in determining whether a subsequent party was in privity with a party to an earlier suit" for purposes of res judicata. Virtual representation is "'an equitable theory rather than . . . a crisp rule with sharp corners and clear factual predicates, such that a party's status as a virtual representative of a nonparty must be determined on a case-by-case basis.'"[25] As the Nebraska Court of Appeals subsequently noted in *Haskell v. Madison Cty. Sch. Dist. No. 0001*,[26] this court has never adopted the "expansive definition of privity" embodied in the doctrine of virtual representation, and we decline to do so on the facts and legal arguments presented by this case.

Based upon our de novo review of this question of law, and applying the traditional notion of privity reflected by our jurisprudence, we conclude that at least some of the landowners who brought this action have not been shown to be in privity with the plaintiffs in *Garey.* Because this is so, we need not and indeed cannot consider whether the substantive issues in this case could have been presented in *Garey.* We therefore conclude that the judgment in *Garey* does not bar this action under the doctrine of res judicata.

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[24] *Nolles v. State Com. Reorganization School Dist.*, 524 F.3d 892, 903 (8th Cir. 2008).

[25] *Id.* at 902, quoting *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994). See, also, *Haskell v. Madison Cty. Sch. Dist. No. 0001*, 17 Neb. App. 669, 771 N.W.2d 156 (2009).

[26] *Haskell v. Madison Cty. Sch. Dist. No. 0001, supra* note 25, 17 Neb. App. at 673, 771 N.W.2d at 162.

2. Constitutional Claims

[7-9] We proceed, therefore, to the merits of the constitutional challenges to the occupation tax authorized by L.B. 701, as codified at § 2-3226.05. We are guided by familiar general principles governing the degree of deference which must be given to a legislative enactment alleged to be unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[27] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[28] The unconstitutionality of a statute must be clearly established before it will be declared void.[29]

(a) Is Occupation Tax "a property tax for state purposes" in Violation of Neb. Const. Art. VIII, § 1A?

Neb. Const. art. VIII, § 1A, provides: "The state shall be prohibited from levying a property tax for state purposes." To determine whether the occupation tax at issue here violates this prohibition, we must determine whether it constitutes a "property tax."

[10-13] Generally, a property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.[30] Property taxes, by their very nature, target the value of that which is being taxed.[31] An excise tax, on the other hand, is imposed upon the performance of an act.[32] Thus, a tax imposed upon the doing of an act, including a business or license tax, is an excise tax and not a property

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[27] *Yant v. City of Grand Island, supra* note 18; *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[28] *Id.*

[29] *Yant v. City of Grand Island, supra* note 18. See, also, *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002).

[30] See, *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985); Black's Law Dictionary 1596 (9th ed. 2009).

[31] See *State v. Garza, supra* note 30.

[32] See, *id.*; *State v. Galyen, supra* note 30; Black's Law Dictionary, *supra* note 30 at 646.

tax.[33] Applying these principles, we have held that a tax stamp imposed on the sale of marijuana,[34] a statutory fee per head of cattle sold within the state,[35] a tax per gallon of motor vehicle fuel sold within the state,[36] and a tax imposed as an annual charge upon the right to continue corporate existence[37] were excise taxes, not property taxes.

Applying the same principles, the district court concluded that the occupation tax was an excise tax, because it was unassociated with the value of the property being taxed and was levied "upon the activity of irrigation."[38] But the landowners argue on appeal that the occupation tax is a "property tax in disguise," because the tax is levied against property which is "'classified by the county assessor as irrigated'" without regard to whether the "'activity of irrigation'" is actually occurring.[39] We reject this argument for two principal reasons. First, it does not address the fact that the occupation tax is not dependent upon the value of the land being taxed. Although two tracts, both classified as irrigated, may have vastly different value based upon various other factors, the levy of the occupation tax does not take the differing values into account. Second, the fact that land is "classified . . . as irrigated" would seem to be a reasonable indicator that the "activity of irrigation" is actually occurring on the land. And if that were not the case, the landowner can avoid the occupation tax by certifying to the natural resources district "the nonirrigation status" of the land on a year-by-year basis.[40] We therefore conclude that the occupation tax authorized by L.B. 701 and codified at § 2-3226.05 is not a "property tax for state purposes" prohibited by Neb. Const. art. VIII, § 1A.

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[33] See *State v. Galyen, supra* note 28.

[34] *State v. Garza, supra* note 30.

[35] *State v. Galyen, supra* note 30.

[36] *Burke v. Bass*, 123 Neb. 297, 242 N.W. 606 (1932).

[37] *Licking v. Hays Lumber Co.*, 146 Neb. 240, 19 N.W.2d 148 (1945).

[38] § 2-3226.05(1).

[39] Brief for appellants at 23-24 (emphasis omitted). See, also, § 2-3226.05(1) and (2).

[40] See § 2-3226.05(2).

(b) Does Statute Authorizing Occupation Tax Constitute Special Legislation Prohibited by Neb. Const. Art. III, § 18?

(i) Effect of Garey v. Nebraska Dept. of Nat. Resources

The landowners argue that the district court erred in rejecting their contention that *Garey* resolved the special legislation claim in their favor under principles of collateral estoppel. In *Garey*, the district court held that § 2-3225(1)(d) as it existed was unconstitutional as special legislation, in violation of Neb. Const. art. III, § 18, because it limited the authority to levy an ad valorem property tax for payment of fund riverflow enhancement bonds to "'a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact basin.'"[41] In this appeal, the court found that this constituted a closed class, based upon its finding that it was "'highly improbable'" that the state would ever again enter into an interstate compact of this nature.[42] As noted, this determination was assigned as error in the *Garey* appeal, but we did not reach it because we concluded that the property tax violated Neb. Const. art. VIII, § 1A. In this appeal, the landowners argue that because the statutory authority to levy an occupation tax is similarly limited,[43] the appellees are collaterally estopped from contesting their special legislation argument.

[14,15] 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.[44] Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action

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[41] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 152, 759 N.W.2d at 923.

[42] See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

[43] See §§ 2-3226.01(1) and 2-3226.05.

[44] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011); *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

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. For purposes of collateral estoppel, we conclude that the final judgment in *Garey* was our order denying the appellants' motion for rehearing. As noted, our resolution of *Garey* did not reach the question of whether the district court erred in its analysis of the special legislation claim because we affirmed on other grounds. Accordingly, there was not a final judgment on the merits of that claim, and *Garey* therefore has no preclusive effect on this case under the doctrine of collateral estoppel.

(ii) Legislative Classification of Political Subdivisions

Neb. Const. art. III, § 18, prohibits the Legislature from passing "local or special laws" in 21 enumerated circumstances. The landowners here focus on the last of these, which prohibits a local or special law "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted."

In their cross-appeal, appellees contend that the district court erred in rejecting their claim that this prohibition is inapplicable to legislative classifications of political subdivisions, including natural resources districts. They argue that the principle of ejusdem generis "precludes the Constitution's explicit limitation to corporations, associations, and individuals from being expanded to implicitly include cities, counties, and [natural resources districts]."[45] But as the district court observed, our cases have applied this constitutional provision to legislative classifications involving political subdivisions. In *State, ex rel. Campbell, v. Gering Irrigation District*,[46] this

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[45] Brief for appellees on cross-appeal at 48.

[46] *State, ex rel. Campbell, v. Gering Irrigation District*, 114 Neb. 329, 334, 207 N.W. 525, 527 (1926).

court held that an amendment was special legislation prohibited by Neb. Const. art. III, § 18, because it authorized the board of directors of one irrigation district to impose upon landowners certain burdens and expenses and the amendment was "so framed that it cannot in the future become of general application" and limited "its application as clearly as though it had by name designated the district to which it was to apply." Similarly, in *Axberg v. City of Lincoln*,[47] this court held that a statute violated the special legislation clause because it exempted "one city of the first class . . . from the special obligations and burdens of the firemen's pension law, while others in the same class [were] required to submit to such obligations and burdens." In *State ex rel. Douglas v. Marsh*,[48] we held that a statute which prevented a county from moving from one classification to another for purposes of receiving state aid constituted unconstitutional special legislation by creating a "frozen classification into which no other county may enter even though it may subsequently acquire the very same characteristics which afforded the first county the benefits it receives." And we have held: "The law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable."[49]

While the appellees' argument would have some logical appeal if we were writing on a clean jurisprudential slate, we are not persuaded to depart from long-established precedent applying the constitutional prohibition against special legislation to legislative classifications involving political subdivisions. We therefore proceed to the merits of the landowners' argument that the district court erred in concluding that the statute in question did not violate this constitutional provision.

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[47] *Axberg v. City of Lincoln*, 141 Neb. 55, 64, 2 N.W.2d 613, 617 (1942).

[48] *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 606, 300 N.W.2d 181, 186 (1980).

[49] *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 261, 175 N.W.2d 74, 79 (1970).

(iii) Merits

[16] The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors 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.[50]

The landowners contend that the statutes in question create two closed classes, one "consisting of the [Republican NRD's] to which the legislature has granted the privilege to levy an occupation tax under § 2-3226.05"; and another consisting of "Nebraska property owners . . . possessing irrigated property not located within the [Republican NRD's], who are exempt from such taxation."[51]

We have little difficulty in concluding that the second of these is not a closed class. Real property being alienable, the makeup of any "class" consisting of owners of property located outside the boundaries of the Republican NRD's is subject to constant change.

[17,18] The landowners' principal argument is that by conferring the power to levy an occupation tax on natural resources districts with jurisdiction that "'includes a river subject to an interstate compact among three or more states and that includes one or more irrigation districts within the compact basin,'" the Legislature has created a permanently closed class consisting of the Republican NRD's within the Republican River Basin, the only natural resources districts in the state which currently have within their jurisdiction a river which is subject to an interstate compact.[52] A "closed class" is one that

> "'limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development . . .'" . . . "In deciding whether a statute legitimately classifies, the court must consider the actual probability that

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[50] *Yant v. City of Grand Island, supra* note 18; *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[51] Brief for appellants at 15.

[52] *Id.*

> others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation."[53]

The landowners do not dispute the possibility that the State of Nebraska could enter into future interstate compacts with adjoining states relating to rivers other than the Republican, but based upon the legislative history of L.B. 701, they argue that it is improbable that this would occur.

The introducer's statement of intent states that L.B. 701 was intended to "[p]rovide a way to guarantee that Nebraska stays in compliance with the . . . Compact . . . with Kansas on an annual basis" and that the legislation would be restricted "to the Republican River Basin using appropriate open class language."[54] In introducing amendments to the bill, counsel for the Natural Resources Committee noted that the bonding authority of natural resources districts "is restricted to those districts that are subject to an interstate compact consisting of three or more states, which at this time is the Republic[an] River Basin only."[55] In testimony before the committee, a special counsel to the attorney general stated:

> First, while everyone has talked about [how] this applies to the Republican River[,] and in fact the [Republican NRD's] are the only ones that currently qualify, this is, as written, an open class. All it takes is for the state to negotiate a compact with two other states over water in order for this provision to then apply . . . to have that apply to them. That's potentially the South Platte, the North Platte, the Missouri River are all potential candidates, so it is an open class and satisfies the constitutional prohibition against special legislation. But to paraphrase Senator Wehrbein in a debate over the Southeastern Dairy Compact a couple of years ago, no Legislature in its right

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[53] *City of Ralston v. Balka*, 247 Neb. 773, 781, 530 N.W.2d 594, 601 (1995) (citations omitted).

[54] Introducer's Statement of Intent, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. (Feb. 28, 2007).

[55] Natural Resources Committee Hearing, L.B. 701, 100th Leg., 1st Sess. 4 (Apr. 4, 2007).

> mind would ever enter into a compact again in this day and age. So I think, while it is an open class, I think we're confident it will be a [sic] Republican River that benefits from this.[56]

During the floor debate, the introducer of L.B. 701 noted:

> And right now, this is mostly focused on the [C]ompact and mostly where you have a three-state compact and it's the only three-state compact that we have. And I'm sure there won't be anyone in the future that will want to enter into another three-state compact. I think Senator Christensen outlined it quite well in his opening remarks and when he went on the history of when the compact started. It had to be done back in the early 40s. And the reason for that was so that the federal government would go in and build some of those dams and reservoirs in there. And they had to have the three states on the Republican River agree to it because at that time that river did run through three states, starting in Colorado, Kansas, Nebraska, and back into Kansas again. So that was, I think, part of the focus has been to try and narrow it down so that at the present time this amendment and this LB701 and everything directs most of the bonding authority and the authority that we're giving the [natural resources districts] at the present time and the [Republican NRD's] in the Republican River project and agreement. So I think that's one of the concerns, that we tried to narrow it down so it didn't affect a lot of areas in the state. . . . But for the most part, this was strictly focused and drafted so that we could do some work, try to solve the problems that are going on with the Republican [NRD's], and what we can do to bring Nebraska in compliance with Kansas and on some of our surface water issues going down the Republican River.[57]

While we consider these statements as part of the pre-enactment legislative history of L.B. 701, we agree with the

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[56] *Id.* at 71.

[57] Floor Debate, L.B. 701, Natural Resources Committee, 100th Leg., 1st Sess. 31 (Apr. 10, 2007).

reasoning of the district court that they amount to nothing more than speculation and opinion as to whether future Nebraska Legislatures would authorize the state to enter into additional interstate compacts with respect to rivers. In *Haman v. Marsh*,[58] we concluded that it was "highly improbable" that a class consisting of depositors of industrial loan investment companies insured by the defunct Nebraska Depository Institution Guaranty Corporation would ever be expanded beyond the depositors of three failed institutions, in light of changes in the law which required such institutions to obtain federal deposit insurance or post notice that they had no insurance at all. But because of the complex nature of water policy in general and interstate water management in particular, and the dynamic natural conditions which they address, we cannot in any principled manner declare the improbability that Nebraska and its neighboring states will ever again utilize a legal mechanism for the management of riverflow which they have used in the past. Moreover, we note that the statutory authority conferred by L.B. 701 to issue riverflow enhancement bonds and levy an occupation tax to provide revenue for their payment cannot be fairly seen as a "special favor" bestowed upon an a natural resources district. Rather, it is an instrument to be utilized in maintaining compliance with an interstate compact, which, in *Garey*, we specifically determined to be "a state purpose."[59] For these reasons, we conclude that these statutes do not constitute special legislation prohibited by Neb. Const. art. III, § 18.

(iv) Is L.B. 701 Occupation Tax Commutation of Taxes in Violation of Neb. Const. Art. VII, § 4?

The landowners contend that the occupation tax violates Neb. Const. art. VIII, § 4, which provides in relevant part:

> [T]he Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of

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[58] *Haman v. Marsh, supra* note 42, 237 Neb. at 718, 467 N.W.2d at 849.

[59] *Garey v. Nebraska Dept. of Nat. Resources, supra* note 1, 277 Neb. at 160, 759 N.W.2d at 928.

> taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever[.]

The constitutional proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax.[60] The landowners argue that because the entire state benefits from compliance with the Compact, requiring only irrigators within the Republican NRD's subject to the Compact imposes a disproportionate burden upon them.

[19] While it is true that compliance with an interstate compact is a state obligation, it is likewise true that irrigators within a river basin subject to an interstate compact have an interest that is distinct from other taxpayers, in that they derive a direct benefit from the riverflow. A tax levy does not equal a commutation merely because the taxing district is broadened to reflect the actual benefits to the public. So long as all taxpayers receive the benefit of the taxes they remit, the taxing district passes constitutional muster without offending the prohibition against commutation.[61] The landowners do not contest that they derive a benefit from the water projects financed by the occupation tax, but they argue that their burden is disproportionate to that of taxpayers owning property outside the Republican NRD's.

The record indicates that compliance with the Compact implicates a variety of funding sources including but not limited to the occupation tax. Indeed, § 2-3226.01(1)(a) specifically provides that riverflow enhancement bonds are payable in part from "funds granted to [an issuing natural resources] district by the state or federal government for one or more qualified projects." The record does not disclose the total cost of compliance with the Compact or the percentage of the total to be derived from the occupation tax. We conclude that the landowners did not meet their burden of establishing that the

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[60] *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992).

[61] *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *State, ex rel. City of Omaha v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922).

occupation tax authorized by L.B. 701 violates the constitutional prohibition against commutation.

V. CONCLUSION

For the reasons discussed, we conclude that the landowners have not overcome the presumption of constitutionality with respect to the challenged statutes, and we therefore affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., not participating.

ROBERT MURRAY, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARY K. MURRAY, AND ROBERT MURRAY, INDIVIDUALLY, APPELLEES, V. UNMC PHYSICIANS, FORMERLY KNOWN AS UNIVERSITY MEDICAL ASSOCIATES, A CORPORATION, APPELLANT.

806 N.W.2d 118

Filed September 16, 2011. No. S-10-455.

1. **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.
2. **Motions for New Trial.** The discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.
3. **Negligence: Evidence: Tort-feasors.** While the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed.

Jeffrey A. Nix, Thomas J. Shomaker, and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellant.

Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellees.

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

GERRARD, J.

This case involves a failure to provide medical treatment. The treatment at issue is a very expensive drug that must be administered indefinitely. But it also may cause serious and even deadly symptoms if its administration is interrupted. In this case, the patient's treating physicians, wary of those health risks, decided not to administer the drug until the patient's insurer approved it or another source of payment could be found. But, regrettably, the patient died before either happened. The question presented in this appeal is whether under such circumstances, an expert medical witness is permitted to opine that under the customary standard of care, a physician should consider the health risks to a patient who may be unable to pay for continued treatment. We conclude that such testimony is admissible and, therefore, reverse the district court's order granting a new trial.

BACKGROUND

This is a medical malpractice case in which Robert Murray, individually and as special administrator of the estate of his wife, Mary K. Murray, alleges that the defendants caused the death of Mary by negligently failing to administer Flolan therapy to treat her pulmonary arterial hypertension. The defendants were the Nebraska Medical Center, the Board of Regents of the University of Nebraska, UNMC Physicians (UNMC), and several associated individual employees, although UNMC was the only defendant remaining by the time of trial.

Pulmonary arterial hypertension is a chronic medical condition in which the blood vessels in the lungs constrict, and the resulting pressure on the heart leads to heart failure. Flolan is a vasodilator that relaxes blood vessels and prevents blood clotting. It is administered by a pump, connected to a port and catheter usually inserted above the collarbone. Flolan is very expensive and shortacting, so patients on Flolan treatment need a constant supply of the drug, because if its administration stops, pulmonary blood pressure rebounds and can be life

threatening. And because Flolan is a chronic treatment, patients who begin Flolan need to remain on it, essentially, for the rest of their lives—it must be administered 24 hours a day and costs approximately $100,000 a year. The parties do not seem to disagree that generally, Flolan therapy is the appropriate course of treatment for chronic pulmonary arterial hypertension. Nor do the parties seem to dispute that there are significant and potentially deadly risks associated with interrupting Flolan treatment.[1]

The course of treatment relevant to this case began in late June 2006, as Mary's treating physician, Austin Thompson, M.D., was preparing to treat Mary's pulmonary arterial hypertension with Flolan. On June 29, Mary underwent a heart catheterization to confirm her diagnosis and eligibility for Flolan; in fact, Thompson had already written the Flolan order before the catheterization, pending the results of the catheterization and insurance approval. The catheterization showed pulmonary arterial hypertension, significant heart failure, and reduced blood flow.

On July 4, 2006, Mary reported to the medical center with swollen legs and fluid around her heart. She was given diuretics and hospitalized until July 8. She was discharged and was supposed to begin Flolan after port placement the following week. But on July 10, she reported to the emergency room with a rapid heartbeat and shortness of breath. She began to seize, then her heartbeat stopped, and medical efforts failed to resuscitate her.

At trial, the parties disputed both the cause of Mary's death and whether UNMC had breached the standard of care. Robert presented expert medical testimony that the proximate cause of Mary's death was pulmonary arterial hypertension. UNMC, on the other hand, presented expert medical testimony that myocarditis, an inflammation of the heart usually caused by viral or bacterial infection, was a contributing factor to Mary's death—a conclusion with which Robert's experts disagreed. And Robert presented expert medical testimony that immediate Flolan administration, even a day or two before Mary's death,

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[1] See Physicians' Desk Reference 1181-82 (54th ed. 2000).

would have prevented her death; UNMC, on the other hand, presented expert medical testimony that Flolan would have made no difference.

Specifically, Robert's experts testified that Mary's pulmonary arterial hypertension was acute by June 29, 2006, based on the results of her heart catheterization, and that Flolan can be administered as an emergent treatment for acute pulmonary arterial hypertension. Robert adduced expert medical testimony that UNMC's treatment of Mary fell below the relevant standard of care after June 29, because the medical center should have paid for and provided Flolan by July 4 or 5—in other words, that the standard of care for a patient as sick as Mary was to start Flolan and obtain insurance approval afterward.

UNMC's witnesses, on the other hand, testified that Flolan was not effective as an emergent treatment, because it did not work immediately. And they testified that their practice was to wait for insurance approval before beginning Flolan, because most patients are not able to pay for the drug without insurance and it can be more dangerous if treatment is started and then stopped.

The UNMC attending physician during Mary's July 2006 hospitalization, James Murphy, M.D., explained that because Flolan treatment can last for years and require hundreds of thousands of dollars, it was important to make sure the treatment was sustainable before commencing. Thompson testified to "horror stories" about patients who had been forced to discontinue treatment, and he said it would be "irresponsible" not to have lifelong financial support for the drug, because it could be "devastating" if discontinued. Thompson said that the standard of care required such a process. And another of UNMC's experts, William Johnson, M.D., explained that the standard of care required finding some source of payment for a patient, but that if insurance was unavailable, it was still usually possible to find some other payment on a "compassionate need basis" within the 12-week timeframe that Johnson opined was appropriate for treatment of chronic pulmonary arterial hypertension.

Robert moved for a directed verdict on the standard of care, arguing that as a matter of law, insurance coverage cannot

dictate what doctors do. UNMC replied that according to its experts, a continuing source for treatment is something that doctors should consider in determining how treatment is to be administered. Robert's motion was overruled. Robert also asked that the jury be instructed that if the standard of care requires prescription of a drug, it is not a defense to a claim the standard of care has been violated that the drug would not be provided until approved by an insurance carrier. That instruction was refused.

The jury returned a general verdict for UNMC. But Robert filed a motion for new trial that the district court granted. The court explained:

> The evidence offered by [Robert's] expert on the issue of standard of care indicated that after the confirmation of [pulmonary arterial hypertension] by a right heart catheterization, the standard of care required the commencement of FLOLAN therapy. The evidence offered by [UNMC's] expert was basically the same with one major difference. [UNMC's] expert opined that the standard of care required the commencement of FLOLAN therapy after payment approval by the patient's insurance carrier. On cross-examination, [UNMC's] expert conceded that if no outside funds were available to subsidize the treatment to a patient who needed it, then treatment would be provided on a "humanitarian" basis. The substance of this concession was that the treatment was required by the standard of care regardless of how it was to be paid for.
>
> This Court is of the opinion that, as a matter of law, a medical standard of care cannot be tied to or controlled by an insurance company or the need for payment. The "bean counters" in an insurance office are not physicians. Medicine cannot reach the point where an insurance company determines the medical standard of care for the treatment of a patient. Nor, can we live in a society where the medical care required is not controlled by the physicians treating the patient. The position advanced by [UNMC's] expert tells us that the standard of care is different for those with money than for those without. This is neither moral nor just. It is wrong.

> This Court cannot determine the basis upon which the jury found in favor of [UNMC]. It could have been on the standard of care issue and it could have been on the causation issue. This Court erred in not directing the jury that the standard of care had not been met by [UNMC]. This error taints the entire verdict of the jury and requires a new trial.

UNMC appeals from the order granting Robert's motion for new trial.[2]

ASSIGNMENT OF ERROR

UNMC assigns that the court erred in granting Robert's motion for new trial.

STANDARD OF REVIEW

[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.[3] But the discretion of a trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case; a new trial may be granted only where legal cause exists.[4]

ANALYSIS

It is important, from the outset, to carefully note what issues this appeal does *not* present. This appeal arises against a backdrop of increasing concern about the costs of health care, among health care providers, insurers, government officials, and consumers. That concern has prompted a great deal of discussion, among commentators and in the public arena, about what should be done to control health care costs or to allocate potentially limited resources. As we will explain below, the question presented in this appeal is narrow and does not require us to address the more sweeping issues that are the subject of greater public policy debate. But some discussion of the broader picture will help us clarify what this case is about—or, more precisely, what it is not about.

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[2] See Neb. Rev. Stat. § 25-1315.03 (Reissue 2008).

[3] *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011).

[4] *Kant v. Altayar*, 270 Neb. 501, 704 N.W.2d 537 (2005).

In Nebraska, in cases arising (like this one) under the Nebraska Hospital-Medical Liability Act,[5] the standard of reasonable and ordinary care is defined as "that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances."[6] That standard is consistent with the general common-law rule and is a so-called unitary, or wealth-blind, standard of care.[7] In other words, the standard of care is found in the customary practices prevailing among reasonable and prudent physicians and must not be compromised simply because the patient cannot afford to pay.[8] That standard of care, however, developed in a world of fee-for-service medicine and persisted while health insurance still primarily provided first-dollar unlimited coverage.[9] Today,

> [h]ealth plans and self-insured corporations are placing increasingly stringent controls on health care resources, thereby limiting physicians' freedom to practice medicine as they see fit. Clinical guidelines have proliferated from a wide variety of sources: managed care organizations, medical subspecialty societies, malpractice insurers, entrepreneurial guideline-writing firms, and others. Each guideline purports to tell physicians the best way to practice. Yet often they conflict with each other, with traditional practice patterns, and with patients' expectations.[10]

But "[b]ecause tort law expects physicians to provide the same standard of care regardless of patients' ability to pay,

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[5] See Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010).

[6] § 44-2810.

[7] See E. Haavi Morreim, *Cost Containment and the Standard of Medical Care*, 75 Cal. L. Rev. 1719 (1987).

[8] See *id*. See, also, John A. Siliciano, *Wealth, Equity, and the Unitary Medical Malpractice Standard*, 77 Va. L. Rev. 439 (1991).

[9] See E. Haavi Morreim, *Stratified Scarcity: Redefining the Standard of Care*, 17 L. Med. & Health Care 356 (1989).

[10] E. Haavi Morreim, *Medicine Meets Resource Limits: Restructuring the Legal Standard of Care*, 59 U. Pitt. L. Rev. 1, 5 (1997).

and because this standard sometimes encompasses costly technologies no longer readily available for the poorest citizens," physicians are "caught in a bind between legal expectations and economic realities."[11] Courts have been accused of being "oblivious to the costs of care, essentially requiring physicians to commandeer resources that may belong to other parties, regardless of whether those other parties owe the patient these resources."[12]

It has been suggested that at a fundamental level, a unitary, wealth-blind standard of care cannot be reconciled with the growth of technology and the stratification of available health care. Custom is increasingly difficult to identify in today's medical marketplace, as resource distinctions produce fragmentation and disintegration.[13] It has also been suggested that maintaining a unitary standard of care disadvantages those who may not be able to pay for health care. Physicians remain free, for the most part, to decline to treat those who cannot pay, and "an outright refusal to treat an indigent patient, in contrast to a decision to treat in a manner inconsistent with the unitary malpractice standard, rarely creates the threat of liability."[14] So, it has been argued that rather than assume the burden of paying for a patient's treatment, or the potential liability of providing some but not all possible care, the unitary standard makes it more likely that "providers will now sidestep the entire problem simply by refusing to accept some, or all, of such patients for treatment."[15]

On the other hand, it has been argued that permitting physicians to make medical decisions based on resource scarcity would compromise the fiduciary relationship between patient and physician, creating a conflict of interest because the

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[11] *Id.* at 4-5.

[12] *Id.* at 4.

[13] See James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 Cornell L. Rev. 1382 (1994).

[14] Siliciano, *supra* note 8 at 457.

[15] *Id.*

patient's well-being would no longer be the physician's focus.[16] The question is how the value judgments inherent in the development of the standard of care might evolve in response to a societal interest in controlling health care costs.[17] It has been explained that a physician's initial value judgment, in treating a patient,

> is made in light of conclusions reached about the likely benefits that services would have had for the plaintiff patient. It involves an evaluation as to whether the services should have been provided given their likely benefits, the risk of iatrogenic harm, and the gravity of the problem experienced by the patient. Normally the value judgment does not involve an explicit consideration of the costs of caring for a patient, although economics are implicitly considered. Physicians do not do everything conceivably possible in caring for a patient—they draw what they consider to be reasonable boundary lines. For example, physicians do not order every diagnostic test available for a patient that requests a physical examination, even though doing so might reveal interesting information. Instead, they order tests which are indicated given the age and physical characteristics of the patient.[18]

A physician's initial value judgment, in other words, is constrained by reason but does not include a societal interest in conserving costs or resources, and certainly does not include weighing the physician's own economic interests.[19]

In short, the traditional ethical norms of the medical profession and the legal demands of the customary standard of care impose significant restrictions on a physician's ability to consider the costs of treatment, despite significant and increasing

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[16] See, Maxwell J. Mehlman, *The Patient-Physician Relationship in an Era of Scarce Resources: Is There a Duty to Treat?*, 25 Conn. L. Rev. 349 (1993); Edward B. Hirshfeld, *Should Ethical and Legal Standards for Physicians Be Changed to Accommodate New Models for Rationing Health Care?*, 140 U. Pa. L. Rev. 1809 (1992).

[17] Hirshfeld, *supra* note 16.

[18] *Id.* at 1835.

[19] See *id.* See, also, Morreim, *supra* note 10.

pressure to contain those costs. Whether the legal standard of care should change to alleviate that conflict, and how it might change, has been the subject of considerable discussion. It has been suggested that the customary standard of care could evolve to permit the denial of marginally beneficial treatment—in other words, when high costs would not be justified by minor expected benefits.[20] Others have suggested that the standard of care should evolve to consider two separate components: (1) a skill component, addressing the skill with which diagnoses are made and treatment is rendered, that would not vary by a patient's financial circumstances and (2) a resource component, addressing deliberate decisions about how much treatment to give a patient, that would vary so as to not demand more of physicians than is reasonable.[21] It has been suggested that physicians should be permitted to rebut the presumption of a unitary standard of care when diminution of care arises by economic necessity instead of negligence.[22] And many have suggested that custom should no longer be the benchmark for the standard of care;[23] instead, practice standards or guidelines could be promulgated that would settle issues of resource allocation.[24]

All of the concerns discussed above are serious, and they present difficult questions that courts will be required to confront in the future. But we do not confront them here, because under the unique facts of this case, they are not presented. Contrary to the district court's belief, this is not a case in

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[20] See Mark A. Hall, *Rationing Health Care at the Bedside*, 69 N.Y.U. L. Rev. 693 (1994).

[21] See, Mark A. Hall, *Paying for What You Get and Getting What You Pay For: Legal Responses to Consumer-Driven Health Care*, 69 Law & Contemp. Probs. 159 (2006); Morreim, *supra* note 10; Morreim, *supra* note 9.

[22] Morreim, *supra* note 7.

[23] See Morreim, *supra* note 10.

[24] See, Daniel W. Shuman, *The Standard of Care in Medical Malpractice Claims, Clinical Practice Guidelines, and Managed Care: Towards a Therapeutic Harmony?*, 34 Cal. W. L. Rev. 99 (1997); Hirshfeld, *supra* note 16; Peter H. Schuck, *Malpractice Liability and the Rationing of Care*, 59 Tex. L. Rev. 1421 (1981). But see Siliciano, *supra* note 8.

which insurance company "bean counters" overrode the medical judgment of a patient's physicians[25] or in which those physicians allowed their medical judgment to be subordinated to a patient's ability to pay for treatment.[26] Nor is this a case in which the parties disputed the cost-effectiveness of the treatment at issue.[27] Rather, UNMC's evidence was that its decision to wait to begin Flolan treatment was not economic—it was a medical decision, based on the health consequences to the patient if the treatment is interrupted.

[3] Whether a medical standard of care can appropriately be premised on such a consideration is a matter of first impression in Nebraska, and the parties have not directed us to (nor are we aware of) any other authority speaking directly to that issue. But as a general matter, we have said that while the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[28] And it is for the finder of fact to resolve that issue by determining what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.[29]

Malpractice, as alluded to above, is defined as a health care provider's failure to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his or her profession engaged in a similar practice in his or her or in similar localities.[30] The district court granted a new trial based on its conclusion that UNMC's expert testimony was inconsistent with the standard of care. So the question is whether, as a matter of law, UNMC's

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[25] Compare *Long v. Great West Life & Annuity Ins.*, 957 P.2d 823 (Wyo. 1998).

[26] Compare *Wickline v. State*, 192 Cal. App. 3d 1630, 239 Cal. Rptr. 810 (1986).

[27] Compare *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974).

[28] *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

[29] *Id.*

[30] § 44-2810.

expert opinion testimony was inconsistent with the standard of care as defined above.

The district court determined that it was. But the district court's reasoning was erroneous in three respects. First, the district court understood Johnson's testimony to concede that "if no outside funds were available to subsidize the treatment to a patient who needed it, then treatment would be provided on a 'humanitarian' basis." The "substance of this concession," the court reasoned, "was that the treatment was required by the standard of care regardless of how it was to be paid for."

But that is not exactly what Johnson said. The import of Johnson's testimony, as revealed by the record, was that if a patient was unable to obtain insurance coverage for Flolan, it was Johnson's practice to try to work with the patient to find another way for the patient to get the drug on a "compassionate need" basis. Johnson's testimony in that regard was about his practice, not the general standard of care. Nor did Johnson testify that the drug would be started regardless—he simply said that if insurance was unavailable, he would try to find another way for the patient to obtain the medication. Nothing in Johnson's testimony is contrary to his basic opinion that the standard of care requires a doctor to make sure that a payment source is in place before beginning Flolan treatment, because of the risks associated with interruption of treatment.

Second, the customary standard of care in this case is defined by statute, and it is not a court's place to contradict the Legislature on a matter of public policy.[31] UNMC's witnesses testified that UNMC's treatment of Mary was consistent with the statutory standard of care—in other words, that health care providers in the same community or in similar communities and engaged in the same or similar lines of work would ordinarily defer Flolan treatment until payment for a continuous supply had been secured. We cannot depart from the customary standard of care on policy grounds, even if it is subject to criticism, because the standard of care is defined by statute and public policy is declared by the Legislature.[32] Robert was, of course,

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[31] See *Wilke, supra* note 28.

[32] See *id.*

free to argue and present evidence that UNMC's experts were wrong when they opined about customary practice. But that was a jury question.

Finally, and more fundamentally, the district court's concerns about health care policy, while understandable, are misplaced in a situation in which the patient's ability to continue to pay for treatment is still a *medical* consideration. In other words, even when the standard of care is limited to medical considerations relevant to the welfare of the patient, and not economic considerations relevant to the welfare of the health care provider,[33] the standard of care articulated by UNMC's witnesses in this case was still consistent with a medical standard of care.

This case does not involve a conflict of interest between the physician and patient—there was no evidence, for instance, of a financial incentive for UNMC's physicians to control costs.[34] As explained by UNMC's witnesses, the decision to defer Flolan treatment was not based on its financial effect on UNMC, or subordinating Mary's well-being to the interests of other patients, or even considering Mary's own financial interest. Instead, when making its initial value judgment regarding Mary's treatment,[35] UNMC's physicians were not weighing the risk to Mary's health against the risk to her pocketbook, or UNMC's budget, or even a general social interest in controlling health care costs. UNMC's physicians were weighing the *risk to Mary's health* of delaying treatment against the *risk to Mary's health* of potentially interrupted treatment. Stated another way, this was not a case in which a physician refused to provide beneficial care—it was a case in which the physicians determined that the care *would not be beneficial* if it was later interrupted. In fact, it could be deadly.

As explained by Murphy, Thompson, and Johnson, the reason for waiting to begin Flolan until after insurance approval

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[33] See, e.g., *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605 (1984); *Wilmington Gen. Hospital v. Manlove*, 54 Del. 15, 174 A.2d 135 (1961). Cf. *Creighton-Omaha Regional Health Care Corp. v. Douglas County*, 202 Neb. 686, 277 N.W.2d 64 (1979).

[34] Compare *Shea v. Esensten*, 622 N.W.2d 130 (Minn. App. 2001).

[35] See Hirshfeld, *supra* note 16.

had been obtained was out of concern for the health of the patient. That was not meaningfully different from any number of other circumstances in which a health care provider might have to base a treatment decision upon the individual circumstances of a patient. For instance, a physician with concerns about a particular patient's ability to follow instructions, or report for appropriate followup care, might treat the patient's condition differently in the first instance. And a health care provider who is told that a patient cannot afford a particular treatment may recommend a less expensive but still effective treatment, reasoning that a treatment that is actually used is better than one that is not. These are difficult decisions, and there may be room to disagree, but it is hard to say they are unreasonable as a matter of law, or that an expert cannot testify that such considerations are consistent with the customary standard of care.

And as noted above, Robert's witnesses were free to disagree with UNMC's witnesses; Robert could (and did) argue that the standard of care required more than UNMC's witnesses said it did. And the evidence might have supported the conclusion that given Mary's deteriorating condition, there was little risk in beginning Flolan even without a payment source in place. (Although we note, for the sake of completeness, that Johnson also testified that Mary's weakening condition militated against beginning Flolan on an emergent basis, because its side effects could have been deadly.)

In other words, the jury *could* have found that in this case, given the facts and testimony, the standard of care required Flolan to be administered immediately. But it was a question for the jury, and there was also competent evidence supporting a conclusion that the standard of care had not been breached. The court erred in concluding that it should have directed a verdict on the standard of care. And for that reason, the court abused its discretion in granting Robert's motion for new trial. UNMC's assignment of error has merit.

UNMC's evidence and opinion testimony reflect difficult medical decisions—but still *medical* decisions. Therefore, the scope of our holding is limited. We need not and do not decide whether the standard of care can or should incorporate

considerations such as cost control or allocation of limited resources. Although the decision (or lack thereof) of a third-party payor contributed to the circumstances of this case, UNMC's decisions were still (according to its evidence) premised entirely upon the medical well-being of its patient. In a perfect world, difficult medical decisions like the one at issue in this case would be unnecessary. But we do not live in a perfect world, and we cannot say as a matter of law that UNMC's decisions in this case violated the standard of care.

CONCLUSION

For the foregoing reasons, the district court's order granting Robert's motion for new trial is reversed.

REVERSED.

WRIGHT and STEPHAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ARMON M. DIXON, APPELLANT.
802 N.W.2d 866

Filed September 16, 2011. No. S-10-476.

1. **Venue: Appeal and Error.** An appellate court reviews the denial of a motion to change venue for abuse of discretion.
2. **Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.
3. **Venue: Proof.** Unless a defendant claims that the pretrial publicity has been so pervasive and prejudicial that a court should presume the partiality of prospective jurors, a change in venue is evaluated under the following factors: These factors are (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.
4. **Venue: Due Process.** Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.
5. **Venue: Due Process: Proof.** To warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity. A defendant must show that publicity has made it impossible to secure a fair and impartial jury.

6. **Venue.** Press coverage that is factual cannot serve as the basis for a change of venue.
7. **Trial: Juries: Appeal and Error.** The decision to retain or reject a venireperson as a juror rests in the trial court's discretion, and an appellate court will reverse only when it is clearly wrong.
8. **Jurors: Appeal and Error.** Even if the trial court erroneously overrules a challenge for cause, an appellate court will not reverse the court's decision unless the defendant can show that an objectionable juror sat on the jury after the defendant exhausted his or her peremptory challenges.
9. **Trial: Jurors: Appeal and Error.** Under Neb. Rev. Stat. § 29-2006 (Reissue 2008), dismissal of a prospective juror is mandatory only if the prospective juror has formed an opinion about the defendant's guilt or innocence based on conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify.
10. **Juror Qualifications.** Nebraska law does not require that a juror be totally ignorant of the facts and issues involved in the case.
11. ____. A dismissal is not required if a prospective juror formed an opinion based on newspaper statements, communications, comments or reports, or upon rumor or hearsay if the prospective juror states under oath that he can render an impartial verdict and the court is satisfied of such.
12. **Trial: Jurors: Appeal and Error.** An appellate court gives deference to a trial court's determination of whether a prospective juror can apply the laws impartially.
13. **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.
14. **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.
15. **Motions for Continuance: Appeal and Error.** A court does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial.
16. ____: ____. Neb. Rev. Stat. § 25-1148 (Reissue 2008) requires motions for a continuance to be in writing. But a failure to put such a motion in writing is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.
17. **Criminal Law: Motions for Continuance.** When deciding whether to grant a continuance in a criminal case, courts must take into consideration the public interest in prompt disposition of the case.
18. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
19. **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 that 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.

20. **Motions for Mistrial.** Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.
21. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
22. **Motions for Mistrial.** A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice.
23. **Motions to Dismiss: Evidence: Waiver: Appeal and Error.** When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss. But the defendant may challenge the sufficiency of the evidence.
24. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence, it does not matter 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 finders of fact. The relevant question 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.
25. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
26. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
27. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
28. **Prior Convictions: Records: Proof.** A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
29. ____: ____: ____. In reviewing criminal enhancement proceedings, a judicial record may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.
30. **Prior Convictions: Records: Names.** An authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the

absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.

31. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
32. **Statutes: Legislature: Intent.** A court's objective in interpreting a statute is to determine and give effect to the legislative intent of the enactment.
33. **Statutes: Appeal and Error.** When construing a statute, an appellate court looks to the statute's purpose and gives the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.
34. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
35. **Aiding and Abetting.** Aiding and abetting is not a separate crime; instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.
36. **Sentences: Appeal and Error.** Sentences imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion.
37. **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, (6) motivation for the offense, (7) the nature of the offense, (8) and the violence involved in the commission of the crime.
38. ____. 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 Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

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

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

CONNOLLY, J.

A jury found Armon M. Dixon guilty of one count of first degree sexual assault and one count of robbery. The court determined that Dixon was a habitual offender as to both counts and sentenced Dixon to consecutive terms of 35 to 60 years in prison. Dixon asserts several errors, none of which have any merit. We affirm.

I. BACKGROUND

1. The Crime

In March 2009, the victim, S.I., arrived for work at a convenience store in Lincoln, Nebraska. S.I. worked alone during the morning shift, which began at 5 a.m. As she approached the front door, someone came up behind her, grabbed her left arm, pulled it behind her back, and then pinned her against a "propane cage." The assailant whispered to S.I., "[I have] been watching [you] for a while now, bitch." He asked S.I. if she had any money. When she responded that she did not, he said that he "was going to get something else instead."

The assailant then forced her to the back of the building. He told S.I. to remove her belt, which she did. He then tied S.I.'s hands behind her back with her belt and told her to sit down. The assailant then began to take off one of S.I.'s boots. Realizing what was happening, S.I. began to scream and attempted to kick the assailant. The assailant then grabbed S.I. by the throat and choked her. As he choked her, he asked her if she was going to stop screaming. She nodded yes. He then removed S.I.'s other boot and "yanked" her pants off.

S.I. began to scream again. The assailant then punched S.I. at least three times in the face, knocking her glasses off and bloodying her lip. Then he sexually assaulted her.

The assailant then asked for her driver's license. He retrieved it from her purse and, after confirming with her that it reflected her current address, told S.I. that if she did not do as he told her to, he was going to "either fuck with [her] or [her] family."

The assailant then led her to the front of the building. He used her keys to gain access to the building. Once inside, he had S.I. lead him to the safe and provide him with the code and keys to open it. He then put cash and coins into grocery bags and ordered S.I. to lie on her stomach. After tying S.I.'s feet to her hands behind her back, he left.

S.I. eventually managed to free herself and called the 911 emergency dispatch service. The police arrived shortly thereafter with a canine unit. The dog picked up a scent at the entrance to the convenience store and continued to track it. Following the dog's track, the officers found two condoms, one

inside the other, and some coins. DNA testing was unable to eliminate S.I. as a possible source of the DNA on the outside of the condom.

Later, the investigation focused on Dixon. An officer asked Dixon to supply a DNA sample, and Dixon did so by swabbing his mouth. Later testing was unable to eliminate Dixon as a source of the DNA that was inside the condom. The record showed the most conservative odds of a person other than Dixon sharing the genetic profile found inside the condom are 1 in 3.17 quintillion.

2. Dixon's Alibi Defense

At trial, Dixon presented an alibi defense; he claimed that he had been drinking with friends all night and thus could not have committed the crimes. Dixon's evidence showed that he had gone to bars in Omaha, Nebraska, that night with two friends, Roman Alexis Zuniga (Alexis) and Jonathan Zuniga (Jonathan). On the way back, outside of Wahoo, Nebraska, Alexis was arrested for driving under the influence. This occurred at about 2:20 a.m. The arresting officer left Dixon and Jonathan at the scene with the vehicle. After about 5 to 10 minutes, the two decided to drive back to Lincoln. According to Dixon, he drove Alexis' car to Alexis' father's house. Alexis' father testified that he then dropped off Dixon and Jonathan around North First Street and Cornhusker Highway before heading to Wahoo for Alexis.

Dixon testified that they then went to the home of one of Jonathan's friends and stayed there for "[m]ore than an hour and a half" before he was taken home. While riding home, Dixon claims that his alarm on his telephone went off, which he claims he usually set for 5:25 a.m. Dixon's sister, with whom he was staying at the time, testified that she awoke to hear him entering her apartment at about 6 a.m.

The jury found Dixon guilty of both charges. At the habitual criminal enhancement hearing, Dixon objected to the introduction of records of his prior convictions. He claimed that there was not sufficient evidence to prove that he was the same person referred to in the records of the prior convictions. He also argued that aiding and abetting was not a crime for

which later sentences could be enhanced under Neb. Rev. Stat. § 29-2221(1)(a) (Reissue 2008). The court overruled these objections and found Dixon to be a habitual criminal. The court sentenced him to consecutive terms of 35 to 60 years' imprisonment.

II. ASSIGNMENTS OF ERROR

Dixon assigns, restated and renumbered, that the district court erred as follows:

(1) in failing to sustain his motion for a change of venue;

(2) in failing to sustain his motion to strike jurors for cause;

(3) in failing to sustain his motion for a continuance when he could not produce a witness;

(4) in failing to sustain his motions for mistrial;

(5) in failing to sustain his motion for a directed verdict;

(6) in finding that the State had adequately proved his prior convictions so that he could be sentenced as a habitual criminal;

(7) in concluding that aiding and abetting first degree assault can serve as a predicate offense under § 29-2221(1)(a); and

(8) in imposing excessive sentences.

III. ANALYSIS

1. Motion for a Change of Venue

[1] Dixon contends that the court erred in overruling his motion to change venue. He claims that the pretrial publicity made it impossible for him to receive a fair trial in Lancaster County. We review the denial of a motion to change venue for abuse of discretion.[1]

[2,3] Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), we have held that a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.[2] Unless a defendant claims that the pretrial publicity has been so pervasive and prejudicial that a court should presume the partiality of prospective jurors—

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[1] See *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).

[2] *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

which Dixon does not—a change of venue is evaluated under the following factors[3]: These factors are (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.[4]

[4,5] As we know, mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.[5] To warrant a change of venue, a defendant must show the existence of pervasive misleading pretrial publicity.[6] So, to secure a change of venue based on pretrial publicity, a defendant must show that the publicity has made it impossible to secure a fair and impartial jury.[7]

Dixon has presented exhibits containing many news accounts of the crimes and his arrest. These articles discuss all stages of the investigation and the lead-up to Dixon's trial. Some of the articles were written before Dixon emerged as a suspect, and so do not mention him by name, while others were written after Dixon had become a suspect.

The articles that do not specifically mention Dixon discuss efforts to find the suspect. Several describe reward funds that had been set up by area businesses, while another mentions that police had stepped up patrols and were seeking tips. Other articles recount requests by police to not have women open or close businesses alone.

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[3] See *Galindo, supra* note 1.

[4] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007); *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

[5] *Rodriguez, supra* note 4; *Strohl, supra* note 4.

[6] *Rodriguez, supra* note 4; *Strohl, supra* note 4; *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

[7] *Phelps, supra* note 6; *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987).

Generally, the articles that mention Dixon recount the allegations of the assault of S.I. as well as other assaults in which Dixon was a suspect. The articles also mention that while being questioned, Dixon lunged at an officer and tried to wrestle the officer's gun from him. One article recounts the prison sentences Dixon faced if convicted of the charges. Some articles discuss some of the evidence that the police had, such as DNA evidence or a witness identification.

Other articles discuss the pretrial proceedings. For example, one article describes how Dixon successfully moved to sever the charges relating to S.I. from charges relating to another victim. Another article discusses an officer's interrogation of Dixon that the district court suppressed because it had concluded that the interrogation had violated Dixon's *Miranda* rights.

Finally, the exhibits also contain articles that reflect more personally on Dixon. One recounts statements from Dixon's mother. His mother commented that she believed her son was innocent and that he had promised to change after he was released on parole. Another discusses Dixon's prior convictions.

[6] The above-mentioned articles are generally factual and none of them are misleading. Press coverage that is factual cannot serve as the basis for a change of venue.[8] The most important consideration "is whether the media coverage [is] factual, as distinguished from 'invidious or inflammatory.'"[9] Because the coverage was factual and not inflammatory, the court did not abuse its discretion in overruling Dixon's motion for a change of venue.

2. Motion to Strike Jurors

Dixon argues that the court erred in failing to strike nine jurors for cause. He claims that these jurors were exposed to publicity surrounding the trial. After peremptory challenges, only two of these jurors ultimately sat on the jury that decided the case.

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[8] E.g., *Galindo, supra* note 1; *Strohl, supra* note 4.

[9] *Galindo, supra* note 1, 278 Neb. at 638, 774 N.W.2d at 225.

[7,8] The decision to retain or reject a venireperson as a juror rests in the trial court's discretion, and we will reverse only when it is clearly wrong.[10] And even if the trial court erroneously overrules a challenge for cause, we will not reverse the court's decision unless the defendant can show that an objectionable juror sat on the jury after the defendant exhausted his or her peremptory challenges.[11] So, we consider only jurors Nos. 10 and 13, the only two challenged venirepersons to sit on the jury.

[9-12] Neb. Rev. Stat. § 29-2006 (Reissue 2008) establishes when jurors in a criminal trial may be challenged for cause. Under this statute, dismissal is mandatory only if the prospective juror has formed an opinion about the defendant's guilt or innocence based on "'conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify.'"[12] But the law does not require that a juror be totally ignorant of the facts and issues involved in the case.[13] A dismissal is not required if a prospective juror formed an opinion based on newspaper statements, communications, comments or reports, or upon rumor or hearsay if the prospective juror states under oath that he can render an impartial verdict and the court is satisfied of such.[14] We give deference to a trial court's determination of whether a prospective juror can apply the laws impartially.[15]

Juror No. 10 mentioned that he had previously heard something about the case on television several months earlier. He recalled that a robbery and an assault had occurred but did not recall anything more specific than that. He mentioned the name "Armon Dixon" was "vaguely familiar." He stated that he could disregard anything he might have heard and decide the case solely on the evidence introduced at trial.

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[10] *Galindo, supra* note 1.

[11] *Id.*

[12] *State v. Hessler*, 274 Neb. 478, 496, 741 N.W.2d 406, 421 (2007). Accord, *Galindo, supra* note 1; *Rodriguez, supra* note 4.

[13] *Galindo, supra* note 1; *Strohl, supra* note 4.

[14] *Hessler, supra* note 12.

[15] See *Galindo, supra* note 1.

Juror No. 13 had also heard about the case through television reports, which he said included images of Dixon. He also stated that he had heard that Dixon had been accused of "rape and burglary" and that there was "maybe DNA evidence." He stated that he had not yet formed an opinion and that he could disregard what he saw and decide the case solely on the evidence presented at trial.

Both jurors were exposed to only news accounts of the incidents, and neither was exposed before the trial to any testimony of the witnesses. Further, both jurors stated that they could render impartial verdicts based only on the evidence adduced at trial and the law as explained by the court. Nothing in the record refutes their statements. And the trial judge was in the best position to assess their attitudes and demeanors. The court was not clearly wrong in overruling Dixon's motion to strike these jurors.

3. Motion for a Continuance

Dixon argues that the court erred in overruling his motion for a continuance. To bolster his alibi defense, Dixon wanted to present the testimony of Jonathan, a friend that he was drinking with the night of the incident. Dixon claims that Jonathan's testimony would support his alibi. Jonathan, however, was the target of an unrelated arrest warrant and was thus making himself difficult to find.

[13-15] 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.[16] 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 the evidence.[17] A court, however, does not abuse its discretion in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice because of that denial.[18]

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

[17] *Id.*

[18] *Id.*

[16] Neb. Rev. Stat. § 25-1148 (Reissue 2008) requires motions for a continuance to be in writing; Dixon never submitted a written motion. Nevertheless, we have previously stated that the failure to put such a motion in writing "'is but a factor to be considered in determining whether a trial court abused its discretion in denying a continuance.'"[19]

We conclude that the court did not abuse its discretion in denying Dixon a continuance. Dixon did not submit a written motion for a continuance even though he knew early on that securing Jonathan's presence would be difficult. Dixon's counsel mentioned the difficulty before voir dire of the jurors. But the motion was never put into writing. This weighs against Dixon.

[17] But more important, Dixon could not say when—if ever—he could serve Jonathan with a subpoena. To grant a continuance in such a circumstance would put the trial in limbo. When deciding whether to grant a continuance in a criminal case, a court must take into consideration "the public interest in prompt disposition of the case."[20] A potentially never-ending continuance would undermine such an interest.[21] The court did not abuse its discretion in denying the motion for a continuance.

4. Motions for Mistrial

[18] Dixon argues that the court erred in denying his motions for mistrial. Dixon twice moved for a mistrial—one motion stemmed from an allegation that the State violated a motion in limine, while the other related to an incident when Dixon became sick outside the presence of the jury. Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion.[22]

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[19] *State v. Davlin*, 272 Neb. 139, 151, 719 N.W.2d 243, 256 (2006), quoting *State v. Santos*, 238 Neb. 25, 468 N.W.2d 613 (1991).

[20] Neb. Rev. Stat. § 29-1206 (Reissue 2008).

[21] See, *Davlin, supra* note 19; *State v. Newton*, 193 Neb. 129, 225 N.W.2d 562 (1975).

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

(a) Questioning by the State

Before trial, Dixon moved in limine to bar any testimony indicating that Dixon could have tested the condoms for DNA but chose not to. The court granted this motion. While questioning the technician who had tested the material, the State asked "was there enough DNA in those exhibits . . . for other testing to be done on it?" Dixon objected as to relevancy and also moved for a mistrial. The court overruled both the objection and the motion. The court, however, instructed the State to rephrase the question. The State then asked the expert if, "in [her] testing of [the] samples[, she] consume[d] all the material." Dixon did not request the court to admonish the jury because he did not want to "highlight[] the issue for the jury."[23]

[19-21] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that 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.[24] Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.[25] And before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[26] In brief, a mistrial is granted when "a fundamental failure prevents a fair trial."[27]

We conclude that the trial court did not abuse its discretion in overruling the motion for mistrial. As mentioned, a mistrial may be granted when there is an event whose damaging effect cannot be removed by an admonition or instruction to the jury. But Dixon did not ask for such an admonition because

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[23] Brief for appellant at 36.

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

[25] See, *id.*; *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[26] *Robinson, supra* note 22.

[27] *Beeder, supra* note 25, 270 Neb. at 803, 707 N.W.2d at 795.

he did not want to highlight the issue for the jury. It appears he thought the jury likely did not notice the question or would not assign any importance to it. This undercuts his claim that the error was so prejudicial that his trial was unfair. Stating the obvious—if the error was so minor that Dixon would gamble on a jury's not noticing it—it is doubtful that it could have resulted in a substantial miscarriage of justice. The trial court did not abuse its discretion in refusing to grant a mistrial.

(b) Dixon's Medical Incident

Dixon also moved for a mistrial after he became sick while being brought into court. Dixon apparently fell to the ground and began vomiting. This incident, however, occurred outside the jury's presence. Dixon does not claim that the jurors saw the incident as they were in the jury room when it occurred. Grasping at a slender reed, he suggests that the jurors may have heard the commotion from their room.

After the incident, the court told the jurors that an issue had arisen that required the court's attention. It released the jurors and asked that they return at 1:30 p.m. the following day. Although there were news accounts of the incident, the court had repeated its admonishment that the jurors avoid news accounts of the trial.

[22] We conclude that the court did not err in refusing to grant a mistrial because of Dixon's medical incident. The record fails to show that the jury ever knew it had happened. A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice.[28] Dixon has failed to show that the incident prejudiced him.

5. Motion for a Directed Verdict

Dixon argues that the court erred in failing to grant his motion to dismiss. He argues that the State did not prove the elements of the crime beyond a reasonable doubt.

[23] When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the

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[28] *Robinson, supra* note 22.

appellate right to challenge the trial court's overruling of the motion to dismiss.[29] But the defendant may challenge the sufficiency of the evidence.[30] So we analyze Dixon's assignment of error as a challenge to the sufficiency of the evidence.

[24,25] When reviewing a criminal conviction for sufficiency of the evidence, it does not matter whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finders of fact.[31] The relevant question 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] Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[33]

The information charged Dixon with first degree sexual assault[34] and first degree robbery.[35] The State can prove first degree sexual assault in one of three ways. Here, the State proved first degree sexual assault when it showed beyond a reasonable doubt that the defendant subjected another person to sexual penetration without that person's consent.

Viewing the evidence in the light most favorable to the prosecution, we determine the record reflects sufficient evidence to sustain the conviction beyond a reasonable doubt.

- S.I. testified that the assailant sexually penetrated her.
- S.I. did not consent; she kicked and screamed and, in response, was choked and punched in the face.[36]

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[29] See, *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[30] *Id.*

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

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

[33] *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006).

[34] Neb. Rev. Stat. § 28-319 (Reissue 2008).

[35] Neb. Rev. Stat. § 28-324 (Reissue 2008).

[36] See Neb. Rev. Stat. § 28-318(8)(a)(iii) (Reissue 2008).

- Experts were unable to exclude S.I. and Dixon as contributors of the DNA found on the condom. The odds of its being someone other than Dixon were at least 1 in 3.17 quintillion.

Here, a rational trier of fact could find that the State proved that Dixon committed sexual assault beyond a reasonable doubt.

To prove robbery, the State must show beyond a reasonable doubt that the defendant, with the intent to steal, forcibly and by violence, or by putting in fear, took any money or personal property of any value whatever from another person. "To steal" is commonly understood to mean taking without right or leave with intent to keep wrongfully.[37] And the property need not be taken from the actual person, it is sufficient if the property is taken from an individual's protection or control.[38]

The State has presented evidence that would allow a rational trier of fact to find the material elements of the crime beyond a reasonable doubt.

- The DNA evidence allowed the jury to conclude that Dixon had assaulted S.I. And S.I.'s testimony established that the same person who assaulted her forced her into the store and to help open the safe.
- S.I.'s testimony also established that Dixon had threatened her and her family.
- The evidence showed that Dixon took money from the safe in the convenience store, where S.I. was an employee.

The State has presented evidence to allow the jury to find beyond a reasonable doubt that Dixon committed robbery.

But Dixon makes three arguments as to why a rational jury could not have found him guilty. First, he argues that the State did not challenge Dixon's alibi defense. Although the State did not explicitly argue that Dixon had not been with his friends at all that night, the State presented DNA evidence that tied Dixon to the assault of S.I. Obviously, if this DNA evidence was believed, this put Dixon at the convenience store; the jurors could not also believe Dixon's alibi.

Second, Dixon argues that he cannot be the man described in S.I.'s testimony. He argues that the man that S.I. described is

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[37] *Aldaco, supra* note 33.

[38] See *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989).

taller than Dixon. And he points out that S.I. testified that she did not smell alcohol on her assailant; Dixon claimed that he was drinking all night.

Third, Dixon contends that the State's DNA evidence was unreliable. First, he claims that the officer who collected his sample touched the swabs without gloves—although the officer denied this. Dixon also claims the DNA evidence is unreliable because the technician had a difficult time generating a complete profile from the sample.

Regarding these last two arguments, what Dixon asks us to do is to reweigh the evidence presented to the jury. But we do not reweigh evidence, resolve conflicts in the evidence, or assess the credibility of witnesses; that is the province of the jury.[39] Viewing the evidence most favorably to the State, we determine the evidence is sufficient to support the convictions beyond a reasonable doubt.

6. Proof of Prior Convictions

Dixon argues that under Neb. Rev. Stat. § 29-2222 (Reissue 2008), the court erred in concluding that the State had sufficiently proved his prior convictions. Section 29-2222 provides:

> At the hearing of any person charged with being a habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment.

[26,27] In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.[40] In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed

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[39] See *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

[40] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.[41]

[28,29] A prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.[42] In reviewing criminal enhancement proceedings, a judicial record may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.[43]

The State introduced four exhibits showing certified felony convictions for an "Armon Dixon." Dixon argues that the State has failed to prove that he is the "Armon Dixon" convicted in these cases. Dixon does not argue that the defendant in the above exhibits was not represented by counsel during the earlier convictions. Nor does he argue that the defendant was not committed to prison for at least 1 year for these earlier crimes. His sole argument is that the State did not sufficiently prove that he was the person convicted in the four exhibits. We note that Dixon is referred to in court records before this court as "Armon M. Dixon." And, as mentioned, the record contains newspaper articles referring to the criminal investigation as well as the lead-up to Dixon's trial. A newspaper article dated May 16, 2009, states that Dixon is 29 years old. A July 2, 2009, article refers to Dixon as being 30 years old. His birth date then would fall either in late May or sometime in June. Further, it shows that Dixon was born in 1979.

The first conviction is a conviction from Illinois for delivery of a controlled substance. The "Armon Dixon" convicted in that case had a birth date of June 2, 1979. The second conviction is

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[41] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

[42] *Alford, supra* note 40.

[43] See *Epp, supra* note 41.

a conviction from Minnesota. It is another conviction for selling drugs. The "Armon Monet Dixon" convicted in that case had a birth date of June 2, 1979. The third conviction is from Lancaster County, Nebraska. Those records show convictions for possession of a controlled substance and theft by receiving stolen property. The "Armon M. Dixon" in that conviction was born on June 2, 1979. The final conviction introduced by the State is again from Lancaster County, and the defendant was "Armon Dixon." It is a conviction for aiding and abetting first degree assault. It does not include a birth date.

[30] Dixon's argument mirrors the one made by the appellant in *State v. Thomas*.[44] In *Thomas*, the defendant did not deny that he was the person referred to in the prior documents; instead, the defendant argued that the State failed to meet its burden. We stated that

> an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto.[45]

Likewise, Dixon never denied that he was the "Armon Dixon" in the earlier cases. Nor did he present any evidence showing that he was not that person. He simply argued that the State had not met its burden. We disagree.

The names in all four of the prior convictions are "Armon Dixon" or "Armon M. Dixon" and thus match Dixon's name. Because Dixon has not denied that he is the person referred to in these earlier convictions and has not presented any evidence contradicting the State's position, under *Thomas*, this is sufficient. Moreover, the birth dates reflected on three of the prior convictions are consistent with Dixon's age. The State has proved the prior convictions by a preponderance of the evidence.

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[44] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). See, also, *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989).

[45] *Thomas, supra* note 44, 268 Neb. at 590, 685 N.W.2d at 86.

7. Aiding and Abetting Under § 29-2221(1)(a)

[31] Dixon next argues that a conviction for aiding and abetting first degree assault cannot serve as a predicate offense under § 29-2221(1)(a). This assignment of error presents a question of statutory interpretation. Statutory interpretation is a question of law that we resolve independently of the trial court.[46]

Section 29-2221(1)(a) provides that if the defendant is convicted of one of several enumerated crimes and one of the defendant's two previous felony convictions is for one of those crimes, the minimum sentence is 25 years' imprisonment, as opposed to the 10-year minimum under § 29-2221(1). The offenses listed in § 29-2221(1)(a) are first degree murder,[47] second degree murder,[48] first degree assault,[49] kidnapping,[50] first degree sexual assault,[51] first degree sexual assault of a child,[52] first degree arson,[53] first degree assault on an officer,[54] and use of explosives to commit a felony.[55] The statute does not mention aiding and abetting.

[32-34] Our objective in interpreting a statute is to determine and give effect to the legislative intent of the enactment.[56] When construing a statute, we look to the statute's purpose and give the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.[57]

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[46] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[47] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[48] Neb. Rev. Stat. § 28-304 (Reissue 2008).

[49] Neb. Rev. Stat. § 28-308 (Reissue 2008).

[50] Neb. Rev. Stat. § 28-313 (Reissue 2008).

[51] § 28-319.

[52] Neb. Rev. Stat. § 28-319.01 (Reissue 2008).

[53] Neb. Rev. Stat. § 28-502 (Reissue 2008).

[54] Neb. Rev. Stat. § 28-929 (Reissue 2008).

[55] Neb. Rev. Stat. § 28-1222 (Reissue 2008).

[56] See *Mena-Rivera, supra* note 46.

[57] See *id.*

Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[58]

Dixon points out that the record contains a previous conviction for aiding and abetting first degree assault. While first degree assault is a crime listed in § 29-2221(1)(a), aiding and abetting[59] is not. So, Dixon argues, he is not subject to the 25-year minimum sentence of imprisonment under § 29-2221(1)(a). But because aiding and abetting is not a separate crime in Nebraska,[60] we disagree.

At common law, there were four classes of parties to a felony: (1) principal in the first degree, (2) principal in the second degree, (3) accessory before the fact, and (4) accessory after the fact.[61] A principal in the first degree was the person who actually committed the felony.[62] A principal in the second degree was someone who was present while the crime was committed and aided and abetted the crime.[63] An accessory before the fact was not present at the crime but aided and abetted the crime before its commission.[64] Finally, an accessory after the fact was not present at the crime but helped the felon after the crime occurred.[65]

These common-law categories sometimes presented procedural difficulties.[66] For example, before a defendant could be convicted as an accessory, the principal must have been first convicted.[67] If the principal was acquitted, had died, or was otherwise unavailable to be tried, an accessory could not be

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[58] *Id.*

[59] Neb. Rev. Stat. § 28-206 (Reissue 2008).

[60] See *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004).

[61] See, 2 Wayne R. LaFave, Substantive Criminal Law § 13.1 (2d ed. 2003); 1 Charles E. Torcia, Wharton's Criminal Law § 29 (15th ed. 1993).

[62] 1 Torcia, *supra* note 61.

[63] See *id.*

[64] See *id.*

[65] See *id.*

[66] 2 LaFave, *supra* note 61, § 13.1(d).

[67] See 1 Torcia, *supra* note 61, § 34.

found guilty, no matter how clear the evidence was that he was an accessory to the crime.[68]

[35] Because of these procedural difficulties, today, all states have abolished the distinction between principals and accessories before the fact.[69] Many states, however, still treat accessories after the fact separately.[70] Under statutes that have abolished the distinction between principals and accessories before the fact, if a person is "charged as a party to the underlying crime and, if the evidence shows that he committed the prohibited act, or aided and abetted its commission, . . . he may be found guilty of the crime as a party."[71] That is, one who aids and abets crime X is not guilty of the crime of aiding and abetting; that person is guilty of crime X. Aiding and abetting is not a separate crime; instead, aiding and abetting is simply another basis for holding one liable for the underlying crime.[72]

Nebraska has followed this modern statutory trend of abolishing the distinction between principals in the first and second degree and accessories before the fact.[73] So, because aiding and abetting is not a separate crime,[74] Dixon's conviction is not for "aiding and abetting." His conviction was for first degree assault. As Dixon concedes, first degree assault is a crime listed under § 29-2221(1)(a). The district court did not err in concluding that Dixon's sexual assault conviction carried with it a 25-year minimum sentence.

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[68] See *id.*

[69] 2 LaFave, *supra* note 61, § 13.1(e).

[70] 1 Torcia, *supra* note 61, § 35. See, also, Neb. Rev. Stat. § 28-204 (Reissue 2008).

[71] 1 Torcia, *supra* note 61, § 35 at 207-08.

[72] See, e.g., *U.S. v. Ellis*, 525 F.3d 960 (10th Cir. 2008); *U.S. v. Garcia*, 400 F.3d 816 (9th Cir. 2005); *U.S. v. Hornaday*, 392 F.3d 1306 (11th Cir. 2004); *Contreras, supra* note 60; *Sanquenetti v. State*, 727 N.E.2d 437 (Ind. 2000); *State v. Nash*, 261 Kan. 340, 932 P.2d 442 (1997); *State v. Carrasco*, 124 N.M. 64, 946 P.2d 1075 (1997).

[73] See *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). See, also, § 28-206.

[74] *Contreras, supra* note 60.

8. Excessive Sentences

Dixon's final argument is that the court erred in imposing excessive sentences. After finding Dixon to be a habitual criminal, the court sentenced Dixon to consecutive terms of 35 to 60 years' imprisonment.

As we explained earlier, the sentence for Dixon's sexual assault conviction is covered by § 29-2221(1)(a). The statutory limits under this section are 25 to 60 years' imprisonment. Dixon's sentence falls within these limits. Dixon's robbery conviction is covered by § 29-2221(1), which provides for a sentence of 10 to 60 years' imprisonment. Again, Dixon's sentence falls within the statutory limits.

[36] We will not disturb a sentence imposed within the statutory limits in the absence of an abuse of discretion.[75] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[76]

[37,38] 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, (6) motivation for the offense, (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[77] Yet 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.[78]

The record shows Dixon has a long history of criminal activity, including crimes involving drugs and violence. The district court correctly noted that the offenses the jury found him guilty of were "simply terrifying . . . in a civilized society." Furthermore, the record shows that S.I. has suffered from

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[75] See *Dinslage, supra* note 32.

[76] See *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[77] *Id.*

[78] *Id.*

flashbacks, depression, anxiety, and sleeplessness. We affirm the convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TREVELLE J. TAYLOR, APPELLANT.
803 N.W.2d 746

Filed September 16, 2011. No. S-10-794.

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. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. ____: ____. The exercise of judicial discretion is implicit in the determinations of relevancy under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.
4. **Trial: Evidence.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.
5. **Criminal Law: Constitutional Law: Due Process: Presumptions: Proof.** A presumption that relieves the State of its burden of proof beyond a reasonable doubt on any essential element of a crime violates a defendant's due process rights and is constitutionally impermissible.
6. **Jury Instructions: Evidence: Proof.** When a trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must specifically include a statement explaining to the jury that it may regard the basic facts as sufficient evidence of the inferred fact, but that it is not required to do so. And the instruction must explain that the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt.
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.
8. **Homicide: Intent: Time.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.

9. ____: ____: ____. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
10. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
11. **Jury Instructions: Appeal and Error.** Although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.
12. **Expert Witnesses.** The weight and credibility of an expert's testimony are a question for the trier of fact.
13. **Rules of Evidence.** Under Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901 (Reissue 2008), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
14. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901 (Reissue 2008).

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Trevelle J. Taylor was convicted in Douglas County District Court of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to serve a term of life imprisonment on the murder conviction and a consecutive term of 10 years' imprisonment on the weapon conviction. Taylor appeals. For the following reasons, we reverse, and remand for a new trial.

II. BACKGROUND

Justin Gaines was shot and killed outside his residence on September 19, 2009. The gunshot entered Gaines' back and fatally penetrated his lungs and heart. Taylor was arrested nine blocks from the scene of the shooting. He was tried before a jury and convicted of first degree murder and use of a deadly weapon to commit a felony. The following evidence was adduced at trial:

In the early afternoon on September 19, 2009, Gaines was driving near his residence on Curtis Avenue in Omaha, when he noticed his friend, Catrice Bryson, standing near her car, which was parked in his driveway. Gaines parked his car in the driveway behind Bryson's and spoke with Bryson through his open driver's-side window while he remained in his car. Gaines asked Bryson to write down her telephone number, and she walked to her car to retrieve a pen. Bryson then heard numerous gunshots before she was able to return to Gaines' car. She observed two men shooting guns at Gaines, who remained seated in his car. Bryson retreated toward the residence and heard Gaines yell that he had been shot in the back. Bryson then observed the two men run from the scene in opposite directions.

Bryson described the two suspects she witnessed at the scene. She described the first suspect as an African-American male, "[s]kinny with a brush cut in a brown shirt with orange on it," and holding a gun. Bryson described the second suspect as an African-American male, light complected with shoulder-length braids, wearing a white T-shirt with a basketball jersey, and also holding a gun.

At the scene of the crime, near the end of the driveway where Gaines' car was parked, the police collected 16 spent shell casings from a 9-mm handgun. Local residents told police that they heard the sounds of two different guns. Police also eventually recovered a 9-mm handgun near the area of the shooting. A neighbor told police that the day of the shooting, he heard the gunshots and witnessed a black male run through the area where the 9-mm handgun was found.

At trial, several local residents testified as to what they witnessed on September 19, 2009. One such witness testified that,

prior to the shooting, she was standing on her porch when she witnessed a black male jog past her house wearing a white T-shirt and baggy denim shorts and that the man had long braids and a goatee. The man proceeded, alone, toward 45th Street and Curtis Avenue. The witness went inside her home and then heard a series of gunshots coming from the area near Gaines' residence. The witness identified a photograph of Joshua Nolan as the man she saw jogging past her house.

Another such witness testified that she heard the gunshots from her residence near 44th Street and Curtis Avenue. She went outside when she heard the shots, and then witnessed a black male running east on Curtis Avenue, then north through the yards of homes across the street from her. She described the man as wearing a brown T-shirt and having a "brush cut" hairstyle.

A third such witness also testified that she witnessed a black male running east on Curtis Avenue, and through her yard. She testified that the man was wearing a brown T-shirt and blue shorts.

A fourth witness testified that she was driving home at the time of the shooting. She witnessed a man run past her car and huddle behind some bushes. The man was wearing a tan shirt and blue shorts, and she overheard him speaking on a cellular telephone, telling someone to "come get [him]." The witness identified Taylor as the man she saw that afternoon.

Officer Joel Strominger was on duty on the afternoon that Gaines was shot. Strominger heard a broadcast regarding the shooting which described the suspects' vehicle as a small, white four-door car without hubcaps. Strominger observed a parked white vehicle matching this description in the area of 40th Street and Redick Avenue. A black male was sitting in the driver's seat, and a black male wearing a white T-shirt and black shorts was standing outside the car, holding what appeared to be a brown T-shirt. Strominger then observed the driver make a U-turn and drive west on Redick Avenue, while the individual outside the car walked east on Redick Avenue. Strominger followed the car, ran a license plate check and determined the car was stolen. He then stopped the car, which was being driven by Joshua Kercheval.

Officer Jarvis Duncan had also responded to the broadcast regarding the shooting, and on his patrol of the area, he came upon a black male running north on 37th Street near Redick Avenue. Duncan and his partner witnessed the individual throw a brown shirt to the ground. Duncan and his partner ordered him to stop, arrested him, and took his cellular telephone into possession. The individual was later identified as Taylor. Strominger identified Taylor as the man he observed standing outside of the car driven by Kercheval. Taylor was transported to the Omaha Police Department's headquarters, where his hands and arms were swabbed for gunshot residue. Police also seized the brown T-shirt Duncan and his partner observed Taylor throw to the ground. Bryson identified the shirt seized as the one that was worn by one of the shooters.

Nolan was stopped by police for a traffic violation 8 days after the homicide. The car Nolan was driving was registered in his name. Nolan was in possession of a .44-caliber Smith & Wesson revolver, with a laser sight, which was hidden in his waistband. Nolan was arrested, and his car was impounded and searched by police. The search produced four spent 9-mm shell casings.

Kercheval testified at trial. He stated that on the morning of the shooting, he was at his home when Taylor and Nolan arrived in a white car. Kercheval had never seen the car before, and the three agreed to ride around for a while with Kercheval driving. They drove to the area of 45th Street and Curtis Avenue, and Kercheval noticed a man sitting in a parked car talking to a woman in a driveway. Taylor told him to stop the car and said, "There's the weedman." Kercheval pulled over and parked near 45th and Vernon Streets.

Kercheval testified that he remained in the car at all times, but that Taylor got out of the car on 44th Street and that Nolan got out of the car after it was parked on 45th Street. Kercheval then heard a series of gunshots, and he started to leave when he noticed Nolan running up the street. Nolan entered the car, and the two men drove east toward 42d Street. Nolan then jumped out of the car, and Kercheval made a U-turn and was then stopped by Strominger. Kercheval did not see Taylor between the time Taylor exited the car and when the police

brought Taylor to where Strominger had stopped Kercheval in the car.

Kercheval was in custody during his testimony, which he gave only after his arrest on a bench warrant for failure to appear when subpoenaed to testify earlier in the trial. Kercheval stated that he received a telephone call from Taylor the Friday prior to the scheduled trial date. During that telephone call, Taylor told Kercheval not to come to court, and Kercheval testified that he subsequently failed to appear because he felt threatened. The telephone call from Taylor to Kercheval was recorded by a system at the jail. A recording of the call was received into evidence and played for the jury. During the call, Taylor stated, among other things: "leave this shit alone"; "don't let me go out like this"; "if I don't come home, man, this shit is gonna go places where it don't even need to go, man"; and "make sure you stay out [of] the way." Prior to receiving the telephone call, Kercheval had told the prosecutor on two separate occasions that he would appear and testify.

The firearm and toolmark examiner employed by the Omaha Police Department, Daniel Bredow, examined the 9-mm handgun found near the scene of the crime. Bredow determined that 14 of the 16 9-mm shell casings found at the scene were fired from that gun. The other two casings were consistent with that weapon, but did not provide conclusive results because of damage to the casings. Bredow also determined that two of the four 9-mm casings found in Nolan's vehicle were fired from the 9-mm gun found near the scene. Additionally, Bredow examined the spent bullet retrieved from Gaines' body at the hospital and determined that it was fired from a .44-caliber weapon. Bredow could not determine whether it came from the weapon found on Nolan because of damage to the bullet.

The State also called Preston Landell as a witness. Landell is a customer operations coordinator for a cellular telephone company. Landell testified that he was familiar with how that company, during its course of business, recorded and kept records of cellular telephone calls. Over Taylor's objection, Landell was allowed to testify that, based on the call records of the telephone seized from Taylor and the telephone found in Nolan's car, there were a number of contacts between Taylor's telephone and Nolan's telephone on September 19,

2009, between 11 a.m. and 2 p.m. The State offered a computer printout of a spreadsheet Landall obtained, after receiving a subpoena from the Omaha Police Department for Taylor's call records for September 19 and 20, by inputting the target number for Taylor's telephone. Taylor objected to the admission of the printout on the ground of insufficient foundation pursuant to Neb. Evid. R. 901[1] and argued that Landell had not provided sufficient information regarding how the information contained in the spreadsheet was gathered, its accuracy, and how it is maintained.

The district court overruled Taylor's foundational objection on the basis of this court's opinion in *State v. Robinson*,[2] and stated, "[T]he records have sufficient — the foundation has been laid as to the trustworthiness of the business records, and . . . there is no evidence that would go to the untrustworthiness of the records themselves as testified to by . . . Landell."

Finally, the State called Allison Murtha, a forensic scientist employed by a "materials analysis company" with a forensics department which analyzes gunshot residue and other trace evidence. Murtha had examined the swabs taken from Taylor to test for gunshot residue. Taylor objected to Murtha's entire testimony on the ground of Neb. Evid. R. 403.[3] The objection was overruled, and Murtha's expert testimony was admitted.

Murtha testified that gunshot residue leaves traces of three elements, lead, antimony, and barium; that all three elements together form gunshot residue; and that when a gun is fired, particles of any of the three elements may fuse together. Murtha stated that if analysis produces particles composed of only one or two of the three elements, she could not definitively conclude that they came from the discharge of a firearm.

The testing instrument utilized by Murtha did not yield particle results containing all three components comprised by gunshot residue. However, upon performing a manual examination of the particles, Murtha identified a particle which

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[1] See Neb. Rev. Stat. § 27-901 (Reissue 2008).

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

[3] See Neb. Rev. Stat. § 27-403 (Reissue 2008).

was composed of all three gunshot residue components. The particle was found on the back of Taylor's left hand. In Murtha's opinion, the presence of the particle indicated that Taylor either "discharged a firearm," "was in proximity when a firearm was discharged," or "came into contact with an area or an environment that contained gunshot residue." However, Murtha was unable to form a conclusive opinion as to whether Taylor fired a gun.

Prior to submitting the case to the jury, the court instructed the jury on the material elements of first degree murder and its lesser-included offenses of second degree murder and manslaughter in jury instruction No. 4. Taylor objected to the step instruction included in instruction No. 4 because it did not conform to NJI2d Crim. 3.1. Taylor argued that the instruction required the jury to "acquit first" when considering the sequential order of first degree murder and its lesser-included offenses. The court overruled Taylor's objection.

Instruction No. 4 included three sections, each of which spelled out the material elements for the three grades of homicide. Each section of the instruction then stated that if the jury found the evidence beyond a reasonable doubt that each of the material elements set out in that section was true, the jury should find Taylor guilty of that crime. The first section went on to state: "If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this section . . . , it is your duty to find [Taylor] not guilty of the crime of murder in the first degree." The second and third sections contained similar directives concerning second degree murder and manslaughter respectively, and the first two sections then directed the jury to "proceed to consider" the specified lesser-included offense in that event.

The court also instructed the jury on the definition of premeditation in jury instruction No. 8, which stated: "'Premeditated' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act." Taylor objected to jury instruction No. 8 on the ground that it did not conform to the statutory

definition of premeditation under Neb. Rev. Stat. § 28-302 (Reissue 2008). The court overruled Taylor's objection on the ground that the instruction conformed to the Nebraska pattern jury instruction at NJI2d Crim. 4.0.

The district court also gave jury instruction No. 9 over Taylor's objection. That instruction provided:

> You have heard evidence regarding [Taylor's] alleged attempt to prevent [Kercheval] from testifying in this case. A defendant's attempt to prevent a state's witness from testifying may be evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crimes charged. Such evidence may be considered by you in determining whether the [S]tate has proved the elements of each of the crimes charged beyond a reasonable doubt.

The jury found Taylor guilty of murder in the first degree and use of a deadly weapon to commit a felony. Taylor was sentenced to life imprisonment on the murder conviction and a consecutive term of 10 years' imprisonment on the weapon conviction. Taylor appeals.

III. ASSIGNMENTS OF ERROR

Taylor assigns, renumbered and restated, that the district court erred in (1) giving jury instruction No. 9, regarding an inference of guilt; (2) giving jury instruction No. 4, a step instruction regarding the lesser-included offenses; (3) giving jury instruction No. 8, regarding the definition of premeditation; (4) receiving expert opinion testimony regarding the presence of gunshot residue on Taylor's hands, in violation of rule 403; and (5) admitting cellular telephone records purporting to prove contacts between Taylor and his codefendant Nolan, on the basis of insufficient foundation.

IV. STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[4]

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[4] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[5] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[6]

[3] The exercise of judicial discretion is implicit in the determinations of relevancy under rule 403, and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.[7]

[4] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. We review a trial court's ruling on authentication for abuse of discretion.[8]

V. ANALYSIS

1. Jury Instructions

Taylor assigns as error the giving of jury instructions Nos. 4, 8, and 9. Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[9]

(a) Inference of Guilt Based on Taylor's Alleged Attempt to Prevent State's Witness From Testifying

The district court gave jury instruction No. 9 over Taylor's objection. The instruction provided:

> You have heard evidence regarding [Taylor's] alleged attempt to prevent [Kercheval] from testifying in this

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[5] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[6] *Id.*

[7] See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[8] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[9] *State v. Miller, supra* note 4.

> case. A defendant's attempt to prevent a state's witness from testifying may be evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crimes charged. Such evidence may be considered by you in determining whether the [S]tate has proved the elements of each of the crimes charged beyond a reasonable doubt.

Taylor argues that because the instruction did not explain to the jury that it had the option of not drawing the specified inference, it created an improper presumption of guilt.

The State argues that *State v. Thorpe*[10] supports the propriety of instruction No. 9. An instruction nearly identical to instruction No. 9 was given to the jury in *Thorpe*. However, on appeal, the defendant argued that the evidence adduced at trial did not sufficiently establish that he either attempted to intimidate or intimidated a witness. The defendant argued that the jury instruction should not have been given, because the issue of conscious guilt was not properly before the jury. The defendant in *Thorpe* did not propose any additions or corrections to the instruction and only argued that it should not be included in the jury instructions. Taylor, in contrast, argues that instruction No. 9 created an improper presumption or inference in favor of the State. *Thorpe* neither addresses this issue nor expressly approves of the language contained in instruction No. 9, and it is therefore not controlling.

The U.S. Supreme Court has determined that jury instructions which create mandatory presumptions are improper, but that those which create merely permissive presumptions are allowed.[11] In *Sandstrom v. Montana*,[12] an appeal from a prosecution for deliberate homicide, the Court held that because the jury, which was instructed that the law presumes a person intends the ordinary consequences of his voluntary acts, might have interpreted the presumption as conclusive or as shifting

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[10] *State v. Thorpe, supra* note 2.

[11] See *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

[12] *Id.*

the burden of persuasion, and because either interpretation would have violated the 14th Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt, the instruction was unconstitutional.

[5] In Nebraska, instructions as to presumptions in criminal cases must also conform to the requirements of Neb. Evid. R. 303(3),[13] which states:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Here, the challenged instruction is based on a common-law inference rather than a presumption. However, we have previously determined that references to "presumptions" in rule 303 necessarily include "inferences" in criminal cases as well.[14] Although frequent reference is made to "presumptions" in criminal cases, a presumption that relieves the State of its burden of proof beyond a reasonable doubt on any essential element of a crime violates a defendant's due process rights and is constitutionally impermissible.[15]

[6] In *State v. Parks*,[16] a theft-by-receiving case, we interpreted the propriety of an instruction which provided, "'[P]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.'" We reversed the conviction based on that instruction. We held that when a

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[13] See Neb. Rev. Stat. § 27-303(3) (Reissue 2008).

[14] *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994).

[15] *Id.*

[16] *Id.* at 209, 511 N.W.2d at 778.

trial court instructs a jury on an inference regarding a specific fact or set of facts, the instruction must specifically include a statement explaining to the jury that it may regard the basic facts as sufficient evidence of the inferred fact, but that it is not required to do so. And the instruction must explain that the existence of the inferred fact must, on all the evidence, be proved beyond a reasonable doubt.[17] Failure to meet these requirements constitutes reversible error.[18]

In *Parks*, the jury might have interpreted the instruction as conclusive that the State had proved one element of the crime charged. But here in Taylor's case, in the context of the "conscious guilt" doctrine, the instruction allowed the jury to presume that the defendant was guilty of the crimes charged. Here, the district court included the requirement that the inferred fact must be proved beyond a reasonable doubt, but the instruction failed to specify that the jury was not required to make the inference of guilt. Rule 303(3) is couched in mandatory terms. The instruction, as given in Taylor's case, failed to inform the jury that it was not required to draw the inference of guilt. This omission in the court's instruction No. 9 is fatal to the constitutional validity of that instruction.[19] Accordingly, the district court's failure to comply with the requirements of rule 303(3) is a ground for reversal of Taylor's convictions.

[7] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Taylor's convictions. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[20] 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.[21] We find that the witness testimony

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[17] See *State v. Parks, supra* note 14.

[18] *Id.*

[19] See *id.*

[20] See, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Parks, supra* note 14.

[21] *State v. McCulloch, supra* note 20.

and physical evidence linking Taylor to the crime, and the circumstantial evidence against Taylor, were sufficient to sustain the verdict. We therefore reverse the convictions and remand the cause for a new trial. Although our determination resolves this appeal, we address Taylor's remaining assignments of error because they are likely to recur on remand.

(b) Definition of Premeditation

The court instructed the jury on the definition of premeditation in jury instruction No. 8, which stated: "'Premeditated' is defined as forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act."

Taylor objected to jury instruction No. 8 on the ground that it did not conform to the statutory definition of premeditation under § 28-302. The court overruled Taylor's objection on the ground that the instruction conformed to the Nebraska pattern jury instruction at NJI2d Crim. 4.0.

The definition of "premeditation" in jury instruction No. 8 is nearly identical to the definition provided in NJI2d Crim. 4.0. However, § 28-302(3) provides: "Premeditation shall mean a design formed to do something before it is done." Thus, NJI2d Crim. 4.0 includes the statutory definition of premeditation contained in § 28-302(3), but adds the sentence "The time needed for premeditation may be so short as to be instantaneous provided that the intent to (act) is formed before the act and not simultaneously with the act." This explanation has apparently been added to further specify the meaning of "before" as it is used in § 28-302(3).

[8,9] This court has consistently determined that no particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.[22] And we

[22] *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007). See, also, *State v. Robinson, supra* note 2; *State v. Larsen*, 255 Neb. 532, 586 N.W.2d 641 (1998); *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995).

have specifically stated: "The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed."[23] Jury instruction No. 8 conformed to our interpretation of premeditation as it is used in § 28-302(3). Accordingly, the district court did not err in giving instruction No. 8 on premeditation.

(c) Step Instruction

The court instructed the jury on the material elements of first degree murder and its lesser-included offenses of second degree murder and manslaughter in jury instruction No. 4. Taylor objected to the step instruction included in instruction No. 4 because it did not conform to NJI2d Crim. 3.1. Taylor argued that the instruction required the jury to "acquit first" when considering the sequential order of first degree murder and its lesser-included offenses. The court overruled Taylor's objection.

Taylor argues that the step instruction given erroneously required the jury to acquit Taylor of the greater charge and that this is not in conformity with our law because Nebraska is not an "acquit first" jurisdiction. Taylor also asserts that the instruction was given in error because it does not conform to the pattern instruction found at NJI2d Crim. 3.1.

[10,11] Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.[24] But although the Nebraska pattern jury instructions are to be used whenever applicable, a failure to follow the pattern jury instructions does not automatically require reversal.[25] NJI2d

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[23] *State v. McGhee, supra* note 22, 274 Neb. at 667, 742 N.W.2d at 504. See, also, *State v. Robinson, supra* note 2; *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999); *State v. Hansen, supra* note 22.

[24] *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003).

[25] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

Crim. 3.1 includes a listing of the offenses which the jury is to consider and the elements of each offense. It then instructs the jury:

> You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must proceed in this fashion to consider each of the crimes in sequence until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.

In *State v. Goodwin*,[26] we concluded that NJI2d Crim. 3.1 provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, and we encouraged the trial courts to utilize the current pattern instruction in circumstances where a step instruction on lesser-included homicide offenses is warranted. However, we did not find error in the court's use of a step instruction based on NJI Crim. 14.06.

Instruction No. 4 included three sections, each of which spelled out the material elements for one of the three grades of homicide. Each section of the instruction then stated that if the jury found the evidence beyond a reasonable doubt that each of the material elements set out in that section was true, the jury should find Taylor guilty of that crime. The first section went on to state: "If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this section . . . , it is your duty to find [Taylor] not guilty of the crime of murder in the first degree." The second and third sections contained similar directives concerning second degree murder and manslaughter respectively, and the first two sections then directed the jury to

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[26] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

"proceed to consider" the specified lesser-included offense in that event. The State argues that instruction No. 4 conforms to our decisions in *State v. Bormann*[27] and *State v. Goodwin*.[28] The district court in *Bormann* gave a step instruction nearly identical to the one given below. While we agree that NJI2d Crim. 3.1 provides a clearer explanation of the jury's consideration of lesser-included offenses, we have previously determined that so-called acquittal first step instructions are not constitutionally deficient.[29]

The step instruction given in this case did not prevent the jury from considering Taylor's theory of defense; nor was his counsel restricted from arguing that Taylor did not have the intent to kill and should therefore be found guilty of the lesser offense of manslaughter. Further, Taylor fails to argue that he was prejudiced in any manner by the step instruction given. He instead rests his argument on the instruction's failure to conform to NJI2d Crim. 3.1. We determine that Taylor was not prejudiced by jury instruction No. 4. However, as we have previously noted, NJI2d Crim. 3.1 provides a clearer instruction, and we once again urge trial courts to use the pattern jury instruction in the future. And on remand, any step jury instruction given should conform to NJI2d Crim. 3.1.

2. Expert Testimony of Gunshot Residue

Taylor argues that the district court abused its discretion in allowing the State to present Murtha's testimony, over Taylor's rule 403 objection, that one particle of gunshot residue was found on a swab of Taylor's hands. Taylor argues that because jurors place elevated trustworthiness on expert testimony, the risk of unfair prejudice and jury confusion outweighed any probative value the evidence might have had. In other words, Taylor maintains that the gunshot residue tests had minimal probative value, but were likely given significant weight by the jury due to the expert testimony which accompanied the results.

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

[28] *State v. Goodwin, supra* note 26.

[29] *State v. Bormann, supra* note 27.

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[30] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[31]

The exercise of judicial discretion is implicit in determinations of relevancy under rule 403, and a trial court's decisions regarding them will not be reversed absent an abuse of discretion.[32] Rule 403 states: "Although 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."

[12] Taylor's arguments on appeal largely focus on the weight that the gunshot residue evidence should be given. The weight and credibility of an expert's testimony are a question for the trier of fact.[33] Taylor had ample opportunity to cross-examine Murtha and to present argument to the jury that her testimony was unreliable. Taylor was not unfairly prejudiced by the admission of the evidence, and we cannot say that the district court abused its discretion in admitting Murtha's testimony. Taylor's arguments to the contrary are without merit.

3. Authentication of Cellular Telephone Records

Finally, Taylor argues that the cellular telephone records received by the district court were erroneously admitted, due to a lack of foundation. Taylor bases his foundational argument on the requirement of authentication provided by rule 901 of the Nebraska Evidence Rules. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.

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[30] *State v. Baker, supra* note 5.

[31] *Id.*

[32] *State v. Iromuanya, supra* note 7.

[33] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

We review a trial court's ruling on authentication for abuse of discretion.[34]

[13,14] Rule 901(1) states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901 does not impose a high hurdle for authentication or identification. A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[35] If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).[36]

Taylor is incorrect in suggesting that Landell lacked the knowledge required to lay foundation adequate to support the authentication of the cellular telephone records. And again, Taylor had the opportunity to cross-examine Landell regarding the process by which the records were created and maintained, yet there is nothing in the record to suggest that the exhibits presented in this case were not trustworthy, as such records are presumed to be when sufficient foundation for the business records exception to the rule against hearsay is laid. The foundation of trustworthiness required by the business records exception is sufficient to satisfy the authentication requirement of rule 901.

Landell, a customer operations coordinator for a cellular telephone company, testified that his duties included keeping records for that company, including "caller-detail records." Landell testified that he was familiar with how the company, during the course of its business, created and kept records of cellular telephone calls. This process involved little more than the recording of information about a call on a hard drive of the company's computer servers. The telephone records made and saved included the number of the caller, the destination of

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[34] *State v. Epp, supra* note 8.

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

[36] *Id.*

the caller's number, where the call came from, and the time and length of the call. Landell further testified that the computer servers where the records are stored are serviced and tested by the company on a regular basis to make sure they are accurate. We determine that Landell's testimony provided sufficient authentication to support the admission of the cellular telephone records. Taylor's arguments to the contrary are without merit.

VI. CONCLUSION

For the foregoing reasons, the district court committed reversible error in giving jury instruction No. 9. Accordingly, we reverse, and remand the cause for a new trial. On remand, any step jury instruction given should conform to NJI2d Crim. 3.1, as discussed above.

REVERSED AND REMANDED FOR A NEW TRIAL.

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

803 N.W.2d 46

Filed September 16, 2011. No. S-10-819.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
4. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
5. **Moot Question: Appeal and Error.** Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.

6. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
7. **Courts: Contempt.** Generally, a court may punish for contempt as a part of the court's inherent contempt powers.
8. **Juvenile Courts: Contempt.** The juvenile court, as a court of record, has the statutory authority pursuant to Neb. Rev. Stat. § 25-2121 (Reissue 2008) to punish contemptuous conduct by fine or imprisonment.
9. ____: ____. To find a party in contempt in juvenile court, there must be a finding of willful violation of a juvenile court's order.
10. **Final Orders: Notice.** Whenever a court must determine an uncertain fact before entering an order, the party affected by the order is entitled to reasonable notice and an opportunity to be heard.
11. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
12. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
13. **Final Orders: Appeal and Error.** To be final and appealable, an order in a special proceeding must affect a substantial right.
14. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.

Appeal from the County Court for Cheyenne County: RANDIN ROLAND, Judge. Appeal dismissed.

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

Krista Shaul, Deputy Cheyenne County Attorney, for appellee State of Nebraska.

Sarah Helvey, for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

The Nebraska Department of Health and Human Services (DHHS) appeals the July 27, 2010, order of the county court for Cheyenne County, sitting as a juvenile court, which found DHHS in contempt of an order requiring it to identify

appropriate placement, including counseling, for Thomas M., a juvenile under the court's jurisdiction. DHHS also appeals the August 9, 2010, order in which the court stated that DHHS would be in contempt of court if it did not provide satisfactory evidence that certain future billings related to Thomas' placement were timely paid. Although the issues surrounding the July 27 order are moot, we consider them under the public interest exception. Because the August 9 order is not a final, appealable order, we do not consider it. In view of the foregoing, we dismiss this appeal.

II. STATEMENT OF FACTS

In April 2010, the county court for Cheyenne County, sitting as a juvenile court, adjudicated Thomas to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1), (2), and (3)(b) (Reissue 2008) on the bases that he had committed acts which would constitute a felony and misdemeanors and that he was uncontrollable by his parents. The court ordered Thomas to be placed in the custody of DHHS and committed to detention. In May 2010, the court further adjudicated Thomas to be a juvenile who was mentally ill and dangerous under § 43-247(3)(c). Because of the basis of these adjudications, Thomas was considered under the Nebraska Juvenile Code as both a law violator and a status offender and therefore subject to statutory provisions relevant to an adjudication under § 43-247(1), (2) and (3). See *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011) (distinguishing between "status offenders" and "law violators" under Nebraska Juvenile Code). The court ordered placement at a youth detention center in Gering, Nebraska.

After a disposition hearing on July 8, 2010, the court filed an order in which it required, inter alia, that Thomas participate in counseling no less than three times per week and that DHHS arrange such counseling. On July 20, the court held another disposition hearing and directed DHHS to provide the court with a list of appropriate placement locations for Thomas after DHHS had consulted with a doctor regarding recommended options. In an order filed July 21, the court stated that if no appropriate placement was immediately available and presented to the

court at the next placement hearing on July 26, then DHHS "shall be in contempt of court and pay $400.00 per day into the Court until Thomas is . . . placed appropriately."

In an order filed July 27, 2010, following the July 26 placement hearing, the court found that Thomas did not have appropriate placement, because DHHS had failed to comply with the court's July 8 order requiring DHHS to place Thomas at a facility which would provide Thomas with counseling no less than three times per week. The court stated that "[p]ursuant to this court's contempt order of July 20, 2010, [D]HHS shall pay into this Court $400.00 per day until it provides written verification that THOMAS . . . is receiving counseling as ordered." The court also approved Thomas' proposed placement at a group home when a bed would become available in 2 to 3 weeks.

Following another placement hearing, the court entered an order on August 9, 2010, in which it ordered that Thomas be placed at Colorado Boys Ranch in La Junta, Colorado. The court ordered that a representative of DHHS transport Thomas to the ranch, tour the ranch, meet the staff, and report findings to the court. The court also stated that all billings from the ranch should be paid within 20 days of receipt and that "[i]f not paid in full as ordered herein, [D]HHS shall be in contempt of court and pay $500.00 per day into the court until the court is provided with satisfactory evidence that the bill has been paid in full." The court further ordered that copies of all billings from the ranch be provided to the court, "with the court setting a contempt hearing on payment of the same about twenty days thereafter."

On August 16, 2010, DHHS filed a notice of appeal in which it stated its intent to appeal the juvenile court's orders of July 27 and August 9.

III. ASSIGNMENTS OF ERROR

Regarding the July 27, 2010, order, DHHS claims that the juvenile court erred when it found DHHS in contempt, because (1) sovereign immunity prevented the court from entering a contempt order against DHHS, which is an agency of the State of Nebraska, and (2) the court failed to give DHHS proper

notice and an opportunity to be heard on the issue of contempt and the element of willfulness. Regarding the August 9 order, DHHS claims that the juvenile court erred when it ordered hearings to determine proof of payment of all billings associated with Thomas' placement at the Colorado Boys Ranch, because such order interfered with DHHS' right to contract without interference.

IV. STANDARDS OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

V. ANALYSIS

1. The July 27, 2010, Order

(a) Although the July 27, 2010, Contempt Order Is Moot, It Will Be Considered Under the Public Interest Exception

The juvenile court found DHHS in contempt at the hearing of July 26, 2010, and the order was later reduced to writing and filed on July 27. The contempt order was based on DHHS' failure to adhere to the court's placement order, which placement was to have included counseling. Although on appeal the parties did not raise the issue of mootness with respect to this contempt order, the record shows that DHHS complied with the court's order to arrange counseling for Thomas three times a week later in the day on July 26. The record from the hearing on August 9 shows that the juvenile court acknowledged that DHHS had satisfied its order. Thus, DHHS purged itself of contempt almost immediately and DHHS' interest in seeking relief from the order of contempt was extinguished. The contempt issue became moot.

[3-6] We have explained mootness and our authority to review a moot issue as follows:

> A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome. Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
>
> But under the public interest exception, we may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. And when determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.

Evertson v. City of Kimball, 278 Neb. 1, 7, 767 N.W.2d 751, 758 (2009).

This appeal presents valid reasons for applying the public interest exception. Previous appellate cases have questioned the authority of the juvenile court to hold DHHS or individuals associated therewith in contempt, but the issue has evaded review. E.g., *In re Interest of Simon H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010). We believe authoritative guidance is warranted regarding the power of the juvenile court to hold DHHS in contempt for violation of its order. Accordingly, this case falls within the public interest exception and we consider the contempt issue.

(b) The Juvenile Court Had the Power to Hold DHHS in Contempt

On July 27, 2010, the juvenile court issued the following written order:

> THOMAS . . . does not have appropriate placement at this time at the Youth Detention Center in Gering, Nebraska due to [D]HHS failing to comply with this court's prior order of July 8, 2010 requiring [D]HHS

> to provide THOMAS . . . with counseling no less than three times per week. Pursuant to this court's contempt order of July 20, 2010, [filed July 21,] [D]HHS shall pay into this Court $400.00 per day until it provides written verification that THOMAS . . . is receiving counseling as ordered.

On appeal, DHHS claims that the juvenile court erred when it found DHHS in contempt, because the juvenile court did not have jurisdiction to issue a contempt order due to DHHS' sovereign immunity. We reject this argument.

[7] We have recognized in a juvenile case that generally, a court may punish for contempt as a part of the court's contempt powers. See *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996). In *In re Interest of Krystal P. et al.*, we affirmed an award of attorney fees against DHHS where DHHS had been held in contempt by the county court sitting as a juvenile court for failure of DHHS to abide by a visitation order issued by the juvenile court. We recognized a limited waiver of sovereign immunity with respect to the issue on appeal. Implicit in our decision in *In re Interest of Krystal P. et al.* was the recognition of the juvenile court's authority to issue the visitation and contempt orders and to hold DHHS, which had appeared in the case, in contempt.

DHHS acknowledges that under the Nebraska Juvenile Code, it became a "'party'" to the action when the juvenile court awarded Thomas to the care and custody of DHHS. Brief for appellant at 13. The juvenile court has jurisdiction over DHHS as the "custodian" of Thomas. See § 43-247(5) (providing that juvenile court has jurisdiction over "[t]he parent, guardian, or custodian of any juvenile described in this section"). See, also, Neb. Rev. Stat. §§ 43-284 (Reissue 2008) and 43-285 (Cum. Supp. 2010).

In the instant case, the State, through the county attorney, initiated the action by filing a juvenile petition as supplemented, alleging that Thomas was a child within the meaning of § 43-247(1), (2), and (3)(b). Because the State, through the county attorney, initiated the action under the juvenile code, the State had elected to sue and waived sovereign immunity to the extent encompassed by the juvenile code. See Neb. Const.

art. V, § 22 (providing that State "may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought").

It logically follows that where the State has waived sovereign immunity in the case and the agency (DHHS) has appeared in the case, the breadth of the waiver by the State is equally applicable to the agency. See *In re Interest of Krystal P. et al., supra*. See, also, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010) (equating agency and State for purposes of waiver of sovereign immunity); *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995). Given that the juvenile court had contempt power, as we will explain below, and given that DHHS had appeared in the case and waived sovereign immunity, the juvenile court had authority to enforce its contempt order against DHHS. See, also, Neb. Rev. Stat. § 43-246 (Cum. Supp. 2010) (providing generally for judicial procedure through which purposes of Nebraska Juvenile Code shall be enforced).

Under § 43-285(1), "*the assent of the court*" is required regarding "placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile" committed to DHHS. (Emphasis supplied.) Under § 43-285(2), the juvenile court has the authority to order DHHS to prepare and file a placement plan for the court's approval. See, also, Neb. Rev. Stat. § 43-286(1) (Reissue 2008) (regarding law violators); § 43-286(2) (regarding status offenders). Section 43-285 has been read to grant broad authority to the juvenile courts to make orders which are in the best interests of juveniles under their jurisdictions. See *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006). A placement order is one such order.

[8] In addition, Neb. Rev. Stat. § 25-2121 (Reissue 2008) provides that "[e]very court of record shall have power to punish by fine and imprisonment . . . persons guilty of" contemptuous conduct. We have repeatedly held that under the Nebraska Juvenile Code, separate juvenile courts and county courts sitting as juvenile courts are courts of record. See, e.g., *In re Interest of Tyler T.*, 279 Neb. 806, 781 Neb. 922 (2010). Therefore, the juvenile court, as a court of record, has the

statutory authority pursuant to § 25-2121 to punish contemptuous conduct by fine or imprisonment, as it did in this case. See *Hofferber v. Hastings Utilities, ante* p. 215, 803 N.W.2d 1 (2011). We read the July 27, 2010, order as an order of contempt in which the juvenile court determined at the July 26 hearing that DHHS had failed to comply with the juvenile court's properly issued placement order. The failure to place Thomas where he could receive counseling was the specific manner in which the placement order was breached. In sum, the juvenile court had authority to find DHHS in contempt of its properly issued placement order, although for reasons explained below, the process by which contempt was found was flawed.

(c) DHHS Did Not Receive Reasonable Notice and Opportunity to Be Heard Regarding Potential Contempt

The juvenile court's order filed July 21, 2010, notified DHHS that "[i]f no appropriate placement is presented to the Court . . . at the next Placement Hearing, [scheduled for July 26,] [D]HHS shall be in contempt of court and pay $400.00 per day into the Court until Thomas . . . is placed appropriately."

DHHS was found in contempt. DHHS claims that the notice of the proceedings of July 26, 2010, as well as the proceeding itself were flawed. We agree.

The written order of July 21, 2010, did not notify DHHS of the specific attributes of an "appropriate placement" and, in particular, failed to advise DHHS that the failure to arrange counseling three times a week for Thomas would be deemed insufficient and result in contempt. Further, the record does not contain a show cause order which would have alerted DHHS that the counseling feature of the placement was critical to the juvenile court's assent to placement and that failure to provide for this attribute of placement without cause would result in contempt. See *In re Contempt of Potter*, 207 Neb. 769, 301 N.W.2d 560 (1981) (noting importance of show cause order prior to holding party in contempt). The notice regarding the hearing of July 26 was inadequate. Finally, a review of the bill of exceptions of the July 26 hearing fails to show a

meaningful opportunity for DHHS to submit evidence which would have negated a finding of a willful violation of the juvenile court's order.

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. *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990). In the instant case, DHHS is neither a natural nor an artificial "person" and, therefore, cannot invoke due process protection against the State. See *id*. See, also, *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002); *Loup City Pub. Sch. v. Nebraska Dept. of Rev.*, 252 Neb. 387, 562 N.W.2d 551 (1997). Although not framed as a due process issue, DHHS nevertheless contends and we agree that adequate notice and a meaningful opportunity to be heard prior to entry of a contempt order are warranted.

[9,10] To find a party in contempt in juvenile court, there must be a finding of willful violation of a juvenile court's order. See *In re Contempt of Miller*, 212 Neb. 864, 326 N.W.2d 680 (1982). The Nebraska Court of Appeals has observed that only a willful failure to abide by the juvenile court's order would be contemptuous and, further, that willfulness is a fact which must be established on the record. See *In re Interest of Simon H.*, 8 Neb. App. 225, 590 N.W.2d 421 (1999), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010). The Court of Appeals observed: "It seems basic that whenever a court must determine an uncertain . . . fact before entering an order, the party affected by the order is entitled to reasonable notice and an opportunity to be heard." *Id*. at 232-33, 590 N.W.2d at 426. In *In re Interest of Simon H.*, the Court of Appeals concluded that the contempt order was void for lack of notice and opportunity to be heard. In a similar manner, we conclude that the process surrounding the contempt order of July 27, 2010, stemming from the July 26 hearing was deficient.

2. The August 9, 2010, Order Regarding Payment Is Not a Final, Appealable Order

The juvenile court order filed August 9, 2010, provides as follows:

> 6. A copy of all billings from the Colorado Boys Ranch shall be provided to the court and all interested parties, with the court setting a contempt hearing on payment of the same about twenty days thereafter.
>
> 7. All billings from the Colorado Boys Ranch shall be paid in full within twenty (20) days of receipt. If not paid in full as ordered herein, [D]HHS shall be in contempt of court and pay $500.00 per day into the court until the court is provided with satisfactory evidence that the bill has been paid in full.

On appeal, DHHS claims that paragraphs 6 and 7 of the August 9, 2010, order will interfere with its statutory right to contract with private institutions and that this juvenile court order should be reversed. Based on the record presented, DHHS has not yet been held in contempt as a result of this order. Thus, DHHS' objection to this order is limited to the terms of the order itself. We conclude that the order appealed from is not a final, appealable order.

DHHS refers us to Neb. Rev. Stat. §§ 81-3117 (Reissue 2008) (providing generally for duties of chief executive officer of DHHS, including duty to enter into agreements to provide services) and 68-1206 (Reissue 2009) (providing generally for DHHS to contract with other social agencies for purchase of social services) as support of its power to contract with private institutions. To the extent relevant, reference to Neb. Rev. Stat. § 43-290 (Reissue 2008) is also made. Section 43-290 provides in part: "If the juvenile has been committed to the care and custody of [DHHS], *the department shall pay* the costs for the support, study, or treatment of the juvenile which are not otherwise paid by the juvenile's parent." (Emphasis supplied.)

We recognize that DHHS has a right to enter into contracts and the responsibility to pay its obligations. We do not read the juvenile court's order as interfering with DHHS' ability to select vendors or enter into contracts. That is, we do not read the juvenile court's order as affecting a substantial right.

[11] In juvenile cases, as elsewhere, we have long observed that "it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it." *In re Interest of Taylor W.*, 276 Neb. 679, 681, 757 N.W.2d 1, 4 (2008). Neb.

Rev. Stat. § 25-1911 (Reissue 2008) provides for appellate review of final orders. A final order is defined as "[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 . . . ." Neb. Rev. Stat. § 25-1902 (Reissue 2008). Since the challenged order of August 9, 2010, neither determines the action and prevents a judgment nor was made upon a summary application in an action after judgment, we must determine whether the challenged order affects a substantial right and is made in a special proceeding.

[12-14] A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). To be final and appealable, an order in a special proceeding must affect a substantial right. *In re interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). A substantial right is an essential legal right, not a mere technical right. *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

DHHS has the technical right to enter into contracts. The August 9, 2010, order does not hinder or affect DHHS' right to contract or select contractors based on criteria which meet the obligations of DHHS. Because the August 9 order does not affect a substantial right of DHHS, it is not a final, appealable order.

VI. CONCLUSION

We conclude that the appeal taken from the July 27, 2010, order is moot, although we discuss it under the public interest exception to mootness. We conclude that the August 9 order does not affect a substantial right and is not a final, appealable order. Accordingly, we dismiss this appeal.

APPEAL DISMISSED.

WRIGHT, J., not participating.

CITY OF NORTH PLATTE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT, V. WILLIAM L. TILGNER ET AL., APPELLANTS AND CROSS-APPELLEES.

803 N.W.2d 469

Filed September 23, 2011. No. S-10-540.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Constitutional Law.** Constitutional interpretation presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court.
4. **Municipal Corporations: Declaratory Judgments: Initiative and Referendum: Notice.** Under Neb. Rev. Stat. § 18-2538 (Reissue 2007), when a municipality does not seek a declaratory judgment until after it is notified that a ballot measure petition contains the required signatures, a court cannot bar the measure from being placed on the ballot.
5. **Initiative and Referendum.** A court order forbidding a county clerk from considering the votes cast for a proposed ballot measure or reporting the results keeps the measure off the ballot.
6. **Municipal Corporations: Declaratory Judgments: Initiative and Referendum: Notice: Time.** Under Neb. Rev. Stat. § 18-2538 (Reissue 2007), if a city brings a declaratory judgment action challenging a ballot measure within 40 days of receiving notice of the requisite signatures, a court may invalidate the measure because of a deficiency in form or procedure even if the voters approved it.
7. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
8. ____: ____. In construing statutory language, an appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
9. ____: ____. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
10. **Initiative and Referendum: Contracts: Ordinances: Taxation.** Under Neb. Rev. Stat. § 18-2528(1)(a) (Reissue 2007), a general tax ordinance cannot be a measure necessary to carry out a contractual obligation if an obligation did not exist when the municipality passed it.
11. **Initiative and Referendum: Contracts: Immunity.** Under Neb. Rev. Stat. § 18-2528(1)(a) (Reissue 2007), the Legislature has immunized from the referendum process measures necessary to carrying out contractual obligations for projects previously approved by a measure which was, or is, subject to referendum or limited referendum.
12. **Municipal Corporations: Initiative and Referendum: Contracts.** Neb. Rev. Stat. § 18-2528(1)(a) (Reissue 2007) does not shield from the referendum process a revenue measure that funds a city's subsequent contractual obligations for a project that was not previously approved by a measure that was subject to referendum.

13. **Municipal Corporations: Initiative and Referendum: Appeal and Error.** An appellate court liberally construes grants of municipal initiative and referendum powers to permit, rather than restrict, the power and to attain, rather than prevent, its object.
14. **Municipal Corporations: Initiative and Referendum.** To determine whether petitioners for a municipal ballot measure are acting under their initiative power or their referendum power, a court should look to the function of their proposed ballot measure—not its label.
15. **Municipal Corporations: Initiative and Referendum: Ordinances.** The correct distinction for determining whether a proposed municipal ballot measure falls under the petitioners' initiative power or their referendum power is whether the proposed measure would enact a new ordinance or would amend an existing ordinance.
16. **Constitutional Law: Legislature: Municipal Corporations: Statutes: Ordinances.** The Legislature's authority to enact statutes providing a right for municipal voters to enact or repeal municipal ordinances does not depend on the existence of article III, §§ 2 and 3, of the Nebraska Constitution.
17. **Constitutional Law: Legislature.** The Nebraska Constitution is not a grant, but a restriction, on legislative power, and the Legislature may legislate upon any subject not proscribed by the Constitution.
18. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, a court may not supply any supposed omission, or add words to or take words from the provision as framed.
19. ____: ____: ____. If the meaning is clear, the Nebraska Supreme Court gives a constitutional provision the meaning that laypersons would obviously understand it to convey.
20. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.
21. **Constitutional Law: Ordinances.** Neb. Const. art. III, § 2, neither applies to proposed municipal ordinances nor requires that they comply with a single subject rule.
22. **Constitutional Law: Municipal Corporations: Initiative and Referendum.** The constitutional power of referendum under Neb. Const. art. III, § 3, does not confer a right to refer municipal measures to the voters.
23. **Constitutional Law: Ordinances: Judgments.** The constitutional requirement in Neb. Const. art. III, § 14, that bills and resolutions contain only one subject does not apply to city ordinances, nor the adoption thereof, and decisions thereunder are valuable only as analogies.
24. **Constitutional Law: Municipal Corporations: Initiative and Referendum: Statutes.** The initiative and referendum powers of municipal voters are established by statute in this state—not the Constitution.
25. **Ordinances: Voting.** The Nebraska Supreme Court has adopted a common-law single subject rule of form that preserves the integrity of the municipal electoral process. The rule invalidates proposed ordinances that require voters to approve distinct and independent propositions in a single vote.

26. ____: ____. A proposed ordinance is invalid if it would (1) compel voters to vote for or against both propositions—when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.
27. **Municipal Corporations: Voting.** A municipal ballot measure with separate provisions does not violate the single subject rule if each of its provisions has a natural and necessary connection with each other and together are part of one general subject.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and vacated.

V. Gene Summerlin, of Ogborn, Summerlin & Ogborn, P.C., for appellants.

Steve Grasz, of Husch Blackwell, L.L.P., and Douglas L. Stack for appellee.

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

CONNOLLY, J.

I. SUMMARY

The appellants, William L. Tilgner, Dallis C. Dye, and Edward L. Rieker, filed an "initiative and referendum" petition to refer a proposed ballot measure to the voters of the City of North Platte, Nebraska (the City). The ballot measure would have amended a 1999 city ordinance that imposed an occupation tax.

After being notified that a sufficient number of voters had signed the petition, the City filed this declaratory judgment action to have the proposed measure declared invalid. The district court ruled that the petition proposed a referendum measure that violated Neb. Rev. Stat. § 18-2528(1)(a) (Reissue 2007). In some circumstances, § 18-2528(1)(a) prohibits referendums that interfere with a city's contractual obligations. The electors voted on the proposed amendment. But the court ordered the county clerk not to count the votes cast and not to report or certify the results.

Our holding will be spelled out with some specificity in the following pages, but briefly stated, it is this:

(1) The court lacked the authority to block a count of the votes cast because the City failed to comply with the statutory requisites that would allow a court to take that action. We reverse and vacate that portion of the order.

(2) We reverse the court's ruling that the proposed referendum violated § 18-2528(1)(a) by interfering with a contractual obligation.

(3) We reject the City's cross-appeal claim that the petition was an improper combination of initiative and referendum measures.

(4) We find merit, however, to the City's cross-appeal claim that the proposed referendum violated a common-law single subject rule. That rule invalidates proposed ballot measures that ask voters to approve independent and distinct measures in a single vote.

Accordingly, we affirm in part, and in part reverse and vacate.

II. BACKGROUND

The parties stipulated to the following facts: In February 1999, the City adopted an ordinance providing for an occupation tax (the ordinance). The ordinance stated in relevant part:

> [R]evenue collected on hotel accommodations shall be used by the [C]ity to assist the [C]ity in constructing and operating a visitors center promoting the [C]ity's railroad heritage until 12:00 a.m. (midnight) February 17, 2029, after which time the same shall be deposited into the General Fund of the [C]ity.

In November 2004, the City entered into an "Option Agreement" to purchase a completed visitor center from Golden Spike Tower & Visitor Center, a Nebraska nonprofit corporation (Golden Spike). The record fails to show how the City approved this contract.

Under the contract, Golden Spike would purchase real estate upon which it would construct a "tourism/museum/educational facility and visitor center promoting the community's railroad heritage." The contract stated that Golden Spike intended to borrow money from the U.S. Department of Agriculture (USDA) to fund the project.

Paragraph A.1 required the City to make option payments to Golden Spike, which payments were to be applied toward the purchase price. Paragraph A.1 comprised two components. Under paragraph A.1(a), all of the (unspecified) revenues from the occupation tax that the City had already paid to Golden Spike constituted one option payment. Paragraph A.1(b) required the City to pay Golden Spike each month an amount equal to the previous month's collected revenues from the occupation tax—until the occupation tax expired in February 2029. The contract stated that upon the City's exercise of its option to purchase the visitor center, the purchase price "shall be the aggregate of the amounts paid pursuant to Paragraph A.1." Golden Spike would use these funds to pay off its USDA loan, make improvements, and fund operating costs.

The City could exercise its exclusive option to purchase the property within 1 year after the earlier of two events occurred: (1) the date that Golden Spike paid the USDA loan in full or (2) February 27, 2029, when the City's use of the tax revenues for a visitor center was scheduled to end. If the City failed to exercise its purchase option, its payments to Golden Spike were nonrefundable.

In March 2009, the appellants filed an "Initiative and Referendum Petition" with the city clerk. The appellants collected signatures, and on January 28, 2010, the petition was certified to have been signed by 15 percent of the City's qualified electors. The petition proposed to amend the occupation tax ordinance as follows:

> [R]evenue collected on hotel accommodations shall be used by the [C]ity to ~~assist the [C]ity in constructing and operating a visitors center promoting the [C]ity's railroad heritage~~ retire debt to the [USDA], secured by [Golden Spike] until 12:00 a.m. (midnight) February 17, 2029[.] ~~after which time the same shall be deposited into the general fund of the City.~~ Any occupation tax revenue collected on hotel accommodations beyond the amount paid to retire the [USDA] debt on [Golden Spike] shall be paid into the City's General Fund to be used by the City for property tax relief.

In February 2010, the city council considered amending the ordinance to reflect the petition's language but declined to do so. Instead, on February 18, the City filed a complaint for declaratory relief, seeking to have the petition declared invalid.

The City claimed that the petition was invalid under three theories: (1) It proposed a referendum on a measure that was not subject to referendum under § 18-2528(1)(a); (2) it violated Neb. Rev. Stat. §§ 18-2523 and 18-2527 (Reissue 2007) by impermissibly joining an initiative and a referendum in the same petition; and (3) it impermissibly combined two or more separate and unrelated questions for voters to approve in a single vote.

The appellants claimed that the purchase price under the contract was indefinite and illusory. The court concluded, however, that the purchase price was the revenues collected from the occupation tax over the course of the agreement, even if the City changed the rate or the revenues varied. That ruling is not part of this appeal. The court also declared that the petition violated § 18-2528(1)(a). The court reasoned that the proposed measure would interfere with a contractual obligation created by the original ordinance. It stated:

> [T]he referendum is clearly an attempt to amend and impair the obligation of the contract and is, thus, violative [sic] of Sec. 18-2528(1)(a) . . . .
>
> . . . The people, acting through their representatives, have determined that referendum may not be used if there is an obligation of contract that will be impaired by the referendum process. That is specifically the situation in this case. . . .
>
> . . . .
>
> The only issue presented to this Court is whether or not the ordinance as adopted creates a contractual obligation that may not be impaired by the action of a referendum. The Court has reached the conclusion that it is and finds that a referendum is not the proper method to attack the ordinance in question.

Because the court concluded that the proposed ballot measure violated § 18-2528, it ordered the county clerk not to count the votes and not to report or certify the results of the vote.

III. ASSIGNMENTS OF ERROR

The appellants assign that the district court erred as follows:

(1) ruling that the appellants' referendum measure violated § 18-2528(1)(a); and

(2) ruling that their referendum measure did not qualify for inclusion on the May 2010 election ballot.

In its cross-appeal, the City assigns, restated, that the district court erred in failing to make the following rulings:

(1) The petition violated §§ 18-2523 and 18-2527 by improperly combining an initiative and a referendum within a single petition; and

(2) the petition unconstitutionally combined two separate and unrelated questions for a single vote.

IV. STANDARD OF REVIEW

[1-3] Statutory interpretation presents a question of law.[1] Constitutional interpretation also presents a question of law.[2] When a declaratory judgment action presents a question of law, we decide the question independently of the conclusion reached by the trial court.[3]

V. ANALYSIS

1. Direct Appeal

(a) The Court Lacked Authority to Stop a Count of the Vote

Although the parties have not raised the issue, we conclude that the court lacked authority to order the county clerk not to count and certify the votes cast for or against the ballot measure. Because the court's lack of authority raises a jurisdiction issue, we address it first.

The jurisdiction issue arises under Neb. Rev. Stat. § 18-2538 (Reissue 2007), which authorized the City's declaratory judgment action:

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[1] *McLaughlin Freight Lines v. Gentrup*, 281 Neb. 725, 798 N.W.2d 386 (2011).

[2] See *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

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

> The municipality or any chief petitioner may seek a declaratory judgment regarding any questions arising under Chapter 18, article 25, . . . including, but not limited to, determining whether a measure is subject to referendum or limited referendum or whether a measure may be enacted by initiative. . . . Any action brought for declaratory judgment for [these] purposes . . . may be filed in the district court at any time after the filing of a referendum or initiative petition with the city clerk for signature verification until forty days from the date the governing body received notification pursuant to section 18-2518. *If the municipality does not bring an action for declaratory judgment to determine* [*these issues*] *until after it has received notification pursuant to section 18-2518, it shall be required to proceed with the initiative or referendum election in accordance with sections 18-2501 to 18-2537 and this section.* If the municipality does file such an action prior to receiving notification pursuant to section 18-2518, it shall not be required to proceed to hold such election until a final decision has been rendered in the action. . . . When an action is brought to determine [one or more of these issues], a decision shall be rendered by the court no later than five days prior to the election.

(Emphasis supplied.)

We specifically discussed the requirements of this statute in *Sydow v. City of Grand Island*.[4] There, whether the petitioners had obtained sufficient signatures depended upon which statute governed their ballot measure. The city council refused to put the initiative on the ballot. It believed that the petition presented a general initiative measure, which required the petition to have verified signatures from 15 percent of the qualified electors.[5] But it was undisputed that the petition had sufficient signatures to satisfy the 10-percent requirement for a sales tax proposal.[6] The petitioners filed for a writ of mandamus to

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[4] *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

[5] See Neb. Rev. Stat. § 18-2524 (Reissue 2007).

[6] See Neb. Rev. Stat. § 77-27,142.03 (Reissue 2009).

have the initiative put on the ballot, which request the district court granted. In affirming that judgment, we explained that to keep a ballot measure off the ballot, a city must comply with § 18-2538:

> Under § 18-2538, either party may seek a declaratory judgment determining whether a proposed measure is a measure that may be enacted by initiative up to 40 days after the governing body receives notification of the verified signatures pursuant to § 18-2518. But, if a city does not bring an action before notification is received, it must proceed with an election on the initiative. If a city files a declaratory judgment action before notification is received, it will not be required to place the challenged proposal on the ballot until a final decision has been rendered in the action. Thus, the plain language of § 18-2538, which we are obligated to respect and enforce, specifically contemplates a circumstance in which a municipality may be required to place an initiative measure on the ballot before a court determines whether the measure would be legally valid if enacted by the voters. . . .
>
> . . . [T]he parties stipulated that the election commissioner formally notified the city council of the number of verified signatures in compliance with § 18-2518. The [c]ity did not at any time seek a declaratory judgment that the proposal was not a measure that may be enacted by initiative. Thus, under § 18-2538, the [c]ity was required to place the proposal on the ballot. Had the [c]ity wished to avoid placing the proposal on the ballot while it challenged whether it could be enacted by initiative, it was required to file a declaratory judgment action before notification of the verified number of signature was received. Because the [c]ity failed to seek a declaratory judgment before it received notification pursuant to § 18-2518, the [c]ity has a ministerial duty to place the proposal on the ballot.[7]

[4,5] In this appeal, the parties' stipulation shows that the City did not seek a declaratory judgment until after it was

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[7] *Sydow, supra* note 4, 263 Neb. at 401-02, 639 N.W.2d at 923-24.

notified that the ballot measure petition contained the required signatures. Therefore, under § 18-2538, the court could not bar the measure from being placed on the ballot. In effect, however, a court order forbidding the county clerk from counting the votes cast for a proposed ballot measure or reporting the results keeps the measure off the ballot.

The time requirements under § 18-2538 were obviously intended to avoid having elections left in limbo whenever a city challenges a ballot measure. We conclude that the order frustrated the Legislature's specific requirement that a municipality "shall be required to proceed with the initiative or referendum election."[8] Here, the City did not file its declaratory judgment action before receiving notification of the requisite signatures. Thus, the court's order blocking a count of the votes was an unauthorized act that was outside of the court's jurisdiction.[9] We reverse and vacate that portion of the court's order.

(b) The Court Had Jurisdiction to Decide the City's Challenges

[6] Although the court lacked authority to block a count of the vote, the City filed its complaint within 40 days of receiving notification of the verified signatures.[10] And in *City of Fremont v. Kotas*,[11] we held that under § 18-2538, if a municipality claims that a proposed ballot measure violates a statute under chapter 18, article 25, of the Nebraska Revised Statutes, the claim is a challenge to the procedure or form of the proposal that may be raised in a preelection declaratory judgment action.[12] So under § 18-2538, if a city brings a declaratory judgment action challenging a ballot measure within 40 days of receiving notice of the requisite signatures, a court may invalidate the measure because of a deficiency in form or procedure even if the voters approved it.

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[8] § 18-2538.

[9] See *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

[10] See § 18-2538.

[11] *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

[12] See 5 Eugene McQuillin, The Law of Municipal Corporations § 16:68 (rev. 3d ed. 2004).

In its first two claims, the City challenged the proposed measure as violating the statutes under chapter 18, article 25. These challenges focused on the petition's failure to comply with procedural requirements or requirements for the form of the proposed measure. In addition, the City claimed that the proposed measure violated the single subject rule. In *City of Fremont*, we stated that a single subject challenge is a request for a procedural review of a city initiative.[13] So all of the City's claims regarding procedure or form were ripe for adjudication in a preelection declaratory judgment action.

(c) The Petition Did Not Impair a Contractual Obligation Incurred Under a Previously Approved Measure

Under § 18-2528, the Legislature has specified the circumstances under which citizens can exercise their municipal referendum power. The district court concluded that § 18-2528(1)(a) barred the referendum measure. In deciding the direct appeal, we assume that the court correctly concluded that the petition proposed a referendum measure. It characterized the issue as whether "the ordinance as adopted create[d] a contractual obligation that may not be impaired by the action of a referendum" and concluded that it had.

Section 18-2528 provides in part:

> (1) The following measures shall not be subject to referendum or limited referendum:
>
> (a) Measures necessary to carry out contractual obligations, including, but not limited to, those relating to the issuance of or provided for in bonds, notes, warrants, or other evidences of indebtedness, for projects previously approved by a measure which was, or is, subject to referendum or limited referendum or previously approved by a measure adopted prior to July 17, 1982.

The Legislature has defined a measure as "an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to

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[13] *City of Fremont, supra* note 11.

pass, and which is not excluded from the operation of referendum by the exceptions in section 18-2528."[14]

(i) Parties' Contentions

The appellants contend that the court erred in concluding that § 18-2528(1)(a) prohibited their proposed referendum. They argue that they sought only to amend the 1999 ordinance passing an occupation tax to assist the City in constructing and operating a visitor center. They contend that the tax ordinance was a measure that contemplated a visitor center but did not formally approve one. Moreover, they argue that no measure approving of a visitor center exists. So they conclude that under § 18-2528(1)(a), there was no measure that was subject to a referendum. They also contend that because the tax ordinance was not a measure that was necessary to carry out a contractual obligation for a previously approved project, it fell under § 18-2528(6), which states that measures not exempted are subject to a referendum at any time.

The City does not contend that the tax ordinance was a measure approving of the visitor center project. And it agrees that the option contract with Golden Spike was not a measure. Although the City makes vague assertions that the contract presupposed an authorizing resolution, it points to no resolution that could have been referred to voters. Instead, the City argues that § 18-2528(1)(a) does not require a project to be previously approved. It contends that the statute protects from the referendum process any measure necessary to carrying out a city's contractual obligations. It argues that the clause in § 18-2528(1)(a) referring to "projects previously approved" modifies only the immediately preceding phrase referring to measures "relating to the issuance of or provided for in bonds, notes, warrants, and other evidences of indebtedness." And because the statute explicitly states that measures necessary to carrying out contractual obligations are not limited to measures such as bonds, notes, et cetera, the City argues that the statute protects any measure necessary to carry out a contractual obligation. We disagree.

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[14] Neb. Rev. Stat. § 18-2506 (Reissue 2007).

(ii) Analysis

[7-9] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[15] In construing statutory language, we attempt to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[16] And when possible, we will try to avoid a statutory construction that would lead to an absurd result.[17]

[10] The Legislature unambiguously excluded from the referendum process "[m]easures necessary to carry out contractual obligations."[18] Regardless of the language following this phrase, under § 18-2528(1)(a), a general tax ordinance cannot be a measure necessary to carry out a contractual obligation if an obligation did not exist when the municipality passed it. Here, no contractual obligation existed in 1999 when the City passed the occupation tax ordinance. The 1999 occupation tax contemplated only a future construction of a visitor center.

Accepting the City's logic would lead to an absurd result. Any general taxation measure that a city is authorized to pass could be considered a measure necessary to carrying out a city's later contractual obligations. It is true that without that revenue stream, a city may not meet its obligations. But the City's interpretation would mean that a city's general taxation measure to raise revenues for a general purpose is shielded from referendum—even if electors later learn that the City unlawfully entered into a contract to carry out that purpose or contracted to spend much more than the tax raised.

[11] Instead, under § 18-2528(1)(a), the Legislature has sensibly immunized from the referendum process measures necessary to carrying out contractual obligations "for projects previously approved by a measure which was, or is, subject to referendum or limited referendum."[19] Obviously, a city must be

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[15] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[16] See *State v. Stolen*, 276 Neb. 548, 755 N.W.2d 596 (2008).

[17] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[18] § 18-2528(1)(a).

[19] *Id.*

able to contract for services to implement approved projects without fear of referendum when its citizens did not petition for a referendum on the original measure approving the project. So we reject the City's argument that the phrase "for projects previously approved" in § 18-2528(1)(a) does not modify the type of measures necessary to carry out a contractual obligation. The City's interpretation renders that phrase meaningless. If the Legislature had intended to shield from the referendum process any revenue-raising measure, it would not have included this language.

[12] We conclude that § 18-2528(1)(a) does not shield from the referendum process a revenue measure that funds a city's subsequent contractual obligations for a project that was not previously approved by a measure that was subject to referendum. The court erred in ruling that § 18-2528(1)(a) shielded the occupation tax ordinance from a referendum. We now turn to the City's cross-appeal.

2. Cross-Appeal

(a) The Petition Was Not an Improper Combination of Initiative and Referendum Proposals

As noted, in deciding the direct appeal, we assumed that the court correctly concluded that the petition proposed a referendum measure. But the City challenges that conclusion. It argues that the petition improperly combined an initiative measure and a referendum measure. It acknowledges that we have previously held that voters may use their municipal initiative power to repeal or amend a city ordinance.[20] But the City argues that the Legislature changed the statutes in 1982 to preclude combining initiative and referendum measures in the same petition. The City argues that the petition proposed an invalid referendum measure that included an initiative proposal "to enact a new provision."[21] That is, the City contends that the part of the proposed measure that would change the required use of the occupation tax revenues was an initiative proposal. We disagree with the City's interpretation.

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[20] See *State ex rel. Boyer v. Grady*, 201 Neb. 360, 269 N.W.2d 73 (1978).

[21] Brief for appellee on cross-appeal at 10.

[13] We liberally construe grants of municipal initiative and referendum powers "to permit, rather than restrict, the power and to attain, rather than prevent, its object."[22]

In 1978, we held that voters may use their municipal initiative power to repeal or amend an existing ordinance.[23] At that time, there were no limitations on the municipal initiative power.[24] But the municipal referendum power was more limited. Petitioners could refer an ordinance to the voters for their approval or rejection only if they had petitioned for a referendum within 30 days of the ordinance's passage.[25] We held that citizens could use their initiative power to take any action that the city council or mayor could take, including the repeal or amendment of an ordinance. We reasoned that over time, "circumstances may change or voters may simply find an ordinance undesirable and wish to abolish it, or amend it."[26]

In 1982, the Legislature substantially revised the statutes governing municipal initiative and referendum powers.[27] The Legislature placed some limits on the power of initiative. Under § 18-2523, the power of initiative is a right to *enact* measures. And a proposed initiative measure "shall not have as its primary or sole purpose the repeal or modification of existing law" unless "such repeal or modification is ancillary to and necessary for the adoption and effective operation of the initiative measure."[28]

But under § 18-2527, the Legislature expanded the power of referendum. It is true that § 18-2528 clarified when citizens could exercise the power. But under § 18-2527, the power of referendum is now the right "to repeal *or* amend existing measures." (Emphasis supplied.) So under the 1982 revisions, the power to amend an existing ordinance is part of the voters'

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[22] *State ex rel. Boyer, supra* note 20, 201 Neb. at 365, 269 N.W.2d at 76.

[23] See *State ex rel. Boyer, supra* note 20.

[24] See, *id.*; Neb. Rev. Stat. § 18-101 (Reissue 1977).

[25] See Neb. Rev. Stat. § 18-112 (Reissue 1977).

[26] *State ex rel. Boyer, supra* note 20, 201 Neb. at 366-67, 269 N.W.2d at 77.

[27] See 1982 Neb. Laws, L.B. 807.

[28] § 18-2523(1).

municipal referendum power, not their initiative power. The City, however, argues that § 18-2527 "prohibits municipal referendum petitions from proposing new measures."[29] We disagree that the appellants' petition proposed a new law.

[14] The problem stems in part from the appellants' incorrect labeling of their petition as an "Initiative and Referendum Petition." Despite this, the court clearly considered the proposal to be a referendum measure. We believe the court was correct in not relying on the appellants' label. As stated, we liberally construe the municipal initiative and referendum statutes to permit the exercise of these powers. To determine whether petitioners for a municipal ballot measure are acting under their initiative power or their referendum power, a court should look to the function of their proposed ballot measure—not its label.

The City incorrectly construes the statutes to preclude a proposed amendment of an ordinance in a referendum petition if it would constitute a new provision of law. It would require a court to construe any substantive change to an existing law as a proposal for a new law that must be presented in an initiative petition. This interpretation of the municipal initiative and referendum statutes would be unworkable.

The definition of "enact"—to "make into law by authoritative act"[30]—is broad enough to include any substantive amendment to an existing law. But a substantive change to an existing law cannot be both an enactment under § 18-2523 and an amendment under § 18-2527 because § 18-2523 precludes a proposed initiative (enactment) from having modification of an existing law as its primary or sole purpose. This prohibition of combined initiative and referendum proposals is consistent with Neb. Rev. Stat. § 18-2513(2) (Reissue 2007). That statute provides that "[p]roposals for initiative and referendum shall be submitted on separate ballots . . . ."

[15] But focusing on the distinction between an enactment and an amendment would obviously create confusion for trial courts applying § 18-2523. Instead, the correct distinction for

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[29] Brief for appellee on cross-appeal at 8.

[30] Black's Law Dictionary 606 (9th ed. 2009).

determining whether a proposed municipal ballot measure falls under the petitioners' initiative power or their referendum power is the one supported by the plain language of the statutes: whether the proposed measure would enact a *new* ordinance or would amend an *existing* ordinance. The appellants did not seek to enact a new ordinance in the same measure that would repeal or amend an existing ordinance. We agree with the court's conclusion that the petition proposed a referendum measure. The City's argument that the petition improperly combined initiative and referendum measures is without merit.

(b) The Petition Violated a Common-Law Single Subject Rule to Protect the Integrity of the Electorate

The City contends that the petition unconstitutionally combined two separate and unrelated questions for a single vote. It argues that the Nebraska Constitution prohibits petitioners from log-rolling issues in a ballot measure. "Log rolling is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately."[31]

(i) The Nebraska Constitution Does Not Impose a Single Subject Rule for Municipal Ballot Measures

We reject the City's argument that Neb. Const. art. III, §§ 2 and 3, prohibit a municipal ballot measure from containing two distinct and independent propositions. It is true that one could read our decision in *City of Fremont* to imply that the Nebraska Constitution confers upon electors the power to propose municipal ordinances:

> The right to an initiative vote to enact laws independent of the Legislature is the first power reserved by the people in the Nebraska Constitution. See Neb. Const. art. III, § 2. The Legislature provides for initiatives and

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[31] *City of Fremont, supra* note 11, 279 Neb. at 727, 781 N.W.2d at 462-63.

> referendums for municipal subdivisions in chapter 18, article 25, of the Nebraska Revised Statutes. See Neb. Rev. Stat. §§ 18-2501 through 18-2538 (Reissue 2007). An initiative . . . may be used to enact a "[m]easure," defined as "an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass, and which is not excluded from the operation of referendum by the exceptions in section 18-2528."[32]

Further, in rejecting the argument in *City of Fremont* that the proposed municipal ordinance was unconstitutional because it contained more than one subject, we specifically applied a single subject rule from Neb. Const. art. III, § 2. Thus, we implicitly reasoned that constitutional requirements for the form of a statewide initiative petition apply to proposals for municipal ordinances. But on further reflection, we were wrong.

[16,17] First, the Legislature's authority to enact statutes providing a right for municipal voters to enact or repeal municipal ordinances does not depend on the existence of article III, §§ 2 and 3, of the Nebraska Constitution. The Nebraska Constitution is not a grant, but a restriction, on legislative power, and the Legislature may legislate upon any subject not proscribed by the Constitution.[33] Because the Nebraska Constitution does not restrict the right to petition for municipal ballot measures, the Legislature was free to grant these powers to municipal voters even if the same powers did not exist for statewide voters under the Constitution.

[18-20] Second, by its terms, the Nebraska Constitution reserves to the people the right to enact or repeal only *state laws*, not municipal ordinances. In ascertaining the intent of a constitutional provision from its language, a court may not supply any supposed omission, or add words to or take words from the provision as framed.[34] If the meaning is clear, we give a constitutional provision the meaning that laypersons would

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[32] *Id.* at 723, 781 N.W.2d at 460.

[33] See *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[34] *State ex rel. Lemon, supra* note 2.

obviously understand it to convey.[35] And as we know, it is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.[36]

No clause in Neb. Const. art. III, § 2, refers to ordinances or municipal laws:

> The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people *independently of the Legislature*. . . . If the petition be for the enactment of a law, it shall be signed by seven percent of the registered *voters of the state*, and if the petition be for the amendment of the Constitution, the petition therefor shall be signed by ten percent of such registered voters. In all cases the registered voters signing such petition shall be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state, and when thus signed, the petition shall be filed with the Secretary of State who shall submit the measure thus proposed to the *electors of the state* . . . . The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. Initiative measures shall contain only one subject.

(Emphasis supplied.)

[21] This section unambiguously refers to state voters—not municipal voters. And the requirement of obtaining signatures from voters distributed in different counties shows that the constitutional provision governs the enactment only of state laws—not of municipal ordinances.[37] Further, article III of the Nebraska Constitution deals with the "legislative authority *of the state*."[38] So references to "the Legislature" in article III should not be construed to include municipal legislative bodies.

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[35] See *State ex rel. Johnson, supra* note 3.

[36] *State ex rel. Lemon, supra* note 2.

[37] See *Schroeder v. Zehrung*, 108 Neb. 573, 188 N.W. 237 (1922).

[38] See Neb. Const. art. III, § 1 (emphasis supplied).

Contrary to our reasoning in *City of Fremont*,[39] we hold that article III, § 2, of the Nebraska Constitution neither applies to proposed municipal ordinances nor requires that they comply with a single subject rule.

Furthermore, the power of referendum under Neb. Const. art. III, § 3, is even more explicitly limited to state laws:

> The second power reserved is the referendum which may be invoked, by petition, against *any act or part of an act of the Legislature*, except [specified appropriation measures]. Petitions invoking the referendum shall be signed by not less than five percent of the registered *voters of the state*, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. . . . No more than one act or portion of an act of the Legislature shall be the subject of each referendum petition.

(Emphasis supplied.)

[22,23] And so we have specifically held that the constitutional power of referendum under article III, § 3, does not confer a right to refer municipal measures to the voters.[40] We have similarly held that the constitutional requirement in Neb. Const. art. III, § 14, that bills and resolutions contain only one subject does not apply "to city ordinances, nor the adoption thereof, and [that] decisions thereunder are valuable only as analogies."[41]

[24] Summed up, the constitutional requirements for the initiative and referendum powers in article III were intended to give statewide voters equal legislative authority to enact state laws or to refer acts passed by the Legislature to the voters. But "[t]he initiative and referendum powers of municipal voters are established by statute in this state"[42]—not the Constitution.

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[39] *City of Fremont, supra* note 11.

[40] See *Schroeder, supra* note 37.

[41] See *Gembler v. City of Seward*, 136 Neb. 196, 198, 285 N.W. 542, 544 (1939), *modified* 136 Neb. 916, 288 N.W. 545.

[42] *State ex rel. Boyer, supra* note 20, 201 Neb. at 364, 269 N.W.2d at 76.

(ii) A Common-Law Single Subject Rule Applies to Municipal Ballot Measures

Despite the Constitution's silence on municipal initiative and referendum powers, we agree with the City that a single subject rule does apply to proposed ballot measures for municipal ordinances. In many cases from other jurisdictions, courts have adopted a common-law single subject rule of form that applies to questions submitted to voters generally.[43] Although it was not explicitly stated, in *Drummond v. City of Columbus*,[44] we adopted a single subject rule for proposed municipal initiatives and held that the adopted ordinance was invalid under that rule.

In *Drummond*, a statute that governed the form of a municipal ballot measure provided the following: "If there is but one proposal submitted, the ballots shall be so printed as to give each voter a clear opportunity to designate by an (X) in parenthesis at the right, his answer 'Yes' or 'No' as approving or rejecting the same."[45] But the parties apparently did not raise that statute, and we did not discuss it. Instead, we relied on cases from other jurisdictions and applied a common-law single subject rule to ordinances that must be approved by the voters.[46]

[25] The common-law single subject rule of form that we adopted in *Drummond* preserves the integrity of the municipal electoral process by invalidating proposed ordinances that require voters to approve distinct and independent propositions in a single vote. Voters must be able to intelligently express what they are voting for or against.

Moreover, the single subject rule is consistent with the ballot form requirements under § 18-2513(1)(b) for initiative and

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[43] See, e.g., *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941), citing *Lang v. Cavalier*, 59 N.D. 75, 228 N.W.819 (1930); *Stern v. City of Fargo et al.*, 18 N.D. 289, 122 N.W. 403 (1909) (citing cases).

[44] *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939).

[45] See Comp. Stat. § 18-511 (1929).

[46] See, *City of Denver v. Hayes*, 28 Colo. 110, 63 P. 311 (1900); *Leavenworth v. Wilson*, 69 Kan. 74, 76 P. 400 (1904); *Stern, supra* note 43; *Julson v. Sioux Falls*, 48 S.D. 452, 205 N.W. 43 (1925).

referendum measures. That section provides that the ballot title must include "[a] briefly worded question which plainly states the purpose of the measure and is phrased so that *an affirmative response to the question* corresponds to an affirmative vote on the measure." (Emphasis supplied.) This statutory rule of form anticipates that a ballot measure will permit voters to clearly express their approval or rejection of a single question. And if a municipality's governing body does not adopt a proposed initiative or referendum measure by resolution, it must submit the measure to voters as presented.[47] But if a proposed ballot measure combines two distinct proposals so that voters are compelled to vote for or against both when they might not do so if separate questions were submitted, then they cannot express a clear preference on both proposals.

[26] We conclude that a proposed municipal ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.[48]

(iii) The Proposed Referendum Violated the Single Subject Rule

The City argues that the petition contains the following distinct questions: (1) whether to continue paying the occupation tax to Golden Spike after the USDA loan is paid off and (2) whether to allocate the occupation tax to property tax relief. We agree that the voters were asked to approve of independent and distinct propositions in a single vote.

In *Drummond*, we determined that the initiative was invalid because it asked voters to decide whether the city should acquire an electrical distribution system "'and/or'" acquire transmission lines to connect to another source of electricity.[49] Instead of being asked to approve one proposal over another, voters could not express their preference for either proposal

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[47] See § 18-2524 and Neb. Rev. Stat. § 18-2530 (Reissue 2007).

[48] See *Drummond, supra* note 44.

[49] *Id.*, 136 Neb. at 88, 285 N.W. at 110.

without also authorizing city officials to take the action that the voters did not prefer. Because voters were compelled to approve either action, they were not expressing their own preference.

[27] In contrast, in *City of Fremont*, we held that a municipal initiative petition to regulate illegal aliens did not violate the single subject rule.[50] We concluded that a municipal ballot measure with separate provisions does not violate the single subject rule if the provisions have a natural and necessary connection with each other and together are part of one general subject.[51]

In this case, the proposed referendum would have amended the ordinance as follows:

> [R]evenue collected on hotel accommodations shall be used by the [C]ity to ~~assist the [C]ity in constructing and operating a visitors center promoting the [C]ity's railroad heritage~~ retire debt to the [USDA], secured by [Golden Spike] until 12:00 a.m. (midnight) February 17, 2029[.] ~~after which time the same shall be deposited into the general fund of the City.~~ Any occupation tax revenue collected on hotel accommodations beyond the amount paid to retire the [USDA] debt on [Golden Spike] shall be paid into the City's General Fund to be used by the City for property tax relief.

The tax ordinance does not include a time limit. The tax continues regardless of how the City uses the revenues. The original ordinance required the City to use the revenues for two purposes: (1) to assist with constructing and operating a visitor center until February 2029; and (2) after that date, to increase the City's general fund. The proposed amendment changed the original ordinance to impose two separate requirements on the City.

The petition's first proposed amendment required the City to use the tax revenues to retire Golden Spike's USDA debt until February 2029. The City could not use the revenues to construct and operate a visitor center. Even assuming that

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[50] *City of Fremont, supra* note 11.

[51] *Id.*

the building had already been constructed, the first proposed amendment would have prohibited the City from using any revenues to operate the facility. The petition's second proposed amendment required the City to use the additional collected revenues to provide property tax relief. So under the second proposed amendment, the City could not use the additional revenues to increase its general fund. The second proposed amendment took effect as soon as the USDA debt was retired.

These amendments were not separate provisions of the same law. But even if they could be construed as such, we conclude that they presented independent and distinct proposals instead of having a natural and necessary connection. The first amendment changed the ordinance by limiting the City's use of revenues to retiring Golden Spike's USDA debt until that debt was retired, instead of using revenues to operate the visitor center. Changing the City's use of additional revenues, however—to require property tax relief instead of increasing its general fund—did not have a natural and necessary connection to limiting the use of revenues for the visitor center to retiring the USDA debt. Because the petition presented distinct but dual propositions for a single vote, voters could not express a preference on either without approving or rejecting both. Because the appellants' referendum petition would not permit voters to express a clear preference on dual propositions, it violated the single subject rule and was invalid.

VI. CONCLUSION

We conclude that although the district court had authority to decide the City's challenges to the proposed ballot measure, it erred in blocking a count of the vote on the measure. We vacate that portion of the court's order.

We determine that court correctly ruled that the proposed ordinance was a referendum measure, instead of a combined initiative and referendum. But we determine that it erred in ruling that § 18-2528(1)(a) barred the appellants' referendum. Section 18-2528(1)(a) does not shield from the referendum process general taxation measures that become necessary to meeting the City's *subsequent* contractual obligations for

municipal projects that the City had not previously approved in a measure subject to referendum.

We conclude, however, that the appellants' referendum petition violated a common-law single subject rule that invalidates proposed ordinances that require voters to approve distinct and independent propositions in a single vote. Accordingly, we affirm the remaining part of the judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

CONNOLLY, J., participating on briefs.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
STUART D. HOWARD, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY M. LAWS, APPELLANT.

803 N.W.2d 450

Filed September 23, 2011. Nos. S-10-660, S-10-874.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must

have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference.

5. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
6. **Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.
7. **Probable Cause.** Reasonable suspicion must be determined on a case-by-case basis.
8. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
9. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If reasonable suspicion exists for a continued detention, the court must consider whether the detention was reasonable in the context of an investigative stop, considering both the length of the continued detention and the investigative methods employed.
10. **Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
11. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.
12. **Probable Cause: Appeal and Error.** Appellate courts determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.
13. **Investigative Stops: Motor Vehicles: Probable Cause: Records.** Evidence of a drug detection dog's search records may be considered in the totality of the circumstances when determining whether a canine alert, combined with reasonable suspicion factors, amounts to probable cause to search a vehicle.
14. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
15. **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.

16. **Controlled Substances.** A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.
17. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
18. **Controlled Substances: Circumstantial Evidence: Intent.** Circumstantial evidence may support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.
19. ____: ____: ____. Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.
20. **Controlled Substances.** Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession.
21. **Investigative Stops: Motor Vehicles: Controlled Substances.** Possession of a controlled substance can be inferred if the vehicle's occupant acts oddly during a traffic stop, gives explanations that are inconsistent with the explanations of other vehicle occupants, or generally gives an implausible explanation for the travels.
22. **Stipulations: Pleas: Evidence.** A stipulation entered by a defendant can be tantamount to a guilty plea. But this is true only when the defendant stipulates either to his or her guilt or to the sufficiency of the evidence.
23. **Effectiveness of Counsel: Proof.** In order to prevail on a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency.
24. **Effectiveness of Counsel: Presumptions.** Under certain limited circumstances, prejudice to the accused is to be assumed (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.
25. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
26. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.
27. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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.

Appeals from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Korey Reiman for appellant Stuart D. Howard.

Matthew K. Kosmicki, of Brennan & Nielsen Law Offices, P.C., for appellant Anthony M. Laws.

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

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

STEPHAN, J.

A vehicle driven by Anthony M. Laws in which Stuart D. Howard was a passenger was stopped for speeding by a Nebraska State Patrol officer. When consent to search was denied, a trained drug detection canine unit was brought to the scene. The canine alerted, and a search disclosed over 700 pounds of marijuana. Laws and Howard were both charged with possession of a controlled substance with intent to deliver. Each filed a motion to suppress the evidence obtained as a result of the traffic stop and canine alert. After a combined hearing, the motions to suppress were denied, and Laws and Howard were both subsequently convicted of the charge. Both filed notices of appeal, assigning separate but related errors. We have consolidated their appeals for purposes of this opinion.

I. FACTS

On June 1, 2009, at 12:50 p.m., Laws was driving a sports utility vehicle (SUV) towing a popup camper eastbound on Interstate 80 in Lancaster County, Nebraska. Nebraska State Patrol officer Robert Pelster's stationary radar showed the SUV was traveling 63 m.p.h. in a 55-m.p.h. construction zone. Pelster initiated a traffic stop.

During the stop, Pelster noted that Laws was driving the vehicle and that there was a female passenger, Sarah R. McGee, in the front seat and a male passenger, Howard, in the rear seat. Pelster thought Laws seemed very nervous and noticed that his hands were shaking. Laws provided documentation showing that both the SUV and the popup camper had been rented near Detroit, Michigan. The SUV was rented on the evening of May 28, 2009, for $767, and the camper was

rented on May 29 for $500. The rental documents showed that the camper had been rented by Howard and that the SUV had been rented by Ebony Young. Howard informed Pelster that Young was his sister. Both Young and Howard were listed as authorized drivers of the SUV. Laws, who was not listed as an authorized driver, initially told Pelster that he had driven during the entire trip.

Laws accompanied Pelster to his cruiser while Howard and McGee remained in the SUV. When Pelster asked Laws about his shaking hands, Laws explained that his hands were shaking because he had not consumed any alcohol for some time. Pelster asked about the group's travel, and Laws told him that they had driven from Detroit to Flagstaff, Arizona, and had seen some sights, including the Grand Canyon. Laws stated that Howard and McGee were his friends, and he was unsure as to exactly when they left Detroit because he was intoxicated at the time. Laws told Pelster that the three did not know anyone in Arizona, but instead had gone there just to sightsee.

Pelster checked the criminal histories of the three travelers and learned that Howard's driver's license was suspended, that an active protection order was issued against him, and that he had a prior criminal history for weapons and assault. Pelster also learned that Laws had a record of a weapons offense and had been involved in a homicide or an attempted homicide. Pelster obtained no criminal history for McGee, but determined that she did not have a driver's license. Pelster then left Laws in the cruiser and returned to the SUV, where Howard and McGee were waiting, to question McGee in order to verify that she was not the subject of the protection order that was issued against Howard. McGee informed him that she was not, and she confirmed that the three had visited Flagstaff and the Grand Canyon. During this conversation, Howard told Pelster that he had family in Flagstaff. Howard also referred to Laws as his uncle.

After speaking with Howard and McGee, Pelster returned to his cruiser to speak to Laws. This occurred at approximately 1:14 p.m. Laws, who had overheard Pelster's conversation with Howard and McGee on the police radio, immediately told

Pelster that he and Howard were just friends but that because Laws was older, Howard referred to him as his uncle. Pelster issued a warning citation to Laws at 1:26 p.m., and then asked Laws for permission to search his luggage. Laws agreed. Because the rental documents were in Howard's name, Pelster then asked Howard for permission to search the SUV and the camper. When Howard refused, Pelster radioed for a trained drug detection canine unit to come to the scene.

Pelster had some difficulty locating a canine unit, and finally, at 1:50 p.m., he was advised that Investigator Alan Eberle and his canine, Rocky, were en route from Omaha, Nebraska. Eberle and Rocky arrived at approximately 2:30 p.m. Rocky alerted on the camper, and a subsequent search led to the discovery of 727.5 pounds of marijuana inside the camper. Laws, Howard, and McGee were all arrested.

Laws and Howard were each charged with one count of possession of a controlled substance with intent to deliver. Each filed a motion to suppress all physical evidence seized after the search, contending, inter alia, that Pelster lacked reasonable suspicion to detain them after the conclusion of the traffic stop. A combined evidentiary hearing was conducted on the motions to suppress. Pelster testified regarding the traffic stop, and Eberle testified regarding the reliability of Rocky as a drug detection canine. At the conclusion of the hearing, the district court denied the motions to suppress.

Laws waived his right to a trial by jury and elected to proceed with a bench trial on stipulated evidence. At his trial, the State offered into evidence a recording of the traffic stop taken from Pelster's cruiser, Pelster's written report of the traffic stop, the rental agreements for the SUV and the camper, a Nebraska State Patrol crime laboratory report identifying the substance found in the camper as marijuana, photographs taken by Pelster of the search of the vehicles, and a document attesting that the certified weight of the marijuana found in the camper was 727.5 pounds. Laws offered the transcript from the hearing on the motion to suppress and preserved all the issues he raised in his motion to suppress. After considering this evidence, the district court found Laws guilty and subsequently sentenced him to incarceration for 8 to 12 years.

Howard also waived his right to a jury trial and elected to proceed with a bench trial on stipulated evidence. The evidence submitted by the State was identical to the evidence submitted at Laws' bench trial. Howard did not offer evidence, but did renew and preserve the issues raised in his motion to suppress. Based on the evidence submitted, the district court found Howard guilty.

Howard then filed a motion for a new trial, claiming that the district court erred in overruling his motion to suppress. Before that motion was ruled upon, Howard's trial counsel filed a motion to withdraw. The district court granted the motion to withdraw, found Howard to be indigent, and appointed new counsel to represent him. Howard's new counsel filed an amended motion for a new trial, alleging irregularities in the proceedings, errors of law, and ineffective assistance of counsel. Following an evidentiary hearing, the district court denied the motion for a new trial and sentenced Howard to 10 to 14 years' imprisonment. Both Laws and Howard filed timely notices of appeal from their sentencing orders.

II. ASSIGNMENTS OF ERROR

Laws assigns (1) that the district court erred in finding the arresting officer had reasonable suspicion to detain him after the conclusion of the traffic stop, (2) that the district court erred in finding there was adequate foundation for the admission of the results of the canine sniff, (3) that the district court erred in failing to suppress the physical evidence resulting from the search and seizure of the vehicle, and (4) that the evidence was insufficient as a matter of law to support his conviction.

Howard assigns (1) that the district court erred in overruling the motion to suppress the evidence obtained from the stop of the vehicle and subsequent search and seizure; (2) that the district court erred in determining reasonable suspicion existed allowing continued detention after the citation had been issued; (3) that the district court erred in determining the lengthy detention, while law enforcement awaited a canine unit, was lawful; (4) that the district court erred in conducting a stipulated trial without first advising Howard of the constitutional

rights he was waiving; (5) that his sentence is excessive, and (6) that his trial counsel was ineffective in proceeding with a stipulated bench trial.

III. ANALYSIS

1. Reasonable Suspicion Justified Further Detention

[1] Both Laws and Howard argue that the evidence found as a result of the search of the vehicles should be suppressed because Pelster lacked reasonable suspicion to detain them while awaiting the arrival of the canine unit. When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.[1]

[2] Neither Laws nor Howard contests the propriety of the initial traffic stop. Nor could they reasonably do so, because the record shows that Laws was stopped for speeding. And a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[2]

[3] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.[3] This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel.[4] Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.[5]

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

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

The record before us indicates that Pelster took about 40 minutes to complete these investigative procedures. Laws and Howard argue that after Pelster concluded these investigative procedures and issued Laws the citation, he lacked legal authority to detain the vehicles and their occupants pending the arrival of the canine unit.

[4-7] In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the interference.[6] Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.[7] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.[8] Reasonable suspicion must be determined on a case-by-case basis.[9]

[8] In this case, the district court found that Pelster had a reasonable, articulable suspicion that the occupants of the SUV were involved in criminal activity, based on (1) the illogical nature of the trip, which was expensive, driving-intensive, and very short; (2) Laws' nervousness; (3) Laws' explanation that his shaking hands were caused by alcohol deprivation when he was the only driver of the vehicle on the long trip; (4) the use of a single driver on such a long trip; (5) the fact that the camper had not been used during the trip; and (6) the recent law enforcement contacts of Laws and Howard. We examine each of these factors separately, mindful of the rule that when a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.[10]

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

(a) Illogical Nature of Trip

The parties left Detroit no earlier than the morning of May 29, 2009. The traffic stop occurred on Interstate 80 near Lincoln, Nebraska, on June 1 at 12:50 p.m. Pelster testified at the hearing on the motions to suppress that he thought the distance between Detroit and Phoenix, Arizona, was 2,000 miles, and he estimated it would take about 28 hours to drive that distance. Pelster further testified that he thought the distance between Phoenix and Lincoln was 1,300 miles. Based on general calculations, Pelster estimated that the parties could not have been in Phoenix for much more than 12 hours.

Laws argues that the evidence shows that the parties were in Flagstaff, not Phoenix, and that the distance between Detroit and Flagstaff is 1,800 miles. He calculates that they were actually in Flagstaff for 22 to 25 hours. Laws contends that the 22- to 25-hour stay, as opposed to the 12-hour stay calculated by Pelster, "conclusively proves that Pelster was fashioning facts to justify his detention and search of the vehicle."[11]

Pelster admittedly was estimating the group's travel times at the time of the traffic stop. Although his estimates may have been slightly off, that fact does not necessarily invalidate his conclusion that the nature of the trip was unusual and suspicious. Even under Laws' calculations, the parties drove 28 straight hours from Detroit to Flagstaff, stayed there for approximately 24 hours, and then drove another 14 straight hours before being stopped outside of Lincoln. Contrary to the assertions made in Laws' brief, a reasonable officer who learned that parties had driven from Detroit to Flagstaff on May 29, 2009, and were midway through a return trip on June 1 would be suspicious of the motive behind the trip. Considering that the trip was made in an SUV which was pulling a popup camper and that both vehicles were rented specifically for the trip at a combined cost of approximately $1,300, the level of suspicion logically increases. Simply stated, there is no innocent explanation for renting a vehicle and a popup camper and then driving more than 25 hours straight to a destination, staying for less than one full day without utilizing the camper, and

[11] Brief for appellant Laws in case No. S-10-874 at 14.

then driving straight back. The short duration of the long road trip, especially viewed in light of its expense and its utilization of the rental vehicles, is an important factor in the reasonable suspicion analysis.

Both Laws and Howard argue that the nature of the travel in this case is similar to travel in other cases which have not been found to be suspicious. Laws relies on *U.S. v. Beck*,[12] *U.S. v. Kirkpatrick*,[13] and *State v. McGinnis*.[14] In *Beck*, the defendant, a truckdriver, was driving from California to North Carolina for a job interview. The court found nothing inherently suspicious about a job search in a different location of the country. In *Kirkpatrick*, the defendant was stopped in a vehicle he had rented in Las Vegas, Nevada, and stated he was returning home to Minnesota. He told the officer that he had flown to Las Vegas in order to drive his niece to Denver, Colorado, because his niece's mother did not want the niece to fly. The court found there was nothing suspicious about the trip or his explanation of it. In *McGinnis*, the defendant flew from Seattle, Washington, to San Francisco, California; rented a car; and began driving to New York. He told officers that he was going to visit his ailing grandfather and that because he had never driven across the country before, he wanted to try it one time. The court found that although the trip was unconventional, it was not suspicious.

Both Laws and Howard cite *State v. Passerini*.[15] In that case, a state trooper saw a vehicle traveling below the speed limit. The trooper noticed that the driver did not glance over at the trooper's patrol car, had his hands "'at ten and two,'" was driving a clean rental vehicle, and appeared tense.[16] The driver slowed down even more when the trooper began following him, and eventually exited the interstate without signaling. When questioned, the driver explained that he had been living with his

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[12] *U.S. v. Beck*, 140 F.3d 1129 (8th Cir. 1998).

[13] *U.S. v. Kirkpatrick*, 5 F. Supp. 2d 1045 (D. Neb. 1998).

[14] *State v. McGinnis*, 8 Neb. App. 1014, 608 N.W.2d 605 (2000).

[15] *State v. Passerini*, 18 Neb. App. 552, 789 N.W.2d 60 (2010).

[16] *Id.* at 557, 789 N.W.2d at 65.

uncle in Reno, Nevada, but was driving back to Pennsylvania to take care of his barn, which had burned down. The Nebraska Court of Appeals determined that the trooper lacked reasonable suspicion to detain the driver for a canine sniff.

In each of these cases, there was a reasonable, innocent explanation for the unusual travel plans. Here, however, there is not. And, as discussed below, this case contains many factors not present in the other cases. The unusual length, nature, expense, and duration of the trip weigh heavily in favor of a finding of reasonable suspicion.

(b) Laws' Nervousness

Pelster noticed that Laws was exceptionally nervous, so much so that his hands were shaking. But trembling hands and other signs of nervousness may be displayed by innocent travelers who are stopped and confronted by an officer, and thus these observations do little to support a reasonable suspicion of criminal activity.[17] This factor weighs little, if at all, into the reasonable suspicion calculation.

(c) Laws' Explanation of His Shaking Hands

When asked by Pelster, Laws explained that his hands were shaking because he had not consumed alcohol in some time. This explanation is odd when it is considered in light of the fact that Laws also stated that he had been the only driver during the trip, for it begs the question of why the parties would choose a chemically dependent driver for a lengthy road trip. And Laws later contradicted his statement that he had been the only driver when he told Pelster that he did not know when they had left Michigan because he had been intoxicated in the back seat. A reasonable officer would be suspicious of Laws' explanation.

(d) Use of Single Driver on Very Long Trip

This factor is somewhat related to the explanation of Laws' shaking hands. But it is also of independent significance that

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[17] *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). See, *U.S. v. Beck, supra* note 12; *U.S. v. Kirkpatrick, supra* note 13.

Laws, who was not identified as an authorized driver on the rental agreement for the SUV, claimed that he was the only driver on what was undisputedly a very long road trip, particularly when all parties agreed that they drove straight through.

(e) Camper Had Not Been Used During Trip

Neither Laws nor Howard challenges the district court's finding that the camper was never used. And this finding is significant; the fact that a camper was pulled for 1,800 miles one way and then never utilized, either en route or upon reaching the destination of a "camping trip," is quite suspicious. This is particularly so when the camper was rented for the sole purpose of the trip. This factor weighs heavily in the reasonable suspicion analysis.

(f) Recent Law Enforcement Contacts of Laws and Howard

Both Laws and Howard had recent law enforcement contacts which included weapons charges and assaults, and Laws had prior involvement in a homicide. Laws and Howard contend that because the contacts were not drug related, they lack probative value in the reasonable suspicion analysis. Laws cites *State v. Draganescu*[18] for this proposition.

We stated in *Draganescu* that a person's "drug-related criminal history" is a factor to be considered in the reasonable suspicion analysis.[19] But the prior criminal history in that case was drug related, and our choice of words was based on the factual circumstances of the case. *Draganescu* cited *State v. Lee*,[20] and in that case, we recognized that any prior criminal history may be a relevant factor in the reasonable suspicion analysis. This factor weighs at least slightly in favor of a finding of reasonable suspicion.

(g) Conclusion

Although some of the factors identified by the district court, when examined in isolation, do not weigh heavily in

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

[19] *Id.* at 462, 755 N.W.2d at 75.

[20] *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

favor of a finding of reasonable suspicion that the occupants of the vehicle were engaged in criminal activity, when viewed in their totality, the circumstances indicate that Pelster had reasonable suspicion to detain the occupants for the canine unit after the completion of the traffic stop. The illogical nature of the trip is a prime factor in this analysis, and when combined with Laws' odd explanation for his shaking hands, the fact that the camper was never used, and the criminal backgrounds of both Laws and Howard, Pelster had a reasonable suspicion that the vehicle's occupants were engaged in criminal activity. We affirm the district court's finding that there was reasonable suspicion to detain the vehicle for the canine unit.

2. Length of Detention Not Unreasonable

[9] Howard argues that the length of the continued detention was unreasonable. If reasonable suspicion exists for a continued detention, the court must consider whether the detention was reasonable in the context of an investigative stop, considering both the length of the continued detention and the investigative methods employed.[21] An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop.[22] Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.[23]

The method utilized by Pelster, a canine sniff, is generally considered to be minimally intrusive.[24] And there is no rigid time limitation on investigative stops.[25] Here, the focus is on the diligence of Pelster, the officer pursuing the investigation,

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[21] *State v. Louthan, supra* note 1.

[22] *State v. Lee, supra* note 20.

[23] *Id.*

[24] *Id.*

[25] See, *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985); *U.S. v. Hardy*, 855 F.2d 753 (11th Cir. 1988); *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

and the question is how quickly he requested the canine unit and how quickly the unit was dispatched.[26]

The district court found that Pelster issued the citation and returned Laws' license to him at 1:26 p.m. Immediately after that, Laws gave consent to search his luggage, and then at 1:34 p.m., Howard refused consent to search the vehicles. Pelster then requested the canine unit, and the nearest available unit was en route from Omaha by 1:50 p.m. The unit arrived at 2:30 p.m., and the canine sniff was completed by 2:36 p.m. Nothing in the record indicates any lack of diligence or abuse of discretion on the part of Pelster in seeking a trained canine unit. The mere fact that it took nearly an hour for the unit to ultimately arrive does not make the delay unreasonable, nor does the fact that the stop was conducted on the side of a busy interstate highway. We affirm the district court's finding that the detention was reasonable and did not amount to a de facto arrest.

3. Canine Sniff Was Reliable

Laws challenges the reliability of the canine sniff. We construe his argument to be that because the canine sniff was unreliable, there was not probable cause to search the vehicles. A district court's finding that a drug detection canine is reliable is a finding of fact that is reviewed for clear error.[27]

[10-12] Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[28] Probable cause is a flexible, commonsense standard.[29] It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not

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[26] See, *U.S. v. Hardy, supra* note 25; *State v. Soukharith, supra* note 25.

[27] See *U.S. v. Winters*, 600 F.3d 963 (8th Cir. 2010).

[28] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[29] *State v. Smith, supra* note 28.

demand any showing that such a belief be correct or more likely true than false.[30] We determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.[31]

[13] Generally, the factors supporting an officer's reasonable suspicion of illegal drug activity, coupled with a well-trained drug detection dog's positive indication of drugs in a vehicle, give the officer probable cause to search the vehicle.[32] Many courts hold that proof that a drug detection dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable.[33] The rationale for this rule is that because a trained drug detection dog has an ability to detect residual drug odors, reliance on an "accuracy" rate measured by the number of times the dog alerts to drugs in the field and the finding of an actual presence of drugs is misleading.[34] Some courts, however, allow a defendant in at least some circumstances to introduce evidence of a drug detection dog's search records and consider those records in the totality of the circumstances when determining whether a canine alert, combined with reasonable suspicion factors, amounts to probable cause to search a vehicle.[35] We adopt this latter standard.

Here, Eberle testified about Rocky's training and certification at the hearing on the motions to suppress. Eberle testified that Rocky is certified by the Nebraska State Patrol, the entity responsible for certifying drug detection dogs in Nebraska. Rocky obtained his certification in June 2007 after Eberle and Rocky attended a 5-week training session where they were trained as a team. Eberle testified that during training, examiners knew whether a drug substance was present or not

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[30] *Id.*

[31] *Id.*

[32] See, e.g., *State v. Draganescu, supra* note 18.

[33] See *State v. Nguyen*, 157 Ohio App. 3d 482, 811 N.E.2d 1180 (2004) (citing cases).

[34] See *id.*

[35] See *U.S. v. Donnelly*, 475 F.3d 946 (8th Cir. 2007).

when Rocky alerted. He testified that he and Rocky passed an examination at the conclusion of the training and have renewed their certification annually.

Eberle also testified about Rocky's field record. He stated that a form is completed every time Rocky is deployed for a field search. The form indicates whether Rocky alerted and whether drugs were found. Eberle explained that sometimes Rocky will alert but no drugs are found. He explained that this can occur because often there is evidence that the items searched contained the scent of drugs, and it is that scent that Rocky is trained to detect.

The record shows that during 79 field deployments, Rocky alerted 41 times. Seven times, no contraband was found following the alert and there was no explanation for the alert. Another seven times, no contraband was found following the alert but there was a reasonable explanation for the presence of the scent of drugs. On three occasions, Rocky alerted but the form did not document whether any contraband was found.

Based on the evidence of Rocky's training and certification and his field records, we conclude that the district court did not err in finding that the canine sniff was reliable and, combined with the reasonable suspicion factors, supported a finding of probable cause to search the vehicles.

4. Evidence Is Sufficient to Support Laws' Conviction

Laws argues that the evidence was insufficient to convict him of possession with intent to deliver, because the SUV and the camper were leased by other individuals and he was merely the driver. He contends that there is no proof that he was aware that marijuana was in the camper so as to possess it and no proof that he had any intention of distributing the marijuana.

[14,15] 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.[36] And 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.[37]

[16-19] A person possesses a controlled substance when he or she knows of the nature or character of the substance and of its presence and has dominion or control over it.[38] Possession can be either actual or constructive, and constructive possession of an illegal substance may be proved by direct or circumstantial evidence.[39] Circumstantial evidence may also support a finding that a defendant intended to distribute, deliver, or dispense a controlled substance in the defendant's possession.[40] Circumstantial evidence sufficient to establish possession of a controlled substance with intent to deliver may consist of evidence of the quantity of the substance, equipment and supplies found with the substance, the place where the substance was found, the manner of packaging, and the testimony of witnesses experienced and knowledgeable in the field.[41]

[20] Laws did not have actual possession of the marijuana, so the question before us is whether there is sufficient evidence from which a trier of fact could reasonably infer that he was in constructive possession, i.e., that he was aware of the presence of the marijuana and had dominion or control over it. Mere presence at a place where a controlled substance is found is not sufficient to show constructive possession.[42] Instead, the evidence must show facts and circumstances which affirmatively

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[36] *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

[37] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[38] See *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

[39] *State v. Draganescu, supra* note 18.

[40] *Id.*; *State v. Utter*, 263 Neb. 632, 641 N.W.2d 624 (2002).

[41] *Id.*

[42] *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

link Laws to the marijuana so as to suggest that he knew of it and exercised control over it.[43]

[21] Here, the record shows that Laws was driving the SUV at the time of the traffic stop, and according to his own statements, he was the sole driver of the SUV during the trip. Generally, the fact that one is the driver of a vehicle, particularly over a long period of time, creates an inference of control over items in the vehicle.[44] Possession of a controlled substance can also be inferred if the vehicle's occupant acts oddly during the traffic stop,[45] gives explanations that are inconsistent with the explanations of other vehicle occupants,[46] or generally gives an implausible explanation for the travels.[47] These factors are all present here—the record shows Laws' extreme nervousness, Laws' odd explanation for his shaking hands, inconsistencies in the stories related to Pelster by Laws and Howard about whether they visited any friends or relatives in Flagstaff and whether Laws was Howard's uncle, and the unusual nature of the group's travels. In addition, the extremely large amount of marijuana that was found in the camper also supports an inference that Laws, as the driver of the SUV, was aware of it.[48] As one court has noted, "[i]t is reasonable to conclude that defendant would not have been allowed in the [vehicle] as a passenger unless he knew of the valuable cargo contained therein and was conscious of the risks and ramifications involved with transporting that cargo."[49] Viewed in the light most favorable to the State, the evidence supports a reasonable

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[43] See *Robinson v. State*, 174 S.W.3d 320 (Tex. App. 2005).

[44] See, *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980); *Corrao et al. v. State*, 154 Ind. App. 525, 290 N.E.2d 484 (1972).

[45] See, *State v. Draganescu, supra* note 18; *Robinson v. State, supra* note 43.

[46] *Id.* See *U.S. v. Villarreal*, 324 F.3d 319 (5th Cir. 2003).

[47] *U.S. v. Villarreal, supra* note 46; *State v. Mercado*, 635 A.2d 260 (R.I. 1993).

[48] See, *U.S. v. Villarreal, supra* note 46; *State v. Draganescu, supra* note 18; *State v. Mercado, supra* note 47; *Robinson v. State, supra* note 43.

[49] *State v. Mercado, supra* note 47, 635 A.2d at 264.

inference that Laws knew of the marijuana and had dominion or control over it.

Laws also argues that there is no direct evidence that he intended to deliver the marijuana. But an inference that he intended to deliver is supported by the amount of the marijuana alone. In *State v. Parsons*,[50] we held that evidence that the defendant was in possession of 16 pounds of marijuana was sufficient to support a finding of his intent to deliver. The same principle obviously applies to possession of 727.5 pounds of marijuana. There was sufficient evidence to support Laws' conviction.

5. Stipulated Bench Trial Not Guilty Plea

Howard argues that by agreeing to go forward with a stipulated bench trial, he essentially entered a de facto guilty plea, and that the district court erred by not informing him of the constitutional rights he was giving up by doing so. The record shows that after Howard waived his right to a jury trial, a bench trial was held on March 1, 2010. The State referred to the trial as a "stipulated trial." At this trial, the State offered documentary evidence and Howard's counsel made no evidentiary objection to the admission of the evidence. Howard did not present evidence. He did, however, preserve all the issues he had raised in his motion to suppress. After considering the admitted evidence, the court found Howard guilty of the crime charged.

[22] A stipulation entered by a defendant can be tantamount to a guilty plea.[51] But this is true only when the defendant stipulates either to his or her guilt or to the sufficiency of the evidence.[52] Howard did not do so. Instead, he merely stipulated to the admission of certain evidence, and then the district court determined whether that evidence was sufficient to convict him

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[50] *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983).

[51] See, generally, *U.S. v. Holman*, 314 F.3d 837 (7th Cir. 2002); *Felker v. Thomas*, 52 F.3d 907 (11th Cir. 1995); *People v. Horton*, 143 Ill. 2d 11, 570 N.E.2d 320, 155 Ill. Dec. 807 (1991); *Glenn v. United States*, 391 A.2d 772 (D.C. App. 1978).

[52] See *id.*

of the crime charged. Simply stipulating to the admission of evidence is not tantamount to a guilty plea.[53] Moreover, it is clear from the record that Howard preserved all of the defenses and arguments he raised in his motion to suppress. Where the defendant has presented or preserved a defense, such as the suppression of evidence, a stipulated bench trial is not tantamount to a guilty plea.[54]

We conclude that Howard's participation in the stipulated bench trial was not tantamount to a guilty plea, and the district court did not err in failing to inform him of any constitutional rights he was waiving by participating in the stipulated trial.

6. No Ineffective Assistance of Counsel

[23,24] Howard contends that his trial counsel was ineffective for failing to contest his guilt. Under *Strickland v. Washington*,[55] in order to prevail on a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency. According to *United States v. Cronic*,[56] under certain limited circumstances, prejudice to the accused is to be assumed (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.

Howard does not cite to either *Strickland* or *Cronic*, but he argues generally that his counsel did not subject the prosecution's case to meaningful adversarial testing at all, because the stipulated bench trial was a de facto guilty plea. As noted, however, nothing about the stipulated bench trial

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[53] *People v. Horton, supra* note 51; *State v. Davis*, 29 Wash. App. 691, 630 P.2d 938 (1981).

[54] *People v. Horton, supra* note 51.

[55] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[56] *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

was tantamount to a guilty plea, and therefore Howard's trial counsel could not have been ineffective under either the *Strickland* or the *Cronic* standard in failing to contest his guilt by proceeding with the stipulated bench trial. Howard makes no argument as to either performance or prejudice outside the assertion that a stipulated bench trial is equivalent to a guilty plea. Howard's ineffective assistance of counsel claim is without merit.

7. Sentence Not Excessive

[25-27] Howard alleges that the trial court erred by imposing an excessive sentence. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.[57] When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime.[58] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. 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.[59]

Howard's conviction was for possession of a controlled substance with intent to deliver, a Class III felony, punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both.[60] Howard received a sentence of 10 to 14 years' imprisonment. He was caught transporting 727.5 pounds of marijuana, and he has a lengthy criminal history. Howard claims that his sentence was excessive because he is a caring father and because his sentence was disproportionate to the sentences imposed on Laws and McGee.

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[57] *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

[58] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[59] *Id.*

[60] See Neb. Rev. Stat. §§ 28-105, 28-405, and 28-416(2)(b) (Reissue 2008).

Howard's sentence is well within the statutory limits and is consistent with the nature of the crime and his prior criminal history. Nothing in our sentencing guidelines requires a judge to consider the sentences imposed on codefendants. The district court did not abuse its discretion in imposing Howard's sentence.

IV. CONCLUSION

Pelster had reasonable suspicion to detain the vehicle after the traffic stop, and the length of the continued detention was not unreasonable. There is sufficient evidence of Rocky's training, certification, and field accuracy in the record to support the district court's factual finding that the results of the canine sniff were admissible. The reasonable suspicion factors combined with the alert by the trained canine constituted probable cause to search the vehicles.

Howard did not enter a de facto guilty plea when he participated in the stipulated bench trial, and his trial counsel was not ineffective. There is sufficient evidence to support the convictions of both Laws and Howard, and Howard's sentence was not excessive.

We affirm the judgment of the district court in each appeal.

AFFIRMED.

HEAVICAN, C.J., not participating.

PAT BRITTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE BRITTON, DECEASED, APPELLANT, V. CITY OF CRAWFORD, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

803 N.W.2d 508

Filed September 23, 2011. No. S-10-1013.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.
2. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff

includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

3. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
4. ____: ____. When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
5. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** When matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.
6. **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.
7. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important that the trial court give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by the rules governing summary judgment.
8. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act allows a limited waiver of a political subdivision's sovereign immunity. This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision.
9. **Political Subdivisions Tort Claims Act: Public Officers and Employees.** Where a claim against a political subdivision is based upon acts or omissions of an employee occurring within the scope of employment, it is governed by the provisions of the Political Subdivisions Tort Claims Act.
10. **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.
11. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.

Appeal from the District Court for Dawes County: LEO DOBROVOLNY, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Pat Britton filed this action as personal representative of the estate of Jesse Britton (Jesse), deceased, against the City of Crawford (the City) under the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007 & Cum. Supp. 2010). The district court for Dawes County granted the City's motion to dismiss, and Britton appealed. The issue on appeal is whether the City is immune from liability under § 13-910(7), which provides that the PSTCA shall not apply to any claim arising out of a battery. For the following reasons, we affirm the determination of the district court.

II. BACKGROUND

1. FACTUAL BACKGROUND

In 2007, Jesse was a suspect in several burglaries, including one involving a stolen firearm. He was 16 years of age. Richard Thompson, a police officer for the City, and Dan Kling, a conservation officer with the Nebraska Game and Parks Commission, investigated the burglaries. On October 3, 2007, Thompson and Kling received information that Jesse was hiding in downtown Crawford in a vacant building called the Frontier Bar. Thompson was also told that Jesse had threatened to shoot Thompson.

Thompson obtained permission to enter the bar. Thompson arrived at the bar and assigned two officers to secure the exterior of the bar at the northeast and southwest corners of the building. Thompson asked Kling to assist him in searching the interior of the bar and requested that Kling carry his state-issued shotgun. Thompson and Kling then used the Realtor's keys to enter the building. Neither party requested any additional assistance from the State Patrol or the county sheriff's office.

After entering the bar, Thompson and Kling heard footsteps on the second floor. They proceeded upstairs and saw Jesse crouched behind a piece of furniture. Thompson and Kling

shouted commands at Jesse, yelling at Jesse to show them his hands and drop the gun, but Jesse refused to comply. Jesse then "sprang up pointing his gun" at Thompson. Thompson and Kling both shouted at Jesse to drop the gun and show them his hands. After Jesse failed to comply with the commands to drop the gun, Thompson and Kling shot him. Ten to twelve minutes passed between the time Thompson and Kling entered the bar and the time shots were fired.

2. Procedural Background

(a) Criminal Trial

On November 20, 2007, Thompson was indicted for second degree assault pursuant to Neb. Rev. Stat. § 28-309(1)(b) (Reissue 2008). The criminal case was tried to the district court. The court determined that Thompson had acted in self-defense and found that Thompson was not guilty. In so finding, the court stated:

> [T]he Court must reach the conclusion that [Jesse] did, in fact, point the pistol at [Thompson], at which time the events ensued resulting in the death of Jesse . . . . The Court can only conclude that [Thompson] was acting in self-defense in the situation that presented itself. Thus, the Court cannot find that [Thompson] acted recklessly in his firing of his weapon which resulted in [Jesse's] being struck by his bullet.

(b) Federal Case

On September 11, 2008, Britton, Jesse's mother and personal representative of his estate, filed suit against the City, Thompson, and Kling in the U.S. District Court for the District of Nebraska under 42 U.S.C. § 1983 (2006) and under the Due Process and Equal Protection Clauses of the U.S. Constitution. The suit also included the state common-law negligence claim at issue in the present appeal. Britton alleged in the federal case that the defendants' actions violated Jesse's constitutional rights and that the defendants' negligence was the proximate cause of Jesse's death.

The U.S. District Court granted the defendants' motion for summary judgment on the basis of qualified immunity.

The federal claims were dismissed with prejudice. The court dismissed the common-law claims without prejudice, stating that it would not exercise ancillary jurisdiction over the claims because the federal character of the complaint had been eliminated.

(c) State Negligence Claim

On November 30, 2009, Britton filed suit against the City on the common-law negligence claims. The operative complaint alleged that negotiation, nonviolent de-escalation techniques, and conflict resolution techniques were the appropriate and reasonable means of dealing with any perceived "'standoff'" at the Frontier Bar. The complaint alleged that the shooting of Jesse was proximately caused by the City's negligence in (1) failing to seek Jesse's removal from the bar through less aggressive, less provocative means; (2) failing to follow recognized procedures for dealing with barricaded subjects; (3) failing to seek the assistance of other law enforcement resources in order to produce Jesse's removal from the bar through nonviolent means; (4) failing to seek the assistance of Jesse's family, friends, or other persons Jesse trusted in order to produce Jesse's removal from the bar through nonviolent means; and (5) otherwise selecting tactics for confronting Jesse that a reasonable law enforcement officer would recognize to be "high-risk, provocative, and likely to frighten and intimidate a barricaded teenager" such as Jesse. Britton also sought damages for Jesse's pain and suffering in the time between the beginning of the standoff and the time of his death.

The City challenged the complaint on a motion under Neb. Ct. R. Pldg. § 6-1112(b)(6) of the Nebraska Court Rules of Pleading in Civil Cases, alleging that it failed to state a cause of action upon which relief could be granted and that the statute of limitations barred Britton's claims. At the hearing on the City's motion to dismiss, Britton was allowed to offer evidence. The City argued that the complaint alleged assault and battery and that, pursuant to the PSTCA, a political subdivision cannot be held liable for such acts as a matter of law. The City offered no evidence. Britton offered the complaint, answer, and memorandum and order of the U.S. District Court from the federal case, as well as the grand jury indictment

and order from Thompson's criminal case. The court admitted the evidence offered by Britton and subsequently granted the City's motion to dismiss. The court determined that the claim was barred by the battery exception to the PSTCA.[1] The court did not rule on the statute of limitations issue, because it was not necessary to decide the case. Britton appeals.

III. ASSIGNMENT OF ERROR

Britton assigns that the district court erred in sustaining the City's motion to dismiss.

IV. STANDARD OF REVIEW

[1-4] Because a motion pursuant to § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.[2] Dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.[4] When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.[5]

[5,6] However, § 6-1112(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute. Our review of an order granting a

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[1] See § 13-910(7).

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

[3] *Id.*

[4] *Id.*

[5] *Id.*

motion for summary judgment is not restricted to the allegations of the complaint, but instead requires that we determine whether the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6]

[7] As a threshold matter, we must determine whether we are reviewing a ruling on a motion to dismiss or a ruling on a motion for summary judgment. We have recognized that when receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important that the trial court "'give the parties notice of the changed status of the motion and a "reasonable opportunity to present all material made pertinent to such a motion"' by the rules governing summary judgment."[7]

In this case, the district court granted Britton's request to submit evidence. The City requested that the court take notice that the receiving of evidence converted the motion to dismiss to a motion for summary judgment. Britton did not object to the City's request, and the court allowed the parties a reasonable opportunity to present all material pertinent to a motion for summary judgment. Accordingly, we apply the standard of review applicable to orders granting summary judgment, as set forth above.

V. ANALYSIS

[8] The PSTCA allows a limited waiver of a political subdivision's sovereign immunity with respect to certain, but not all, types of tort actions.[8] This waiver is limited by specifically delineating claims that are exempt from being brought against a political subdivision such as the City.[9]

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

[7] *Doe v. Omaha Pub. Sch. Dist., supra* note 2, 273 Neb. at 83, 727 N.W.2d at 452, quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (3d ed. 2004).

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

[9] See § 13-910(1) through (12).

[9] Where a claim against a political subdivision is based upon acts or omissions of an employee occurring within the scope of employment, it is governed by the provisions of the PSTCA.[10] Britton does not allege, nor does she argue, that Thompson and Kling acted outside the scope of their employment at the time of the alleged negligence. Britton argues that her claim alleged that the City breached its duty of care in its handling of a "barricaded suspect situation."[11]

The district court determined that "the assault and battery exception in the [PSTCA] found at §13-910(7) applies and bars the action." This exception to the general waiver of the PSTCA, sometimes called the intentional torts exception, provides that the PSTCA shall not apply to "[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[12]

[10,11] 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 its waiver.[13] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[14]

1. Battery

The City maintains that the intentional torts exception bars Britton's claims because they arise out of a battery. Britton argues that the City cannot rely on the intentional torts exception because Thompson pled not guilty to the criminal assault charge. As stated above, the district court found Thompson not guilty on the basis of self-defense.

We first address whether Thompson's and Kling's actions qualify as a battery as it is contemplated in § 13-910(7). In

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[10] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[11] Brief for appellant at 11.

[12] § 13-910(7).

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

[14] *Id.*

Nebraska, the intentional tort of battery is defined as "'an actual infliction' of an unconsented injury upon or unconsented contact with another."[15] We have also recognized the definition of battery as "any intentional, unlawful physical violence or contact inflicted on a human being without his consent."[16] These definitions are not inconsistent. We have noted, regarding the requirement that the contact be "'unlawful,'" that such contact is "'an angry, rude, insolent, or revengeful touching of the person . . . .'"[17]

"Unlawful" is a legal term. A contact is unlawful if it is unconsented to.[18] The Restatement (Second) of Torts[19] does not use the term "unlawful" in its definition of battery and states:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results.

A harmful contact intentionally done is the essence of battery.[20]

In discussing the intentional torts exception to the PSTCA, we have not analyzed whether an affirmative defense would remove an intentional tort from coverage under the exception. We conclude that such an analysis is not appropriate for the determination of whether certain claims fall under the exception found in § 13-910(7). The plain language of the exception excludes an enumerated list of intentional torts. On its face, it does not contemplate whether such intentional acts are legally justified. Nor does the exception state that the waiver of

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[15] *Bergman v. Anderson*, 226 Neb. 333, 336, 411 N.W.2d 336, 339 (1987).

[16] *State v. Washington*, 232 Neb. 838, 839, 442 N.W.2d 395, 396 (1989).

[17] *Newman v. Christensen*, 149 Neb. 471, 474, 31 N.W.2d 417, 418 (1948).

[18] See, *In re Baldwin*, 245 B.R. 131 (9th Cir. 2000), *affirmed* 249 F.3d 912 (9th Cir. 2001); 6 Am. Jur. 2d *Assault and Battery* § 5 (2008).

[19] Restatement (Second) of Torts § 13 at 25 (1965).

[20] See *Newman v. Christensen, supra* note 17. See, also, *Barouh v. Haberman*, 26 Cal. App. 4th 40, 31 Cal. Rptr. 2d 259 (1994).

sovereign immunity only applies to claims based on intentional torts for which the actor could be held liable. Furthermore, we have consistently recognized that the key requirement of the intentional torts exception is that the actor intended the conduct.[21] If the conduct was unintentional or negligent, it falls outside of the scope of the exception. Accordingly, we hold that in deciding whether conduct falls within the "battery" exception of § 13-910(7), it is only necessary to determine whether the conduct "aris[es] out of" a battery. We need not determine whether the actor ultimately could be held liable for any damage resulting from the battery, based on the presence or absence of affirmative defenses.

Britton argues that Thompson defended against the criminal charges by "pleading and admitting that his actions were not intentional."[22] This is a mischaracterization of the record. Thompson did plead not guilty. However, the plea was based on self-defense. Thompson did not argue that he accidentally or unintentionally shot Jesse. By invoking the affirmative defense, Thompson admitted that he intended to shoot Jesse, but that he should not be held criminally liable for his actions because they were legally justified.[23]

The shooting at issue in this case constituted a battery as that tort is defined in Nebraska and as contemplated by § 13-910(7). Thompson's admission that his actions were intentional supports our determination that the shooting was a battery. As noted above, our previous analysis of the intentional torts contemplated in § 13-910(7) has focused on whether the actor intended the acts alleged in the claim. There is no allegation that Thompson and Kling did not intend to shoot Jesse. Thompson and Kling intended to shoot Jesse, and the shooting qualifies as a battery under Nebraska law. We therefore address whether the claims alleged by Britton arise out of the battery.

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[21] See *McKenna v. Julian, supra* note 10.

[22] Brief for appellant at 22-23 (emphasis in original).

[23] See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

2. "Arising Out of" Battery

In *Johnson v. State*,[24] this court addressed the intentional torts exception contained in the State Tort Claims Act,[25] which is identical to the exception articulated in § 13-910(7) of the PSTCA. *Johnson* involved a negligence claim asserted against the State of Nebraska for a failure to supervise, hire, and discipline. This court determined that the claim in *Johnson* was barred because it arose out of assault and battery and that a failure to supervise, hire, and discipline was simply a way to reframe the claim.

Britton does not contend that Jesse's death was the result of negligent supervision or hiring, and therefore, *Johnson* is distinguishable on these facts. However, in *Johnson*, we analyzed the statutory language "arising out of assault."[26] Our analysis here must similarly apply the meaning of the phrase "arising out of battery." The phrase "arising out of" battery as it is used in § 13-910(7) creates a broader exemption than that which would be created by use of the language "for a battery."[27] Britton's argument is primarily one of characterizing or framing the pleaded conduct as negligence even though the injuries suffered by Jesse were the result of a battery, an intentional tort.

In *Johnson*,[28] we adopted the reasoning of four of the eight participating justices in *United States v. Shearer*,[29] who concluded:

> "[The plaintiff] cannot avoid the reach of [the intentional torts exception] by framing her complaint in terms of negligent failure to prevent the assault and battery. [The exception] does not merely bar claims *for* assault

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[24] *Johnson v. State, supra* note 13.

[25] See Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008).

[26] *Johnson v. State, supra* note 13.

[27] *Id.*; *Hammond v. Nemaha County*, 7 Neb. App. 124, 581 N.W.2d 82 (1998).

[28] *Johnson v. State, supra* note 13, 270 Neb. at 320, 700 N.W.2d at 624 (emphasis in original).

[29] *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985).

> or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like [the plaintiff's] that sound in negligence but stem from a battery committed by a Government employee."

And we further agreed:

> "To determine whether a claim arises from an intentional assault or battery and is therefore barred by the exception, a court must ascertain whether the alleged negligence was the breach of a duty to select or supervise the employee-tortfeasor or the breach of some separate duty independent from the employment relation. . . . If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception . . . bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception."[30]

In *Westcott v. City of Omaha*,[31] the Eighth Circuit Court of Appeals addressed the intentional torts exception of the Nebraska PSTCA. The plaintiff in *Westcott* alleged that an officer was negligent in his mistaken assumption that a suspect was armed, which in fact he was not. The officer based his decision to shoot on this assumption, and the shooting resulted in the suspect's death. The Eighth Circuit determined that the allegedly negligent assumption was "inextricably linked" to battery; therefore, the suit was barred by the PSTCA.[32]

Britton alleged in her amended complaint and argues on appeal that the "barricaded suspect situation"[33] imposed a

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[30] *Johnson v. State, supra* note 13, 270 Neb. at 322, 700 N.W.2d at 625, quoting *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring in judgment).

[31] *Westcott v. City of Omaha*, 901 F.2d 1486 (8th Cir. 1990).

[32] *Id.* at 1490.

[33] Brief for appellant at 11.

standard of care for law enforcement and that the present tort claim is based on the City's handling of and decisionmaking in such a situation. This court has stated that where a plaintiff's tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim), the intentional torts exception applies and the political subdivision is immune from suit.[34] Britton's claims are similarly based on the mere fact of Thompson's and Kling's government employment. As the basis for her claims, Britton alleges conduct of Thompson and Kling while acting within the scope of their employment. Britton does not plead any facts that would explain how the City would be liable without the connection of the employment relationship between Thompson, Kling, and the City. Therefore, the City is protected by sovereign immunity.

While other factors may have contributed to the situation which resulted in Jesse's death, but for the battery, there would have been no claim. No semantic recasting of events can alter the fact that the shooting was the immediate cause of Jesse's death and, consequently, the basis of Britton's claim. Even if it is possible that negligence was a contributing factor to Jesse's death, the alleged negligence was inextricably linked to a battery. Britton's suit is thus barred by the PSTCA.

VI. CONCLUSION

For the foregoing reasons, we determine that the pleadings and admissible evidence offered at the hearing show that the City is immune from Britton's suit pursuant to § 13-910(7). Accordingly, we affirm the district court's determination that the City is entitled to judgment as a matter of law.

AFFIRMED.

WRIGHT, J., not participating.

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[34] *Johnson v. State, supra* note 13.

STATE OF NEBRASKA, APPELLEE, V. SARAH R. McGEE, APPELLANT.

803 N.W.2d 497

Filed September 23, 2011. No. S-10-1065.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** Occupants of a private vehicle traveling together by choice may be assumed to have some personal or business association with each other. Knowledge or suspicion that one of the occupants has been involved in criminal activity occurring within the vehicle or involving the vehicle serves as a basis for reasonable suspicion that the other occupants may be participants in that activity.
3. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
4. **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.
5. **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.
6. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.
7. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
8. **Convictions: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.

9. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.
10. **Investigative Stops: Motor Vehicles: Controlled Substances: Circumstantial Evidence.** While a passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession, a passenger's possession of an illegal substance can be inferred from his or her proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.
11. **Investigative Stops: Motor Vehicles: Controlled Substances: Evidence.** Generally, a passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.
12. **Investigative Stops: Motor Vehicles: Controlled Substances.** A finder of fact may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite someone into his or her vehicle who had no knowledge of the driver's drug activities.
13. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

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

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

STEPHAN, J.

A vehicle driven by Anthony M. Laws in which Stuart D. Howard and Sarah R. McGee were passengers was stopped for speeding by a Nebraska State Patrol officer. When consent to search was denied, a trained drug detection canine unit was called. The canine alerted, and a search disclosed over 700 pounds of marijuana in a camper being towed by the vehicle.

Laws, Howard, and McGee were all charged with possession of a controlled substance with intent to deliver.[1] After their motions to suppress were denied, each was convicted. We addressed the convictions of Laws and Howard in a separate opinion released today. This appeal addresses McGee's challenge to the denial of her motion to suppress and to the sufficiency of the evidence to support her conviction.

FACTS

The facts relating to the vehicle stop and canine sniff are identical to the facts stated by this court in our consolidated opinion on the appeals of Laws and Howard.[2] We refer the reader to that published opinion for an extensive discussion of the underlying facts. For purposes of this appeal, it is sufficient at this point to state that after 727.5 pounds of marijuana were found in a popup camper being towed by the vehicle in which McGee was a passenger, McGee was charged with possession of a controlled substance, marijuana, with intent to deliver. She initially filed a plea in abatement, arguing that the evidence at the preliminary hearing was insufficient to show probable cause, in that the evidence did not show that she had knowledge of or reasonably should have had knowledge that the marijuana was in the camper or that she had control of the camper or constructive control of the marijuana. The court overruled the plea in abatement.

McGee then filed a motion to suppress the evidence found as a result of the search of the vehicles. She generally argued that the patrol officer lacked reasonable suspicion to detain the vehicle's occupants for the canine sniff and that the results of the canine sniff were unreliable and could not serve as a basis for probable cause to search. Laws and Howard filed similar motions, and after conducting a combined evidentiary hearing, the district court overruled all three motions to suppress.

McGee was then tried to a jury. After a 4-day trial, the jury was unable to reach a verdict and the district court declared a mistrial. Prior to retrial, McGee filed a motion to dismiss

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[1] See Neb. Rev. Stat. § 28-416 (Reissue 2008).

[2] See *State v. Howard, ante* p. 352, 803 N.W.2d 450 (2011).

the charge against her, alleging that the State had failed to disclose exculpatory evidence that materially prejudiced her initial trial, in violation of *Brady v. Maryland*.[3] The evidence in question was a statement made by Laws during settlement negotiations with the State, which the parties refer to as a "proffer" statement.

The district court determined that the State failed to disclose Laws' proffer statement to McGee either prior to or during her initial trial. It concluded that although this may have resulted in a *Brady* violation, dismissal of the charge against McGee was not an appropriate remedy. The court therefore overruled McGee's motion to dismiss. The State then filed a motion in limine seeking to bar McGee from presenting evidence of the proffer statement given by Laws to law enforcement, contending that it was inadmissible hearsay. The district court sustained the motion in limine, rejecting McGee's argument that Laws' statement fell within an exception to the hearsay rule.[4]

The case then proceeded to retrial. The State sought to convict McGee as a principal or, alternatively, under the theory that she aided and abetted Laws and Howard. The jury found McGee guilty. After her motion for new trial was overruled, McGee was sentenced to a term of 2 to 4 years in prison. She filed this timely appeal.

ASSIGNMENTS OF ERROR

McGee assigns, consolidated and restated, that the trial court erred in (1) finding that the arresting officer had reasonable suspicion to detain her while awaiting the arrival of the canine unit and failing to suppress the physical evidence resulting from the search and seizure of the vehicle, (2) finding the length of time that she was detained without a warrant was reasonable, (3) finding adequate foundation for admission of the results of the canine sniff of the vehicle, (4) denying her motion to dismiss for insufficient evidence made at the close

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[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[4] See Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

of the State's case in chief during the first trial, (5) denying her renewed motion to dismiss for insufficient evidence made at the close of all evidence during the first trial, (6) failing to grant her motion to dismiss the charge against her based on the State's failure to disclose exculpatory evidence before or during her first trial, (7) failing to find that Laws' statements during the proffer interview fell within a hearsay exception and were admissible, (8) denying her motion to dismiss for insufficient evidence made at the close of the State's case in chief during the second trial and accepting the guilty verdict when insufficient evidence supported it, (9) overruling her plea in abatement, and (10) denying bond pending appeal.

ANALYSIS

Reasonable Suspicion Justified Further Detention

[1] McGee argues that the district court erred in finding that there was reasonable suspicion to detain her for the canine sniff. Generally, she contends that the factors considered by the district court in its analysis related only to Laws and Howard and that thus, the factors were not sufficient to detain her. When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo. But findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.[5]

[2] In our separate opinion related to Laws and Howard, we concluded that the district court did not err in finding reasonable suspicion to detain the vehicle and its occupants for the canine sniff. Although many, but not all, of the factors relied upon by the district court focused on Laws and Howard, it is undisputed that McGee was a passenger in the vehicle with Laws and Howard and that she had traveled with them on the entire trip. Occupants of a private vehicle traveling together by choice may be assumed to have some personal or business

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

association with each other.[6] We agree with other courts which have held that knowledge or suspicion that one of the occupants has been involved in criminal activity occurring within the vehicle or involving the vehicle serves as a basis for reasonable suspicion that the other occupants may be participants in that activity.[7] For all of the reasons articulated in our separate opinion related to Laws and Howard, we conclude that the district court did not err in finding reasonable suspicion to detain the vehicle's occupants for the canine sniff.

Length of Detention Not Unreasonable

McGee argues that the length of time she was required to wait for the canine sniff was unreasonable. For the reasons articulated in our opinion related to Laws and Howard, we find this assignment of error to be without merit.

Canine Sniff Was Reliable

McGee also argues that the evidence was insufficient to support a finding that the canine was sufficiently reliable so that its alert supported a finding of probable cause to search. McGee did not raise this argument in her motion to suppress. To the extent the issue is properly before us in this appeal, it is without merit for the reasons articulated by this court in the opinion related to Laws and Howard.

Sufficiency of Evidence at First Trial Is Irrelevant

McGee assigns as error the denial of her motions to dismiss made at the close of the State's case and again at the end of the first trial. The motions were based upon insufficient evidence to convict her of the crime charged.

McGee's first motion, made at the close of the State's case, was waived when McGee elected to present evidence in her defense.[8] And resolution of the second motion is unnecessary,

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[6] *People v. In Interest of H.J.*, 931 P.2d 1177 (Colo. 1997).

[7] *Id.* See, also, *U.S. v. Price*, 184 F.3d 637 (7th Cir. 1999); *U.S. v. Tehrani*, 49 F.3d 54 (2d Cir. 1995); 4 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 9.5(f) (4th ed. 2004).

[8] See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

because the evidence presented by the State against McGee at her initial trial did not result in a conviction. The U.S. Supreme Court has held that retrial of a defendant after a mistrial due to a hung jury is not barred, regardless of the sufficiency of the evidence at the first trial.[9]

Dismissal of Charges Not Warranted

McGee argues that the district court erred when it failed to grant her motion to dismiss filed after the first trial resulted in a mistrial. She claimed that dismissal of the charge prior to a retrial was proper because the State violated *Brady v. Maryland*[10] when it failed to provide her with Laws' proffer statement prior to or during her initial trial.

[3] In *Brady*, the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment."[11] We have stated:

> "Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial."[12]

However, "the mere determination that evidence was withheld does not automatically indicate that the prosecution violated its *Brady* duty."[13] Although the term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence, there is no real constitutional violation unless "the nondisclosure was so serious that there is a

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[9] *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

[10] *Brady v. Maryland, supra* note 3.

[11] *Id.*, 373 U.S. at 87.

[12] *State v. Lykens*, 271 Neb. 240, 249, 710 N.W.2d 844, 851 (2006), quoting *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[13] *State v. Lykens, supra* note 12, 271 Neb. at 251, 710 N.W.2d at 852.

reasonable probability that the suppressed evidence would have produced a different verdict."[14] There are three components of a true *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[15]

Here, the State admits that Laws' proffer statement was not provided to McGee prior to her first trial. Assuming without deciding that the proffer statement was material under the *Brady* standard and thus the failure to disclose was a true *Brady* violation, we find that the district court did not err in refusing to dismiss the charge against McGee.

Generally, *Brady* violations occur during trials that result in a defendant's conviction.[16] The remedy for such violations is the granting of a new trial.[17] Although some courts have determined that dismissal of all charges against a defendant is a possible remedy for a *Brady* violation, courts have done this only in rare and unusual circumstances.[18] These circumstances generally involve complete destruction of material evidence by the prosecution or the prosecution's repeated and systemic disregard for the duty to disclose exculpatory evidence.[19] We find nothing in the record before us that would justify such remedy. Instead, this is the type of *Brady* violation that would entitle McGee to a new trial if she had been convicted by the

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[14] *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[15] *Id.*, 527 U.S. at 281-82.

[16] See, e.g., *State v. Lykens, supra* note 12; *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

[17] See, e.g., *State v. Castor, supra* note 16.

[18] See, *Government of Virgin Islands v. Fahie*, 419 F.3d 249 (3d Cir. 2005); *U.S. v. Fitzgerald*, 615 F. Supp. 2d 1156 (S.D. Cal. 2009); *U.S. v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004); *U.S. v. Diabate*, 90 F. Supp. 2d 140 (D. Mass. 2000); *U.S. v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998); *People v. McCann*, 115 Misc. 2d 1025, 455 N.Y.S.2d 212 (N.Y. Crim. 1982).

[19] *Id.*

jury at the first trial. Here, because her first trial resulted in a mistrial and McGee was aware of the proffer statement prior to her second trial, she has received the general equivalent of a new trial based on the *Brady* violation, in that she had the use of the information at her second trial. The district court did not err in denying the motion to dismiss the charge based on the alleged *Brady* violation.

Laws' Statements Were Inadmissible Hearsay

The district court found that Laws' proffer statement was hearsay and was inadmissible at McGee's retrial. McGee argues that the evidence was admissible as an exception to hearsay under § 27-804(2)(c), which provides that if a declarant is unavailable as a witness, a statement he or she previously made is not hearsay if it was

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Laws invoked his Fifth Amendment privilege not to testify prior to McGee's retrial and was thus unavailable as a witness.[20] McGee argues that Laws' proffer statement was trustworthy because it was against his penal interest and was made while he was in police custody, lending credibility.

Without detailing the contents of the proffer statement, we conclude that the district court did not err in ruling on its admissibility. The proffer statement was given as part of plea negotiations between Laws and the State. Laws' agreement with the State expressly provided that "[n]o statements made or

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[20] See, *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991); 2 McCormick on Evidence § 253 (Kenneth S. Broun ed., 6th ed. 2006).

other information provided by you during the 'off-the-record' proffer or discussion will be used against you in any prosecution." Because by the nature of the agreement Laws' statement could not have been used to prosecute him, it was not against his penal interest and did not subject him to civil or criminal liability.

Evidence at Second Trial Was Sufficient

[4,5] McGee also claims that the State presented insufficient evidence to convict her at the second trial. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[21] And 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.[22]

[6,7] The jury was instructed that it could convict McGee either as a principal or as an aider and abettor. In its closing argument, the State argued only the aiding and abetting theory. In Nebraska, a person who aids, abets, procures, or causes another to commit any offense may be prosecuted as if he or she were the principal offender.[23] Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.[24]

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[21] *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

[22] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[23] *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

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

Under the circumstances of this case, in order to be guilty of aiding and abetting, McGee must have (1) known about the marijuana in the camper and (2) encouraged or assisted Laws and Howard in transporting the marijuana. Viewed in the light most favorable to the prosecution, based on the circumstantial evidence before it, a rational jury could have found these essential elements were met beyond a reasonable doubt.

[8,9] In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[25] Constructive possession of an illegal substance may be proved by direct or circumstantial evidence.[26]

[10-12] In *State v. Draganescu*,[27] we considered whether circumstantial evidence was sufficient to support a reasonable inference that a passenger in a vehicle being used to transport illegal drugs was in joint possession of the contraband. We noted that while a passenger's mere presence in a vehicle with contraband is insufficient to support a finding of joint possession, a passenger's possession of an illegal substance can be inferred from his or her proximity to the substance or other circumstantial evidence that affirmatively links the passenger to the substance.[28] Generally, a passenger's joint possession of a controlled substance found in a vehicle can be established by evidence that (1) supports an inference that the driver was involved in drug trafficking, as distinguished from possessing illegal drugs for personal use; (2) shows the passenger acted suspiciously during a traffic stop; and (3) shows the passenger was not a casual occupant but someone who had been traveling a considerable distance with the driver.[29] We agreed with the conclusion of other courts that a finder of fact may reasonably infer that a driver with a possessory interest in a vehicle who is transporting a large quantity of illegal drugs would not invite

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[25] *State v. Babbitt, supra* note 22.

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

[27] *Id.*

[28] *Id.*

[29] *Id.*

someone into his or her vehicle who had no knowledge of the driver's drug activities.[30]

The same principles apply to the question of whether one aided and abetted another in the possession of a controlled substance with intent to deliver. In this case, State Patrol officer Robert Pelster testified that drug traffickers sometimes use a "disclaimer" in order to avoid suspicion. He testified that one type of "disclaimer" is a person that rides along on a drug transportation trip in order to make the trip look like a family outing. The sheer volume of the marijuana found in the camper supports an inference that Laws and Howard were trafficking the drugs and that both of them knew the marijuana was in the camper and intended to distribute it. A reasonable juror, after hearing the evidence, could conclude that McGee affirmatively assisted in this endeavor by agreeing to act as the "disclaimer."

A key piece of evidence is the videotape of the traffic stop. In that video, when questioned by Pelster about the nature of the trip, McGee informs him that the group had gone to Flagstaff, Arizona, to see the Grand Canyon; that they had stayed for the weekend; and that they had "had a good time out there." This statement, however, was largely contradicted by statements made by McGee to Investigator Alan Eberle in the interview conducted after her arrest. McGee told Eberle that the group did not leave Detroit, Michigan, until Friday, May 29, 2009, at approximately 3:30 p.m.; that they drove straight through and arrived in Flagstaff late Saturday evening; and that after briefly meeting up with Howard's cousins in a dark desert, they slept for approximately 6 hours at a hotel and then left Flagstaff at approximately noon on Sunday. At one point, McGee told Eberle that she saw "red rocks" that she assumed was the Grand Canyon, but at another point, she told him it was dark when they arrived in Flagstaff. McGee professed in her interview with Eberle that the purpose of her trip was to have a romantic getaway with Howard and to see the Grand Canyon, and yet she stated that when they arrived at what she

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[30] See *id.*

thought was the Grand Canyon, she refused to leave the vehicle because she was desperately afraid of snakes. A reasonable juror could conclude that this was not a "weekend trip" to the "Grand Canyon" for the purpose of having a "good time," and could therefore infer that McGee's statement to Pelster was misleading and was an active attempt to encourage the drug-transporting endeavor and assist Laws and Howard in avoiding detection.

In addition, McGee told Eberle that they were returning to Detroit early because she received a telephone call that a family member was ill. However, she did not mention this fact to Pelster during the stop on the interstate, even though the stop took almost 2 hours. And in fact, the rental agreement for the vehicle reflected an expiration date of June 2, 2009, the day after the traffic stop in Nebraska. McGee also told Eberle that they stayed at a Red Roof Inn in Flagstaff, but evidence was presented that there is no hotel by that name at the location she identified. A different hotel at that location had no record that McGee, Laws, or Howard had ever stayed there and had no room number corresponding to that which McGee gave Eberle.

Although other explanations for McGee's conduct were plausible, we find that viewing the evidence in the light most favorable to the prosecution, a reasonable jury could find from all the surrounding circumstances that by agreeing to go along on the trip, and particularly in giving the statement to Pelster about the trip, McGee was attempting to help Laws and Howard avoid detection. And a reasonable jury could also find that the fact that McGee assisted Laws and Howard in attempting to avoid detection demonstrated that she was aware of the drugs in the camper. The evidence was sufficient to support McGee's conviction.

Plea in Abatement Properly Overruled

McGee argues that the district court erred in overruling her plea in abatement. She contends that insufficient evidence was presented at the preliminary hearing to bind her over for trial.

[13] Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt

which is supported by sufficient evidence.[31] Because the evidence was sufficient to support McGee's conviction, any error at the plea in abatement stage was cured.

[14] McGee assigns that the district court erred in refusing her bond pending her appeal. But this assignment of error is not argued in her brief. Errors that are assigned but not argued will not be addressed by an appellate court.[32] We therefore do not reach this assignment of error.

CONCLUSION

For all of the foregoing reasons, we affirm McGee's conviction and sentence.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[31] *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997).

[32] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

THOMAS L. PEARSON, APPELLANT, V. ARCHER-DANIELS-MIDLAND MILLING COMPANY, APPELLEE.

803 N.W.2d 489

Filed September 23, 2011. No. S-10-1142.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. 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. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.

4. **Workers' Compensation.** A work-related injury need not result in permanent disability in order for medical treatment to be awarded. The question is simply whether treatment is necessary to relieve or cure the injury.
5. **Final Orders: Intent.** The meaning of a decree as a matter of law is determined only from the four corners of the decree.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

Eric B. Brown, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Jason A. Kidd and Brynne E. Holsten, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The appellant, Thomas L. Pearson, was injured in the course of his employment with Archer-Daniels-Midland Milling Company (ADM). The Workers' Compensation Court entered an award granting Pearson, among other benefits, certain future medical expenses. Pearson subsequently had total knee replacement and sought reimbursement from ADM for those expenses as well as for expenses relating to a back injury. ADM declined to pay the expenses. Pearson then filed a motion to compel payment. A further award was entered denying Pearson's motion with respect to the knee replacement, but ordering ADM to pay expenses relating to the treatment of the back injury. The further award applied the Workers' Compensation Court's fee schedule to payments for the back injury, which had previously been paid by Pearson's health insurer. Following affirmance by the Workers' Compensation Court review panel, Pearson filed this appeal. We affirm in part, and in part reverse and remand for further proceedings.

FACTUAL BACKGROUND

Pearson was struck by a forklift while at work at an ADM facility on October 27, 2006. He filed a claim for workers'

compensation. A trial was held on June 16, 2008, with an award entered on August 29.

In the award, the workers' compensation trial court concluded that Pearson suffered an accident arising out of and in the course of his employment with ADM and that Pearson suffered injury to his right knee and lower back. In so finding, the trial court concluded that while there was an aggravation of Pearson's preexisting arthritic condition, such aggravation was not permanent, and that Pearson had reached maximum medical improvement (MMI) on April 14, 2008, for the knee injury. According to the award, MMI was reached on August 22, 2007, regarding the back injury. The award granted both temporary total disability benefits and permanent disability benefits, as well as future medical benefits. Vocational rehabilitation benefits were denied.

Regarding future medical benefits, paragraph V of the August 29, 2008, award stated:

> In reviewing the evidence presented at trial, the Court observes that the parties have not stipulated to an award of future medical benefits. With respect to [Pearson's] right knee injury, the Court is persuaded despite its earlier findings of a lack of permanency, restrictions, or impairment rating that future medical treatment will be reasonably required. In reaching this opinion, the Court rejects the conclusions of Dr. Gammel that no such treatment will be necessary . . . . Rather, the offering by Dr. Bozarth is more persuasive. In a report dated April 14, 2008, and addressed to [Pearson's] counsel, Dr. Bozarth opined that [Pearson] will need future medical treatment to his right knee owing to his injury, degenerative arthrosis, and obesity. Specifically, he indicated that periodic injections of medications to alleviate pain as well as oral anti-inflammatory medications and an unloader brace would likely be required . . . . [The fact that there was no finding of permanent disability does not serve ipso facto to prohibit an award of future medical benefits. See Hand v. Flexcon Co., Inc., No. A-06-709, 2007 Neb. App. Lexis 37 (not designated for publication)].

> With respect to [Pearson's] low back injury, the Court is similarly persuaded by the evidence. Dr. Gammel indicated that . . . Pearson would likely need to continue to take over the counter anti-inflammatory medications and engage in home physical therapy . . . . Dr. Bozarth also indicated his belief that medications would be necessary for the treatment of [Pearson's] low back injury as well as conditioning programs to maintain his fitness . . . .
>
> Thus, the Court is satisfied that [Pearson] has carried his burden of proof and persuasion and is, thus, entitled to an award of future medical benefits. Any future medical treatment received by [Pearson] which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of [ADM].

The award then ordered the continued payment of "future medical care and treatment as may be reasonably necessary as a result of the accident and injuries sustained as memorialized in paragraph V" of the award. There was no appeal from this award.

On June 19, 2009, Pearson underwent total right knee replacement. Following that surgery, he was assigned a 37-percent impairment rating. Pearson also underwent several spinal injections for his low-back injury. Pearson submitted all of these medical bills to ADM, which declined to pay them. Pearson then moved to compel payment, and asked also that the award be modified to reflect the 37-percent impairment to the right knee.

The trial court entered a further award that denied the motion to compel payment with respect to the knee injury and consequently declined Pearson's motion to modify the award to reflect any impairment. The trial court concluded that the issue of knee replacement was known at the time of the original trial:

> Having made that determination, the Court observes further that it did, indeed, find that [Pearson's] knee injury was a temporary exacerbation of a pre-existing knee condition . . . . [MMI] was found and no award

> of permanent disability benefits was provided as to the right knee injury. While the Court did award certain future medical expenses for the temporary aggravation of [Pearson's] right knee, it cannot be denied that MMI was also declared. While [Pearson's] request for right knee replacement surgery was not expressly denied, it most assuredly was implied. Otherwise, there would be no consistency of thought in declaring [Pearson] to have reached MMI with no resulting permanent impairment. Restated, if the Court had meant to award [Pearson] knee replacement surgery in its award of future medical benefits, there would have been no need to address the subject of permanency of that injury in its original Award. Consequently, to the extent that [Pearson] argues that the original Award served to provide a basis for the compensability of the knee replacement surgery he underwent in June of 2009, the Court rejects [Pearson's] contention.

While the knee replacement was not found to be compensable, the trial court did order that ADM pay for the spinal injections, because they were part of "reasonable and necessary" future medical treatment.

Finally, the further award addressed a "dispute over whether or not the fee schedule audits submitted by [ADM] ought to be applied to any outstanding medical bills deemed compensable." The trial court cited Neb. Rev. Stat. § 48-120(1)(e) (Reissue 2010) and concluded that outstanding amounts should be reimbursed with all applicable fee schedule reductions. The trial court therefore ordered ADM to "pay" certain medical expenses. The further award then specifically listed the provider or supplier and the expense that needed to be paid.

Pearson appealed the trial court's further award. The review panel affirmed the award, and Pearson appeals to this court.

ASSIGNMENTS OF ERROR

On appeal, Pearson assigns, restated and consolidated, that the review panel erred in (1) affirming the trial court's conclusion that the original award did not provide for reimbursement of Pearson's knee replacement surgery and associated expenses and (2) failing to hold that ADM should be ordered

to directly reimburse third-party payors without fee schedule reduction.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2] 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]

[3] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[3]

ANALYSIS

Did Original Award Deny Knee Replacement?

Pearson first argues that the original award's provision for future medical expenses should include his total right knee replacement surgery. The trial court disagreed, and the review panel affirmed the award. We reverse the decision of the trial court.

In this case, the original award entered by the trial judge provided that

> [Pearson] has carried his burden of proof and persuasion and is, thus, entitled to an award of future medical benefits. Any future medical treatment received by [Pearson] which falls under the provisions of § 48-120, and which

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[1] Neb. Rev. Stat. § 48-185 (Reissue 2010).

[2] *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

[3] *Id.*

> otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of [ADM].

Under the plain language of this award, Pearson is entitled to "[a]ny future medical treatment . . . which falls under the provisions of § 48-120." Thus, if Pearson's knee replacement was due to his compensable injury, then it should be provided at ADM's expense. But in this case, Pearson was not permitted to present any evidence that might support his assertion that the knee replacement was due to his compensable injury.

The trial judge concluded that the original award impliedly rejected knee replacement, because the necessity of such replacement had been presented at the time of that award and because the original award found that MMI had been reached and no permanent disability suffered. We are not persuaded by these contentions, however.

With respect to the former, we note that the trial judge stated in the original award that Pearson's treating physician said that a knee replacement would be "'indicated.'" We read this as suggesting that knee replacement was a possibility for Pearson after weight loss, including possible bariatric surgery. Thus, while Pearson might eventually benefit from knee replacement, he was not yet ready for it. In other words, the evidence was insufficient to establish *at the time of the award* that knee replacement would *at that time* "relieve pain or promote and hasten the employee's restoration to health and employment" within the meaning of § 48-120(1)(a). But, there was no basis at that time for the court to rule one way or the other.

[4] As for the fact that Pearson had reached MMI and was not found to have suffered a permanent injury, such is also not persuasive. Obviously, a work-related injury need not result in permanent disability in order for medical treatment to be awarded. The question is simply whether treatment is necessary to relieve or cure the injury.[4] An injury could cause disfigurement or pain and require medical treatment, yet produce no permanent loss of function or earning capacity. Relief from the

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[4] See *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978) (superseded by statute on other grounds as stated in *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993)).

symptoms of an injury is compensable under § 48-120(1)(a), regardless of whether those symptoms produce a permanent physical impairment or disability.

Nor are we convinced that the fact that the same judge entered both the original order and the further award is in any way relevant to this court's ultimate determination. We have explained:

> "If a judgment can mean one thing one day and something else on another day, there would be no reason to suppose that the litigation had been set at rest. The same must be said if the judgment can mean one thing to one judge and something else to another judge. All are bound by the original language used, and all ought to interpret the language the same way. . . . The judge who tried the case and who ought to know what he meant to say, after the time for appeal, etc., has passed cannot any more change or cancel one word of the judgment than can any other judge."[5]

[5] So, we have repeatedly held that

> neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.[6]

In this case, it does not matter that the judge who entered the "further award" of April 26, 2010, was the same judge who had entered the August 29, 2008, award. We are required to determine the effect of the August 29 award as a matter of law from its four corners, and the judge's belief about what he

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[5] *Neujahr v. Neujahr*, 223 Neb. 722, 726, 393 N.W.2d 47, 49 (1986). Accord *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990).

[6] *Neujahr, supra* note 5, 223 Neb. at 728, 393 N.W.2d at 51. Accord, *Universal Assurors Life Ins. Co. v. Hohnstein*, 243 Neb. 359, 500 N.W.2d 811 (1993); *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Kerndt, supra* note 5. See, also, *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Bokelman v. Bokelman*, 202 Neb. 17, 272 N.W.2d 916 (1979).

"impliedly rejected" in the August 29 award cannot change the fact that the award expressly did not reject it.

Given the broad provision for future medical treatment in the original award, and the complete absence of any language in the award denying knee replacement, the original award simply cannot be read as denying Pearson's knee replacement. This is not to say that the knee replacement is necessarily compensable. Rather, the award should be enforced according to its terms—Pearson was awarded "[a]ny future medical treatment received by [Pearson] which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto . . . ." We therefore reverse the decision of the Workers' Compensation Court insofar as it found that the original order denied knee replacement, and we remand this cause for a factual determination as to whether Pearson's knee replacement falls under the provisions of § 48-120.

Is Reimbursement to Third-Party Payor Subject to Fee Schedule?

In addition to arguing that his knee replacement was compensable, Pearson also argues that the trial court and review panel erred in finding that the fee schedule should be applicable to medical expenses already paid by his health insurer.

We begin with some background. In addition to the knee replacement, Pearson had steroid spinal injections for pain management with regard to his low-back injury, which was ruled compensable in the original award. ADM refused to pay for those injections. The trial court, in its further award, found that the injections were compensable and ordered ADM to pay for them. Pearson argues that because those bills have already been paid by his health insurer, that insurer should be entitled to reimbursement for the full amount it paid without application of the fee schedule. The trial court disagreed and found that the fee schedule was applicable.

Subsections (1) and (8) of § 48-120 are both relevant to this discussion. Section 48-120(1)(a) provides that an "employer is liable for all reasonable medical, surgical, and hospital services." Subsection (1)(b) requires the compensation court to

establish a schedule of fees for the services from (1)(a). And § 48-120(1)(e) provides:

> The provider or supplier of such services shall not collect or attempt to collect from any employer, insurer, government, or injured employee or dependent or the estate of any injured or deceased employee any amount in excess of (i) the fee established by the compensation court for any such service . . . .

Finally, § 48-120(8) provides:

> The compensation court shall order the employer to make payment directly to the supplier of any services provided for in this section *or reimbursement to anyone who has made any payment to the supplier* for services provided in this section. No such supplier or payor may be made or become a party to any action before the compensation court.

(Emphasis supplied.)

In its further award, the trial court concluded that § 48-120(1)(e) plainly requires the use of the fee schedule and that there was no conflict between it and § 48-120(8). The review panel affirmed, but noted that the trial court did not actually order payment to the third-party insurer. Instead, according to the review panel, the trial court simply ordered ADM to pay certain medical expenses. As such, the review panel noted that after receiving payment from ADM, the medical provider or supplier should then reimburse the insurance company. And because the trial court ordered payment and not reimbursement, the distinction raised by Pearson is not at issue.

We agree with the trial court that subsections (1)(e) and (8) of § 48-120 are not inconsistent. Pearson is correct that § 48-120(1)(e) does not mention such third parties, while § 48-120(8) does. But the purpose behind § 48-120(1)(e) is to prohibit a supplier or provider from charging more than the fee schedule permits. Because a third party in this instance is not providing or supplying services and thus is not charging for them, it is unnecessary to prohibit one from charging *more* than the fee schedule, and thus unnecessary to include third parties in that subsection.

And § 48-120(8) mentions third parties only insofar as it gives the compensation court the power to order a third party to be reimbursed if it pays a provider or supplier. Pearson expresses concern that a third party might pay an amount higher than the fee schedule initially and, if reimbursed only according to the fee schedule, might not be reimbursed for the full amount paid. We find this possibility mitigated by the prohibition in § 48-120(1)(e) against providers or suppliers charging more than the fee schedule allows.

Because we conclude that § 48-120(1)(e) and (8) can be read consistently, we conclude that the trial court did not err in applying the fee schedule to any reimbursement to a third party. We therefore find Pearson's second assignment of error to be without merit.

CONCLUSION

The decision of the review panel is affirmed in part, and in part reversed and remanded for further proceedings.

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

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. REMACK, RESPONDENT.

802 N.W.2d 887

Filed September 23, 2011. No. S-11-551.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Robert J. Remack, on July 1, 2011. The court accepts respondent's surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 20, 2001. On June 21, 2011, respondent self-reported to relator, the Counsel for Discipline of the Nebraska Supreme Court, that he had misappropriated client funds for his own use. On July 1, respondent filed a voluntary surrender of license in which he admitted that he self-reported to the Counsel for Discipline that he had misappropriated client funds for his own use and in which he stated that he freely and voluntarily consented to the entry of an order of disbarment and freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of such an order.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law. Respondent has self-reported the act of misappropriating client funds, and therefore, he knowingly does not contest the truth of such an allegation. Further, respondent has waived all proceedings against him in connection with the entry of an order of disbarment based on the admitted act. 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 respondent has stated that he freely, knowingly, and voluntarily admits he misappropriated client funds for his own

use and that he freely and voluntarily consents to the entry of an order of disbarment and freely and voluntarily waives his right to proceedings prior to entry of an order. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY D. GLAZEBROOK, APPELLANT.
803 N.W.2d 767

Filed September 30, 2011. No. S-09-1170.

1. **Appeal and Error.** Absent plain error, an appellate court will not consider an issue not raised to the trial court.
2. **Constitutional Law: Speedy Trial.** The right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities knew of the offense.
3. **Constitutional Law: Criminal Law: Due Process: Proof: Time.** The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay. But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.
4. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
5. **Trial: Due Process: Time: Appeal and Error.** When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment

delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.

6. **Due Process: Proof: Time.** A defendant alleging that a delay in filing charges constituted a denial of due process cannot rely on the real possibilities inherent in the delay, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice.
7. **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.
8. ____: ____: ____. In reviewing the admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), an appellate court 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.
9. **Rules of Evidence: Other Acts: Proof.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), prohibits the admission 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. The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
10. **Evidence: Other Acts.** The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.
11. ____: ____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
12. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity.
13. **Rules of Evidence.** The proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), is, upon objection to its admissibility, required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.
14. **Evidence: Other Acts.** 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.

15. **Trial: Juries: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
16. ____: ____: ____: ____. 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.
17. **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.
18. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
19. ____: ____: ____. Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.
20. ____: ____: ____. It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.
21. **Evidence.** Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
22. **Trial: Evidence.** Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.
23. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
24. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
25. **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.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

In 2009, Jeffrey D. Glazebrook was convicted of first degree murder in connection with the 1977 death of Sadie May McReynolds. He was sentenced to life imprisonment. In this direct appeal, Glazebrook contends that the State's delay in charging him with the offense violated his constitutional rights and that the trial court erred in receiving certain evidence over his objections. We find no merit in the constitutional claim, but we determine that the conviction must be reversed because the district court improperly received evidence of Glazebrook's criminal history.

I. FACTS AND PROCEDURAL BACKGROUND

1. 1977 CRIME

Shortly after 1 p.m. on November 7, 1977, the Ashland, Nebraska, rescue squad was dispatched to the Ashland home of 97-year-old McReynolds. McReynolds was a widow who lived alone. She was transported to a Lincoln, Nebraska, hospital, where the admitting nurse documented bruises on McReynolds' right lower leg, left thigh, left wrist, and left hand. McReynolds also had large amounts of dried blood on her face, abdomen, legs, and feet. An examination at the hospital disclosed that McReynolds sustained injuries to her vagina and urethra. McReynolds died on November 20, 1977, as a result of her injuries.

2. PRETRIAL PROCEEDINGS

In 2008, a Saunders County grand jury indicted Glazebrook on one count of first degree sexual assault and one count of felony murder in the first degree in connection with the assault and death of McReynolds. The State later filed the operative second amended information charging Glazebrook with a single count of first degree murder. The State alleged that Glazebrook killed McReynolds during the perpetration of a sexual assault or a robbery. Following a preliminary hearing, the court determined there was probable cause to believe that

Glazebrook committed the murder but stated there was no evidence a robbery had occurred.

Glazebrook filed a plea in abatement asserting various arguments, including that the delay in filing charges against him had unfairly prejudiced his right to present a defense, in violation of his due process rights under the federal and state Constitutions. The district court overruled the plea in abatement but specifically stated that Glazebrook could raise the issue of preindictment delay at trial. Glazebrook then entered a plea of not guilty.

Before trial, the State filed a motion requesting a hearing on the admissibility of other "crimes, wrongs, or acts" committed by Glazebrook. The pretrial motion asserted the other crimes were relevant to prove the identity of the person who killed McReynolds and as "proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident."

A rule 404[1] hearing was conducted in June 2009. At the hearing, the State informed the court that its sole ground for seeking admission of the other crimes evidence was that it was relevant to the identity of the person who killed McReynolds. The State then adduced evidence that in 1978, Glazebrook committed a physical assault in Ashland upon a female victim, E.S., for which he was convicted and sentenced to 4 to 10 years' imprisonment. The State also adduced evidence that in 1991, Glazebrook committed a sexual assault in Lincoln against another female victim, K.B., for which he was convicted and sentenced to 15 to 35 years' imprisonment. We shall discuss this evidence in more detail in our analysis of Glazebrook's assignment of error regarding its admissibility. After the hearing, the district court entered an order allowing the State to adduce the other crimes evidence at trial.

3. Trial

First responders testified they found McReynolds lying on the floor, partially in a hallway and partially in a bathroom, dressed in a flannel nightgown which she was still wearing

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

when she was taken to the hospital. An Ashland police officer who was one of the first officers at the crime scene arrived while McReynolds was still being attended to by the first responders. The officer observed bloodstains primarily in the bathroom, but also in other rooms in the house. Nebraska State Patrol Investigator Ron Osborne arrived at the scene a short time later, and Osborne thereafter directed the investigation.

At Osborne's request, Trooper James Snyder of the Nebraska State Patrol went to the Lincoln hospital to which McReynolds was taken. Snyder arrived at the hospital at 1:30 p.m. and was present in the emergency room when McReynolds was questioned by a nurse regarding the events which led to her injuries. McReynolds reported that her doorbell rang sometime after 9:30 p.m. on the preceding day and that when she responded, an unidentified man grabbed her and pushed her down "'"over [her] organs."'" He told her to do certain things, such as to "'spread [her] feet apart.'" McReynolds thought that his objective was sex. The man eventually apologized and left.

Utilizing a "rape kit," the nurse assisted an attending physician in obtaining tissue specimens from McReynolds, including fingernail scrapings, vaginal and rectal smears, and hair specimens. Snyder took possession of the rape kit and delivered it the same afternoon to Karen Schmidt, who was then the chief forensic serologist at the State Patrol Criminalistics Laboratory (crime lab) in Lincoln. Schmidt placed the rape kit in a locked evidence room at the crime lab. On the following morning, Osborne brought additional items of evidence to Schmidt, including a nightgown and a washcloth. Schmidt inventoried and numbered each item of evidence and placed each item in a separate paper bag labeled with the case number. The nightgown and washcloth were placed in a paper bag which was initialed by Schmidt and Osborne.

Schmidt later performed nondestructive testing on the tissue specimens included in the rape kit. She also examined the nightgown, which had McReynolds' name on it and was heavily stained with blood and urine. Schmidt was unable to detect the presence of semen from either the rape kit specimens or the nightgown. Schmidt did find that the blood on the nightgown was the same type as the sample of McReynolds' blood

from the rape kit specimen. Schmidt also observed hairs on the nightgown, which she removed and mounted on four individually numbered microscope slides. After examining the slides, Schmidt determined that slides Nos. 3 and 4 contained hairs that did not come from McReynolds. Schmidt identified the hairs on slide No. 3 as head hairs and those on slide No. 4 as pubic hairs. After examining the slides, Schmidt stored them in slide mailers and put them in the crime lab's evidence room; the nightgown was placed in its paper bag and returned to the evidence room. The nightgown and other evidence were later released to Osborne, but the slides containing the hair specimens obtained from the nightgown were retained in the crime lab.

An investigator with the Nebraska State Patrol interviewed Glazebrook in December 1977, at Osborne's request. Glazebrook, then a 17-year-old, resided in Ashland, as did other members of his family. He told the investigator he had not known McReynolds personally, but he knew who she was because he had scooped her walks on one occasion and his brother may have mowed her lawn. Glazebrook told the investigator that on the evening of the assault, he and a few friends were in Council Bluffs, Iowa, and he returned to his grandparents' home in Ashland at approximately 11:45 p.m. Glazebrook's grandparents lived approximately one block from McReynolds' home. He denied assaulting McReynolds and said he did not know who did.

A urologist who treated McReynolds following the assault found that her urethra was severely lacerated and torn. A forensic pathologist reviewed the medical records and concluded the injuries McReynolds sustained in the assault were the direct cause of her death.

Nebraska State Patrol Lt. Robert Frank began reviewing the McReynolds files as a cold case in 1996. He knew about advances in DNA testing and was looking for DNA evidence. When he learned of the slides containing the hair specimens, Frank went to the locked long-term evidence storage facility, where he located a cardboard box with the McReynolds case number on it. Inside the box was a black plastic garbage bag containing individual brown paper bags and boxes. One of the

paper bags contained the nightgown and the washcloth. Frank testified neither this paper bag nor any of the others had been sealed or stapled shut. He determined the evidence had not been checked out of the storage facility after 1978, but was unable to locate the slides.

Frank then contacted the crime lab to ask about the slides. The crime lab found two of the four slides, Nos. 3 and 4, and Frank had those slides sent to an outside facility for DNA testing. No nuclear DNA could be obtained from the slides, and they were returned to the crime lab in November 1997.

In late 1999, Frank learned of a new technology known as mitochondrial DNA (mtDNA) testing. This technique differs from nuclear DNA testing in that it utilizes DNA from outside the cell nucleus which is inherited only from the individual's mother. The testing of mtDNA can exclude individuals as donors, but cannot identify a specific individual as a donor or identify the donor's sex, race, or ethnicity. Frank obtained slides Nos. 3 and 4 from the crime lab and sent them, along with two vials of Glazebrook's blood, to a testing facility. At the facility's request, Frank later sent 19 head hairs obtained from Glazebrook.

Pamela Pogue performed mtDNA testing on the slides prepared by Schmidt and sent to her by Frank. Pogue also tested the hair specimens and blood obtained from Glazebrook. Over a defense objection with respect to chain of custody and relevance, Pogue testified that Glazebrook could not be excluded as the donor of the hair on one of the slides. Pogue sent the mtDNA sequence she found on that slide to the Federal Bureau of Investigation's database to determine how often that particular mtDNA sequence had been found in an individual. The database showed that the sequence had been found in 1 of 563 African Americans, 0 of 1,219 Caucasians, 0 of 302 Hispanics, and 0 of 342 Asians.

Although 19 hair samples taken from Glazebrook were sent to Pogue to serve as known samples of his mtDNA, only 1 hair sample was returned after the mtDNA testing was completed. Pogue testified she did not know what happened to the remaining 18 hair samples, but she was confident that they were not consumed in the testing process.

Over Glazebrook's objection, evidence regarding the assaults committed by Glazebrook on E.S. and K.B. was received at trial. The court instructed the jury that the evidence was received "for the limited purpose of establishing the identity of the person responsible for the charged offense" and that the jury must consider the evidence "for that limited purpose and for no other."

After the State rested, Glazebrook renewed his plea in abatement and a hearing was held outside the presence of the jury. Glazebrook adduced evidence that generally showed the records of his assignments within the penal system had been destroyed and that certain witnesses he wished to call could not remember the events. The district court overruled the renewed plea in abatement.

The jury returned a verdict of guilty, and Glazebrook was sentenced to life imprisonment. He perfected this timely direct appeal.

II. ASSIGNMENTS OF ERROR

Glazebrook assigns, restated and renumbered, that the district court erred in (1) not dismissing the charge on the basis of preindictment delay, in violation of his rights under the 6th Amendment and the Due Process Clause of the 14th Amendment to the U.S. Constitution; (2) receiving the other crimes evidence over his objection; and (3) receiving the mtDNA evidence over his objection.

III. ANALYSIS

1. Preindictment Delay

[1,2] Glazebrook argues the State's delay in filing charges against him in connection with the McReynolds homicide violated his rights under the 6th Amendment and the Due Process Clause of the 14th Amendment. He did not assert his Sixth Amendment claim in the district court. Absent plain error, this court will not consider an issue not raised to the trial court.[2]

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[2] See, *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

There can be no plain error with respect to this issue, because the right to a speedy trial, as guaranteed under the Sixth Amendment, is not implicated until after the accused has been charged or arrested, even though the prosecuting authorities knew of the offense.[3] Thus, we need not consider Glazebrook's Sixth Amendment claim.

[3-5] The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay.[4] But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.[5] Our cases do not clearly delineate the standard of review applicable to trial court rulings on this issue. We conclude that a criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact and requires the dual standard of review which we have employed for other mixed questions, such as ineffective assistance of counsel[6] and juror misconduct.[7] Accordingly, when reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, we will review determinations of historical fact for clear error, but we will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.[8]

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[3] *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

[4] *U.S. v. Sturdy*, 207 F.3d 448 (8th Cir. 2000). See, also, *State v. Huebner, supra* note 3.

[5] *United States v. Marion, supra* note 3; *State v. Huebner, supra* note 3.

[6] *Golka v. State*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[7] *State v. Thorpe, supra* note 2.

[8] See *State v. Davis*, 345 Or. 551, 201 P.3d 185 (2008).

[6] On this issue, Glazebrook had the burden of establishing that the delay in filing charges actually prejudiced his defense and that the State intentionally caused the delay to gain an unfair tactical advantage.[9] On appeal, he argues only the prejudice prong of this test, contending that the passage of time dimmed the memories of witnesses and deprived him of the ability to call witnesses, now deceased, who may have had knowledge of unspecified facts. But a defendant alleging that a delay in filing charges constituted a denial of due process "cannot rely on the real possibilities inherent in the delay, such as dimmed memories, inaccessible witnesses, and lost evidence. The defendant must show actual prejudice."[10] Glazebrook's evidence falls far short of this requirement. And there is no evidence to support the second prong of the test, which requires a showing that the State intentionally caused the delay to gain an unfair tactical advantage. As the Supreme Court has noted, "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."[11] Accordingly, the district court's determination that Glazebrook failed to establish a denial of due process resulting from preindictment delay was not clearly erroneous.

2. Evidence of Other Crimes

(a) Additional Facts

Glazebrook argues the district court erred in receiving, over his objection, evidence of other crimes he committed. We summarize the other crimes evidence here.

(i) Assault on E.S.

In May 1978, Glazebrook was convicted by a jury of an assault with intent to inflict serious bodily injury on E.S. Glazebrook was sentenced to 4 to 10 years' imprisonment. He was 17 years old at the time the crime was committed. E.S. was 56 when she was assaulted and died before the rule 404

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[9] See *State v. Huebner, supra* note 3.

[10] *Id.* at 345, 513 N.W.2d at 289.

[11] *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

hearing in this case. At trial, the State offered the testimony of E.S. from the 1978 trial and a portion of Glazebrook's testimony from that trial. This evidence was received over Glazebrook's objections under rules 403[12] and 404, subject to the court's limiting instruction as noted above.

E.S. testified at the 1978 trial that she had fallen asleep on her living room sofa on the evening of February 1, 1978. She woke to find a man standing over her and striking her head with a hammer. E.S. tried to resist, but he struck her several times. Suddenly he stopped and left. After he left, she discovered that her wallet was missing from her purse, which had been in her kitchen. The investigation revealed that Glazebrook broke into her house through a basement window and picked up the hammer in the basement. He could have taken the purse without disturbing her as she slept. Glazebrook testified at the 1978 trial that he knew E.S. from helping his brother mow her lawn, but stated he had never been in her home.

(ii) Assault of K.B.

In September 1991, Glazebrook entered a no contest plea to a charge of first degree sexual assault of K.B. and was convicted and sentenced to a term of 15 to 35 years' imprisonment. K.B. testified at the trial of this case, over Glazebrook's rules 403 and 404 objections, and subject to the same limiting instruction given with respect to the testimony of E.S.

K.B. was 45 years old at the time of the assault and lived in a basement apartment at her parents' home in Lincoln. Glazebrook was dating K.B.'s daughter at the time. In February 1991, K.B. was asleep in her apartment when she was awakened at 2 a.m. by a noise at her door. When the noise persisted, she got up to investigate. She found the door to her apartment ajar, and when she attempted to close it, Glazebrook unexpectedly entered. He told K.B. he had had an argument with her daughter and asked if he could use her restroom. K.B. agreed. When Glazebrook returned, he grabbed K.B.'s shoulders and pushed her to the floor, where they struggled and K.B. screamed for help. During the struggle, Glazebrook removed

[12] Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

K.B.'s underwear and digitally penetrated her. K.B. managed to break away and run to the door, but Glazebrook caught her and dragged her onto her bed. When K.B.'s father heard the commotion and called down the stairs to ask what was going on, K.B., fearing for her life, told Glazebrook that if he left she would not tell about the incident. Glazebrook then left, and K.B. later called the police.

(b) Applicable Law and Standard of Review

Glazebrook's principal objection to the evidence of his prior crimes was based on rule 404(2), which 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.[13] For completeness, 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.[14] Those amendments were not in effect at the time of trial in this case and do not affect our analysis in this appeal.

[7,8] 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.[15] In reviewing the admissibility of other crimes evidence under rule 404(2), an appellate court 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

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[13] Rule 404(2).

[14] See rule 404(4) and Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Cum. Supp. 2010).

[15] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

consider the evidence only for the limited purpose for which it was admitted.[16]

[9,10] Rule 404(2) prohibits the admission 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.[17] The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.[18] The exclusion of other bad acts evidence offered to show a defendant's propensity protects the presumption of innocence and is deeply rooted in our jurisprudence.[19]

[11-13] 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).[20] Such evidence is often referred to as having "special" or "independent" relevance, which means its relevance does not depend on its tendency to show propensity.[21] The proponent of such evidence is, upon objection to its admissibility, required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.[22] In this manner, the claimed independent relevance of the evidence is identified for the finder of fact and the appellate court.

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[16] See, *State v. Epp, supra* note 15; *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[17] *State v. Ellis, supra* note 15. See, also, *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[18] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[19] *State v. Trotter, supra* note 17; *State v. Sanchez, supra* note 18.

[20] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[21] *State v. Baker, supra* note 20; *State v. Sanchez, supra* note 18; *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[22] *State v. Burdette, supra* note 16; *State v. Sanchez, supra* note 18.

[14] Here, the evidence of other assaults committed by Glazebrook was offered and received for the sole purpose of proving Glazebrook's identity as McReynolds' assailant. 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.[23] 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.[24] For example, we held in *State v. Burdette*[25] that evidence of prior crimes was admissible to prove the identity of the perpetrator of the charged offense, where the victims of the prior crimes and the charged offense were chosen from newspaper articles identifying women likely to be living alone; the victims were bound, gagged, and blindfolded in a similar manner; and the victims were subjected to both anal and vaginal penetration.

But in other cases, we have held that general similarities between prior crimes and the charged offense are insufficient to establish admissibility of the prior crimes to prove identity under rule 404. In *State v. Trotter*,[26] we held that prior incidents of spousal abuse perpetrated by the defendant should not have been admitted on the issue of identity in his prosecution for child abuse and manslaughter, because the prior crimes and the charged offense were not so similar, unusual, and distinctive as to establish a "signature" methodology. While noting that both the charged offense and the prior acts involved abuse of a person, we reasoned the similarities urged by the State as the basis for admissibility to prove identity were, "in essence, the similarities in the statutory definition of the crimes themselves, not the manner in which [the defendant] may have

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[23] *State v. Ellis, supra* note 15; *State v. Trotter, supra* note 17.

[24] *Id.*

[25] *State v. Burdette, supra* note 16.

[26] *State v. Trotter, supra* note 17.

carried them out."[27] Recently, in *State v. Ellis*,[28] we concluded that evidence of the defendant's prior sexual assaults directed at his minor stepdaughters should not have been received on the issue of identity in his prosecution for first degree murder in which the State alleged that the death of the minor female victim occurred in the perpetration of a sexual assault. We noted the prior acts occurred more than a decade before the charged offense and that although the victims were approximately the same age, assaulted in isolated locations, and subjected to blows on the head, these facts were not "so distinctive as to separate [the] prior acts from nearly any other forcible sexual assault."[29]

(c) Application of Law to Facts

(i) Assault of E.S.

Because McReynolds was unable to identify her assailant before her death, a jury could have concluded that someone other than Glazebrook committed the crime. Therefore, identity was a fact of consequence in the case.[30] In determining that evidence of the assault on E.S. was admissible under rule 404(2), the district court reasoned (1) both E.S. and McReynolds were considerably older than Glazebrook, (2) Glazebrook had done odd jobs for both women prior to the assaults, (3) both assaults occurred late at night in the homes of women who lived alone, (4) both victims lived near Glazebrook's home, (5) both attacks involved violence and resulted in serious injuries, and (6) the attacks occurred in November 1977 and February 1978.

The use of violence and the occurrence of injury are inherent in any assault, and the commission of an assault during nighttime hours in the victim's home is hardly unusual. The temporal proximity of the two attacks and the fact that both victims lived near Glazebrook and near each other lends some

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[27] *Id.* at 461, 632 N.W.2d at 340.

[28] *State v. Ellis, supra* note 15.

[29] *Id.* at 581, 799 N.W.2d at 282.

[30] See *State v. Sanchez, supra* note 18.

credence to a finding that the attack on E.S. is probative of the identity of the attacker of McReynolds. But the key in any identity analysis is whether the crimes are so unusual and distinctive that the trial judge can reasonably find that they bear the same signature.[31] Here, the fact that Glazebrook knew both women because he had performed odd jobs for them is not unusual, especially considering they all lived in a small town. And although both victims were older than Glazebrook, nothing about their ages creates a signature method of attack. In addition, we note that the attacks also have substantial dissimilarities, in that E.S. was attacked with a weapon, while McReynolds was not. E.S. was robbed, but McReynolds was not. And McReynolds was sexually assaulted, while E.S. was not. Viewing the evidence as a whole, we conclude that although there is some temporal and geographic relationship between the crimes, the manner in which the attacks on E.S. and McReynolds were committed is not so similar, unusual, or distinctive that they could reasonably be found to bear the same signature. The evidence of the attack on E.S. was therefore inadmissible under rule 404(2). Accordingly, we conclude the district court abused its discretion in receiving evidence of Glazebrook's assault on E.S.

(ii) Assault of K.B.

In determining that evidence of the assault against K.B. was admissible on the issue of the identity of McReynolds' assailant, the district court reasoned (1) both victims were considerably older than Glazebrook, (2) both assaults occurred late at night in the homes of women who lived alone, (3) Glazebrook knew both women, and (4) both women were forced to the floor and digitally penetrated. But again, the use of violence and the occurrence of injury are inherent in any assault, and the commission of a sexual assault during nighttime hours in the victim's home is hardly unusual. And although Glazebrook knew both K.B. and McReynolds, the manner by which he knew them differed greatly, in that K.B. was the mother of his girlfriend and McReynolds was an elderly woman who lived

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[31] *State v. Ellis, supra* note 15.

in his hometown and for whom he performed odd jobs. And while both victims were older than Glazebrook, nothing about the age difference creates an inference of a signature method of carrying out the crimes. It is notable too that McReynolds was assaulted in Ashland, while the assault upon K.B. occurred more than 13 years later in Lincoln. Viewing the evidence as a whole, we conclude that while there are some general and superficial similarities between the crimes, the manner in which they were committed is not so similar, unusual, and distinctive that they could be reasonably found to bear the same signature. The evidence of Glazebrook's assault on K.B. was therefore inadmissible under rule 404(2). Accordingly, we conclude the district court abused its discretion in receiving evidence of Glazebrook's assault of K.B.

(d) Harmless Error Analysis

[15,16] An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[32] 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.[33] In *Ellis*, we determined that erroneous admission of other crimes evidence was harmless in light of the strength of other evidence, including DNA test results which linked the defendant to the crime.

Here, the other evidence of guilt is not as compelling. The mtDNA testing utilized in this case can exclude individuals as donors, but it cannot identify a specific individual as a donor or identify the donor's sex, race, or ethnicity. Although the testing established that Glazebrook could not be excluded as the donor of the hair found on the nightgown, it did not establish with certainty that the hair was his. And, as noted below, there are

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[32] *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[33] *State v. Ellis, supra* note 15; *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe, supra* note 2.

circumstances affecting the weight to be given to the mtDNA test results.

Based on our review of the entire record, we conclude that the erroneous admission of evidence concerning Glazebrook's other crimes was not harmless beyond a reasonable doubt. Accordingly, the error requires reversal and a new trial.

3. Evidence of mtDNA Testing

[17] 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.[34] We invoke this principle to discuss Glazebrook's contention that the district court erred in receiving Pogue's testimony regarding mtDNA test results. Glazebrook makes a three-part argument. First, he contends there was insufficient foundation with respect to the chain of custody of the nightgown from which a hair specimen was obtained and subjected to mtDNA testing. Second, Glazebrook contends there were "unexplained alterations" to the hair specimens which affected the integrity of the testing.[35] Third, Glazebrook argues there was no comparative mtDNA profile of McReynolds or other persons who were present at the crime scene.

(a) Foundation and Chain of Custody of Nightgown

As noted, the hair specimens tested for mtDNA were taken from a nightgown which Osborne delivered to the crime lab on the day after McReynolds was hospitalized. Osborne died prior to Glazebrook's trial, and his testimony was not preserved. Glazebrook argues there was insufficient foundational evidence regarding when, where, or by whom the nightgown was taken into the custody of law enforcement.

[18-23] Where objects pass through several hands before being produced in court, it is necessary to establish a complete

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[34] *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011); *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified on denial of rehearing* 276 Neb. 965, 767 N.W.2d 68 (2009).

[35] Brief for appellant at 39.

chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.[36] Objects which relate to or explain the issues or form a part of a transaction are admissible in evidence only when duly identified and shown to be in substantially the same condition as at the time in issue.[37] It must be shown to the satisfaction of the trial court that no substantial change has taken place in an exhibit so as to render it misleading.[38] Important in determining the chain of custody are the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.[39] Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.[40] Our review concerning the admissibility of such evidence is for an abuse of discretion.[41]

Glazebrook relies on *Priest v. McConnell*[42] and *Raskey v. Hulewicz*[43] in support of his argument that foundation for the nightgown was insufficient. In *Priest*, the defendant sought to introduce evidence that one of the victims of an automobile accident was intoxicated at the time he was killed. The record showed a doctor recalled taking blood samples from the victim at the mortuary, but did not remember to whom he passed them for handling. A sheriff testified he took both blood and urine samples to his office, but did not remember from whom he received the samples. The doctor who performed the autopsy received the samples from the sheriff, locked them in his laboratory, and later gave them to the technician who performed

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[36] *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977).

[37] *Id.*

[38] See, *State v. Tolliver, supra* note 36; *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992).

[39] *State v. Tolliver, supra* note 36.

[40] *Id.*

[41] See *id.*

[42] *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985).

[43] *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970).

the alcohol testing. On that record, we concluded the evidence of the victim's level of intoxication was inadmissible because there was no evidence of the origin of the urine sample of the victim and little evidence of the origin of the blood sample. In *Raskey*, we held the trial court did not abuse its discretion in refusing to admit the results of a urine test where there was no evidence regarding customary procedures for obtaining and preserving a urine sample and the testimony of the person responsible for taking the sample was equivocal.

The chain of custody evidence is considerably stronger in this case than in *Priest* or *Raskey.* Schmidt, the forensic serologist who obtained the hair specimens from the nightgown, testified she took the nightgown from a paper bag Osborne delivered to her on the day after McReynolds was found and taken to the hospital. Osborne was identified as the Nebraska State Patrol investigator responsible for Saunders County who responded to the crime scene and directed the investigation. There was testimony that in 1977, it was standard procedure for State Patrol investigators to place evidence in a clean paper bag for delivery to the crime lab. There was evidence McReynolds was wearing a nightgown when she was found lying on the floor after the assault and that there was blood on the floor. There is also testimony that McReynolds was wearing a nightgown when she arrived at the hospital and that she had dried blood on her body. Schmidt testified that the nightgown had McReynolds' "name on the back cover" and was heavily soiled with blood and urine. Testing established that bloodstains on the nightgown matched McReynolds' blood type. Schmidt testified as to the manner in which she placed the hair specimens from the nightgown on microscope slides, which were retained in the custody of the crime lab from 1977 until they were sent out for DNA testing in 1996 and again in 1999. There is no evidence of tampering. From this evidence, it is reasonably probable that the nightgown from which the hair specimen was taken was the nightgown worn by McReynolds at the time of the assault and that it was on her person or in the custody of the State Patrol at all relevant times prior to the mtDNA testing. We therefore conclude the district court did not abuse its discretion in deciding that there was sufficient

foundational evidence regarding chain of custody to permit testimony regarding the results of mtDNA testing on the hair specimen taken from the nightgown.

(b) Unexplained Alterations in Hairs

Glazebrook argues that because two of the original microscope slides containing hair obtained from the nightgown are now missing and only 1 of the 19 hair samples taken from him were returned by the crime lab which performed the mtDNA tests, the test results cannot be associated with the McReynolds assault with any degree of confidence. We conclude these matters go to the weight of the test results, not their admissibility.

(c) Absence of Comparative mtDNA Profiles

Glazebrook argues the results of mtDNA testing should not have been admitted because "[t]he State did not obtain an elimination mtDNA profile for . . . McReynolds or any of the other ten individuals" who were present at the McReynolds residence during the initial investigation of the crime.[44] Glazebrook cites no authority for this argument. We note that the only two bases for Glazebrook's objection to the mtDNA test results were "chain of custody," as discussed above, and "relevancy." Thus, the issue presented is whether the mtDNA test results were relevant in the absence of comparative mtDNA profiles from other persons at the crime scene.

[24] Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[45] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[46] Schmidt testified that when she examined the hairs she found on the

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[44] Brief for appellant at 37.

[45] *State v. Sellers, supra* note 2.

[46] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

nightgown under a microscope, they appeared to be of a different color, diameter, and length than hair samples obtained from McReynolds. There was thus a reasonable inference that the hairs were left by McReynolds' assailant. Pogue testified mtDNA testing can exclude persons as donors of the tissue from which the mtDNA was extracted, but cannot identify specific persons as donors.

The State was not required to produce mtDNA profiles of each person who was present at the crime scene, as Glazebrook contends. But it is clear from the record, and from the jurisprudence and forensic literature, that mtDNA "is not a unique identifier because it is shared by individuals within a given maternal line."[47] Thus, the fact that a defendant cannot be excluded as the donor of mtDNA found at a crime scene is of limited probative value in the absence of evidence upon which to assess the significance of that fact, such as a reliable estimate of the number of persons who could be excluded as donors. At least one court has held that statistical statements based upon a sample of the population may be utilized to estimate the frequencies of mtDNA types in the general population.[48] In cases where mtDNA evidence has been held to be admissible, the evidence has included expert testimony regarding the statistical significance of the fact that the defendant could not be excluded as the donor. For example, in *State v. Pappas*,[49] there was evidence that at a 95-percent confidence interval, 99.7 percent of the Caucasian population could be excluded as the source of the questioned sample. Similarly, in *Magaletti v. State*,[50] there was testimony that at a 95-percent confidence interval, 99.93 percent of persons randomly selected would not match the mtDNA sample.

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[47] See *State v. Pappas*, 256 Conn. 854, 882, 776 A.2d 1091, 1109 (2001), citing Mitchell M. Holland & Thomas J. Parsons, *Mitochondrial DNA Sequence Analysis — Validation and Use for Forensic Casework*, 11 Forensic Sci. Rev. 21 (1999).

[48] *State v. Pappas, supra* note 47.

[49] *Id.*

[50] *Magaletti v. State*, 847 So. 2d 523 (Fla. App. 2003).

As noted, the State presented evidence in this case that according to the Federal Bureau of Investigation's database, the particular mtDNA sequence obtained from the evidence had been found in 1 of 563 persons of African American descent, 0 of 1,219 Caucasians, 0 of 302 Hispanics, and 0 of 342 persons of Asian descent. But Pogue noted that back in 1999, this was a small database, and the record includes no explanation of the significance of this raw data in arriving at a statistical probability analysis to establish relevancy.[51] Although this issue was not preserved for appeal, we note that the statistical significance of the fact that a particular individual cannot be excluded as the donor of mtDNA is an important factor in determining the relevancy of mtDNA evidence.

4. Sufficiency of Evidence

[25] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Glazebrook's conviction. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[52] 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.[53] We conclude the evidence against Glazebrook was sufficient to sustain the verdict.

IV. CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for a new trial.

Reversed and remanded for a new trial.

Connolly, J., participating on briefs.

Wright, J., not participating.

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[51] See *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[52] See, *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011); *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[53] *Id.*

RSUI Indemnity Company and Liberty Mutual Insurance Group, as subrogees of Kiewit Construction Company, appellees, v. Ronald "Tim" Bacon et al., appellants.

810 N.W.2d 666

Filed September 30, 2011. No. S-10-1020.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
3. **Contracts: Principal and Agent: Liability.** An agent for a disclosed principal is not liable on a contract in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility.
4. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
5. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
6. ____: ____. The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
7. ____: ____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.
8. ____: ____. The question of a party's good faith in the performance of a contract is a question of fact.
9. **Prejudgment Interest.** Prejudgment interest accrues on the unpaid balance of a liquidated claim from the date the cause of action arose until the entry of judgment.
10. ____. A claim is liquidated when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery; there must be no dispute as to the amount due and to the plaintiff's right to recover.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed in part, and in part reversed.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellants.

Matthew D. Hammes and Michelle D. Epstein, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

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

STEPHAN, J.

This is an appeal from an order granting summary judgment in a breach of contract action. The primary issue is whether an attorney and/or a law firm is liable on a contract negotiated on behalf of a client when the contract provides that both the client and the attorney "agree to and will pay" a certain sum of money and the attorney signs the contract under the legend "Agreed to in Form & Substance." We conclude that neither the attorney nor the firm is liable but otherwise affirm the order granting summary judgment.

I. FACTS

Ronald "Tim" Bacon was injured on July 28, 2003, while working at a construction site. Kiewit Construction Company (Kiewit) was the general contractor on the site, and Bacon was employed by subcontractor Davis Erection. Ridgetop Holdings, Inc. (Ridgetop), is the parent company of Davis Erection.

Liberty Mutual Insurance Group (Liberty Mutual) insured Kiewit under a commercial liability policy. Liberty Mutual also insured Davis Erection under a workers' compensation policy. The two policies bore separate policy numbers and had separate named insureds. RSUI Indemnity Company (RSUI) insured Kiewit under a separate liability policy.

After his accident, Bacon filed a lawsuit in the district court for Douglas County against Kiewit, Liberty Mutual, Davis Erection, and Ridgetop. Harris Kuhn Law Firm, LLP (Harris Kuhn), and attorneys James E. Harris and Britany Shotkoski of that firm represented Bacon in the lawsuit. Prior to trial, Kiewit and Bacon entered into a settlement in which Kiewit agreed to pay Bacon a specified sum in full and final settlement of his claims in exchange for a release. The settlement agreement provided in relevant part:

> [I]n the event BACON obtains a settlement with Ridgetop . . . or judgment against RIDGETOP, BACON and his

> attorneys, . . . Harris and . . . Shotkowski [sic], agree to and will pay to KIEWIT and/or its insurer(s) a sum of money up to a total sum of Seven Hundred Fifty Thousand and 00/100 ($750,000.00) from any such settlement with RIDGETOP or final judgment against RIDGETOP, by paying to KIEWIT 50% (1/2) of the first Five Hundred Thousand and 00/100 ($500,000.00) obtained by BACON in settlement with RIDGETOP or final judgment against RIDGETOP and 25% (1/4) of any monies obtained in excess of Five Hundred Thousand and 00/100 ($500,000.00) obtained by BACON in settlement with RIDGETOP or final judgment against RIDGETOP, up to the total reimbursable amount of Seven Hundred Fifty Thousand and 00/100 ($750,000.00). BACON further agrees that any payment owed by BACON to KIEWIT pursuant to the terms of this paragraph will be made by BACON in cash or its equivalent as soon as possible, and not to exceed seven (7) days, after receipt of good funds from RIDGETOP, unless such time is extended by agreement of the parties.

In a section entitled "Worker's Compensation," the settlement agreement stated that Liberty Mutual had advised the parties that it "did not believe" it would be asserting an interest in any settlement proceeds obtained by Bacon from either Kiewit or Ridgetop. Although the agreement contemplated the receipt of written verification from Liberty Mutual to this effect, it was executed prior to this occurring and it appears from the record that no written verification ever occurred. The settlement agreement further provided that "notwithstanding" Liberty Mutual's advisement and anticipated written verification, Bacon agreed to defend and indemnify Kiewit "with respect to any claim or suit which is or may be made by Liberty Mutual . . . as the workers' compensation insurer for Davis Erection."

The settlement agreement contained the notarized signatures of Bacon and a Kiewit representative. Harris signed the agreement under the legend "Agreed to in Form & Substance," and Kiewit's attorney did likewise. The attorneys' signatures were not notarized.

On August 23, 2007, RSUI issued a draft payable to Bacon and his attorneys at Harris Kuhn. On August 29, Liberty Mutual issued a draft which was also payable to Bacon and Harris Kuhn. These payments were made by the insurers on behalf of Kiewit pursuant to the settlement agreement. The payments were deposited into Harris Kuhn's trust account.

Bacon, represented by Harris and Harris Kuhn, then began settlement negotiations with Ridgetop. The negotiations became complicated when Liberty Mutual claimed an interest in any amount Bacon received from Ridgetop. Liberty Mutual eventually conceded that it had no subrogation right to any amount obtained by Bacon from Ridgetop, but insisted that it was entitled to a statutory credit against its future workers' compensation benefit payments to Bacon based on any amount Bacon obtained from Ridgetop.[1] Bacon ultimately settled with Ridgetop and received $1.25 million. At the time Bacon obtained the money from Ridgetop, the validity of Liberty Mutual's claim for a future statutory credit had not been resolved.

RSUI and Liberty Mutual filed this breach of contract action after Bacon received the proceeds of the Ridgetop settlement but refused to make payment to them under the terms of the Kiewit settlement agreement. The district court granted summary judgment in favor of RSUI and Liberty Mutual and found Bacon, Harris, and Harris Kuhn liable in the amount of $437,500 plus prejudgment interest. Bacon, Harris, and Harris Kuhn filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Bacon, Harris, and Harris Kuhn assign, restated and consolidated, that the district court erred in (1) finding that Harris and Harris Kuhn were personally liable on the settlement agreement, (2) granting summary judgment in favor of RSUI and Liberty Mutual, (3) requiring Bacon to indemnify Liberty Mutual against its own intentional acts, (4) calculating the amount owed under the settlement agreement, and (5) finding

[1] See Neb. Rev. Stat. § 48-118 (Reissue 2010).

that the amount owed under the settlement agreement was a liquidated amount and awarding prejudgment interest.

III. STANDARD OF REVIEW

[1] 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]

[2] Whether prejudgment interest should be awarded is reviewed de novo on appeal.[3]

IV. ANALYSIS

1. Harris and Harris Kuhn Have No Personal Liability

The district court found that RSUI and Liberty Mutual were entitled to summary judgment and that they could recover from Bacon, Harris, or Harris Kuhn. Harris and Harris Kuhn argue that even if the Kiewit settlement agreement was breached as a matter of law, they cannot be personally liable for the amounts due, because they acted solely as Bacon's agent. They rely on the general rule that an agent, acting for a disclosed principal, is not liable for the principal's contract.[4]

[3] While that is the general rule, an agent can become personally liable if "the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract."[5] Stated another way, an agent for a disclosed principal is not liable on the contract "'in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended

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[2] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[3] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010); *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

[4] See, *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987); *Cargill Leasing Corp. v. Mueller*, 214 Neb. 569, 335 N.W.2d 277 (1983).

[5] *Broad, supra* note 4, 275 Neb. at 795, 749 N.W.2d at 483.

to incur personal responsibility.'"[6] The question before us is whether the terms of the contract and/or the circumstances of the deal showed that Harris and/or Harris Kuhn impliedly incurred or intended to incur personal liability.

The Kiewit settlement agreement provides: "[I]n the event BACON obtains a settlement with Ridgetop . . . BACON and his attorneys, . . . Harris and . . . Shotkowski [sic], agree to and will pay to KIEWIT and/or its insurer(s) a sum of money" according to the contractual formula. The agreement also specifies that settlement drafts were to be payable to both Bacon and "His Attorneys At Harris Kuhn." RSUI and Liberty Mutual argue that these contractual provisions, combined with Harris' signature on the settlement agreement, demonstrate that Harris and the firm intended to incur personal liability on the contract.

Although the contractual language refers to both Harris and Shotkoski, RSUI and Liberty Mutual do not argue that Shotkoski has any personal liability on the contract. We assume this is because Shotkoski did not sign the agreement. The rule in Nebraska is that signatures of the parties are not essential to establish a binding contract if manifestation of mutual assent is otherwise shown, unless there is a statute requiring a signature or an agreement by the parties that a contract shall not be binding until it is signed.[7] Here, the settlement agreement, at section 21, expressly states that it "shall not be effective . . . unless and until each party executes the original or a counterpart."

In light of this, Shotkoski cannot under any interpretation of the contract be personally liable, and Harris and Harris Kuhn cannot be personally liable unless Harris' signature on the "form and substance" block can be construed to bind him and his firm personally. We conclude that under the circumstances of this case, particularly the nature of the signature

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[6] *Cargill Leasing Corp., supra* note 4, 214 Neb. at 572, 335 N.W.2d at 279, quoting *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981).

[7] *In re Estate of Mathews*, 134 Neb. 607, 279 N.W. 301 (1938); *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998).

and the ambiguous contractual language, it cannot. Harris' signature under the legend "Agreed to in Form & Substance" demonstrates only that he was Bacon's attorney and that "the document [was] in the proper form and embodie[d] the deal that was made between the parties."[8] Nothing about the signature indicates or implies an intent to incur personal liability on the contract. Indeed, Kiewit's attorney signed an identical signature block even though no contractual language could be construed to impose a personal obligation on Kiewit's attorney. In addition, the contractual language relied upon by RSUI and Liberty Mutual is ambiguous, but at most governs the manner by which payment under the contract was to be made, not the parties which were to be liable for such payment.

RSUI and Liberty Mutual rely on *Kalberg v. Gilpin Company*.[9] In that case, buyers executed a written offer to purchase a home for the total price of $18,000. The contract required the buyers to pay $1,500 in earnest money and provided that the remaining $16,500 would be financed by first and second deeds of trust through the real estate agency. The contract further provided that if the financing could not be obtained, the earnest money would be returned. The contract was signed by the buyers, the seller, and an agent of the real estate company. Prior to closing, the buyers were informed by the agency that there was a fee for obtaining the deeds of trust and that the final amount due was $18,800. The buyers refused to pay the additional $800 because it was not agreed to in the purchase contract. When the seller and the agency refused to return the earnest money, the buyers sued them both.

In resolving the dispute in favor of the buyers, the court noted that the buyers had "proceeded properly in joining as defendants both the seller-principal and his agent."[10] It reasoned:

> Although it is generally true that an agent who discloses the name of his principal to the persons with whom he is dealing incurs no personal responsibility to such persons

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[8] *Freedman v. Brutzkus*, 182 Cal. App. 4th 1065, 1070, 106 Cal. Rptr. 3d 371, 374 (2010).

[9] *Kalberg v. Gilpin Company*, 279 S.W.2d 177 (Mo. App. 1955).

[10] *Id.* at 181.

> on account of the transaction, there is an exception where the contract or circumstances of the transaction discloses a mutual intention to impose a personal responsibility on the agent. Such intention appears in the written contract here involved wherein the agent acknowledged receipt of the $1,500 earnest money subject to a stipulation contained on the reverse side of the contract that it would be retained by the agent subject to certain conditions or until the sale was consummated. Thus the agent was to hold this payment as a stakeholder subject to being accountable to both the seller and the buyers.[11]

We find *Kalberg* distinguishable from the instant case, because in *Kalberg*, the real estate agent signed the contract as a party and the contract contained express terms about the agent's duty to hold the money in escrow for the parties. Here, both the contractual language and the import of Harris' signature are much less clear, and we decline to find that general agency principles can be displaced in such a situation. The district court erred in finding that Harris and Harris Kuhn were personally liable on the contract.

2. Contract Breached as Matter of Law

(a) Plain Language of Contract

Bacon contends the district court also erred in finding the settlement agreement was breached as a matter of law. He argues that because Liberty Mutual continues to assert it is entitled to a statutory credit against future workers' compensation payments based on the amount of the Ridgetop settlement, the amount he will actually receive from Ridgetop is unknown, and that thus, the amount owed to Kiewit under the settlement agreement is also unknown. In essence, Bacon interprets the Kiewit agreement to apply to only the "'net'" of any amounts he receives from a settlement with Ridgetop.

[4] The plain language of the settlement agreement refutes Bacon's argument. The agreement provides that if Bacon "obtain[ed]" a settlement or judgment against Ridgetop, a sum of money calculated pursuant to the contractual formula

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[11] *Id.*

was to be paid to Kiewit "and/or its insurer(s)." The agreement on its face does not require payment to Kiewit from the "net" received by Bacon from Ridgetop; it requires payment from any settlement or judgment "obtain[ed]" from Ridgetop. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[12]

According to the clear, plain, and ordinary meaning of the contractual language, once Bacon settled with Ridgetop and obtained money from that settlement, the contractual formula was triggered. The record shows that Bacon received $1.25 million from Ridgetop, and application of the contractual formula establishes as a matter of law that Bacon owes Kiewit and/or its insurers $437,500.

(b) Implied Covenant of Good Faith and Fair Dealing

Bacon also argues that summary judgment is improper because genuine issues of material fact exist as to whether Liberty Mutual violated the implied covenant of good faith and fair dealing in the Kiewit settlement agreement. We note that Bacon does not assert that RSUI violated this covenant.

[5-8] The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.[13] The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties.[14] Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.[15] A violation of the covenant of

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[12] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008); *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[13] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[14] *Spanish Oaks, supra* note 13.

[15] *Id.*

good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[16] The question of a party's good faith in the performance of a contract is a question of fact.[17]

Bacon asserts Liberty Mutual violated the implied covenant of good faith and fair dealing when it asserted its right to a statutory credit against the settlement that he reached with Ridgetop. For this argument to have merit, we would have to impute Liberty Mutual's action in its capacity as Davis Erection's workers' compensation carrier to Liberty Mutual's action in its capacity as the insurer for Kiewit. Even assuming that this would be proper, the express terms of the settlement agreement negate Bacon's argument. The settlement agreement states that at the time the parties entered into the agreement, they were aware of the possibility that Liberty Mutual could assert an interest, based on its prior workers' compensation payments, in any proceeds Bacon obtained from Ridgetop. According to the settlement agreement, although Liberty Mutual had indicated it would not seek to enforce such an interest, the parties understood that Liberty Mutual had not expressly stated that it would not do so. And Bacon expressly assumed the risk of Liberty Mutual asserting its interest. Liberty Mutual could not, as a matter of law, have violated a covenant of good faith and fair dealing in later asserting an interest in the Ridgetop settlement when all parties knew at the time the settlement agreement was entered into that there was a possibility that Liberty Mutual would act as it did, and the settlement agreement clearly placed that risk on Bacon. The district court did not err in finding no reasonable fact finder could conclude that Liberty Mutual's actions with respect to its workers' compensation setoff credit violated an implied covenant of good faith and fair dealing in the Kiewit settlement agreement.

We note that after this appeal was submitted, both parties filed motions requesting that this court take judicial notice of

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[16] *Id.*

[17] *Id.*; *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

activity in related proceedings. A February 3, 2011, order of the district court for Douglas County granted Liberty Mutual summary judgment on its claim that it was entitled to a statutory credit against future workers' compensation claims for the amounts Bacon obtained in the Ridgetop settlement. Even though this issue has now been resolved, it still does not affect the total amount Bacon obtained as a result of the Ridgetop settlement. Instead, Liberty Mutual has a credit against future workers' compensation payments based on the amount of the Ridgetop settlement. Bacon is thus affected only to the extent that this credit affects the amount of the weekly workers' compensation he receives from Liberty Mutual in its capacity as the workers' compensation carrier for Davis Erection.

(c) Subrogation Against Own Insured

Bacon also makes a complicated argument based on the premise that an insurer cannot subrogate against its own insured.[18] Generally, he contends that the liability policy that Liberty Mutual issued to Kiewit was part of an "owner-controlled" insurance policy and included both Davis Erection and Bacon, as an employee of Davis Erection, as additional insureds. He contends that because Liberty Mutual owed Bacon as an additional insured under the same policy the same duty it owed Kiewit, Liberty Mutual cannot recover against Bacon on the settlement agreement because it has no right of subrogation against its own insured.

But the fact that Davis Erection and Bacon were additional insureds under Liberty Mutual's liability policy means only that if one or both of them had engaged in negligent acts and been found liable to another, those acts would have been covered by the liability policy. It does not mean, and cannot mean, that because Bacon was injured by the negligent acts of another entity which was also covered by the liability policy, Liberty Mutual owed no duty to him to pay for that negligence.

Even if this premise were sound, it would have no application in this case. Here, Liberty Mutual seeks only to enforce

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[18] See *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988).

the contractual rights it obtained through the settlement agreement. It is not subrogating against Bacon, in that it is not claiming that Bacon owes money to it because it paid an obligation on his behalf. The mere fact that Bacon is the other party to the contractual agreement does not make this a subrogation action.

(d) No Hindrance or Delay

Bacon also argues that Liberty Mutual's actions hindered or delayed his ability to enter into a settlement with Ridgetop, and he implies that this then released him from the obligation under the Kiewit settlement agreement. But even if Liberty Mutual's decision to seek an interest in the Ridgetop settlement delayed Bacon's receipt of that settlement money, it is undisputed that he ultimately received it. In this action, RSUI and Liberty Mutual are not arguing that they are entitled to any damages due to any delay in the finalization of the settlement between Bacon and Ridgetop. Instead, their sole contention is that once Bacon "obtain[ed]" money from Ridgetop due to settlement, the formula of the settlement agreement was triggered and he owed Kiewit, and/or RSUI and Liberty Mutual, the stipulated contractual amount. There are therefore no relevant issues of fact about any delay in obtaining the Ridgetop settlement. The settlement agreement between Kiewit and Bacon was enforceable as a matter of law, and the district court did not err in finding it to be so.

3. Prejudgment Interest Proper

[9,10] Bacon argues the district court erred in awarding prejudgment interest. Prejudgment interest accrues on the unpaid balance of a liquidated claim from the date the cause of action arose until the entry of judgment.[19] A claim is liquidated when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery; there must be no dispute as to the amount due and to the plaintiff's right to recover.[20]

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[19] Neb. Rev. Stat. § 45-103.02(2) (Reissue 2008).

[20] See, *Dutton-Lainson Co., supra* note 3; *Archbold, supra* note 3.

Here, the amount due to RSUI and Liberty Mutual is clear; based on the formula of the settlement agreement, when Bacon obtained the $1.25 million settlement from Ridgetop, he was obligated to pay Kiewit and/or its insurers $437,500. The evidence thus furnishes a basis for computing an exact amount determinable without opinion or discretion.[21] None of Bacon's excuses or justifications for not paying the amount when it came due are either legally persuasive or meritorious. Once Bacon obtained the funds from the Ridgetop settlement, there was no reasonable controversy as to RSUI and Liberty Mutual's right to recover the amount owed on the Kiewit settlement. We conclude on de novo review that the district court did not err in awarding prejudgment interest.

V. CONCLUSION

The settlement agreement is clear and unambiguous and required payment to Kiewit based on the contractual formula once proceeds were obtained by Bacon from Ridgetop. The record is clear that $1.25 million was obtained from Ridgetop, and application of the contractual formula shows that $437,500 is due on the contract. This is not a subrogation action, and nothing about Liberty Mutual's subsequent assertion of an interest in the proceeds of the Ridgetop settlement affects the terms of the Kiewit settlement.

The amount due on the settlement agreement is liquidated because it can be readily determined, and there is no reasonable controversy as to RSUI and Liberty Mutual's right to enforce the contract. However, the district court erred in finding Harris and Harris Kuhn personally liable on the contract. We reverse that portion of the judgment but affirm in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., not participating.

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[21] See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).

STATE OF NEBRASKA, APPELLEE, V. JONATHAN S. BECKER, APPELLANT.

804 N.W.2d 27

Filed September 30, 2011. No. S-11-041.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the court below.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Statutes: Legislature: Intent.** When construing a statute, courts look to give effect to the legislative intent of the enactment.
4. **Statutes.** Courts generally give words in a statute their ordinary meaning.
5. **Sentences: Words and Phrases.** Under Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008), "in custody" means judicially imposed confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after trial on a criminal charge.
6. **Sentences.** Under Neb. Rev. Stat. § 83-4,145 (Reissue 1999), credit is given for time actually served in an incarceration work camp program.
7. **Probation and Parole: Sentences.** Under Neb. Rev. Stat. § 29-2268 (Reissue 2008), if a court finds that a probationer violated a condition of his probation, the court may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted.
8. **Homicide: Motor Vehicles: Licenses and Permits: Revocation: Time.** While Neb. Rev. Stat. § 28-306 (Cum. Supp. 2002) requires a license revocation regardless of whether the defendant is sentenced to probation or incarceration, the court may, in some cases, also do so as a condition of probation for a period of 5 years.
9. **Probation and Parole.** Under Neb. Rev. Stat. § 29-2262(2)(r) (Cum. Supp. 2004), the court may attach any condition reasonably related to the rehabilitation of the offender to his or her probation.
10. **Sentences: Legislature: Licenses and Permits: Revocation.** The Legislature has not given credit for prior license revocations.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Sentence vacated, and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, Kelly M. Steenbock, and Timothy P. Burns for appellant.

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

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

CONNOLLY, J.

In 2005, Jonathan S. Becker pleaded guilty to one count of motor vehicle homicide. The court sentenced him to 5 years of probation, which included a requirement that Becker participate in a "work ethic camp." The court also revoked his driver's license for 5 years as a condition of probation. Becker later violated his probation, and the court revoked it. The court then sentenced Becker to 5 years in prison. At the same time, the court again revoked Becker's license, this time for 15 years. This appeal presents two questions: whether Becker will receive credit for time served at a work ethic camp; and whether he will receive credit for his previous license revocation. We conclude that Becker should receive credit for the time served at the work ethic camp but reject his argument that he should receive credit for the time his license was revoked while he was on probation.

BACKGROUND

In 2004, Becker, while intoxicated, crashed his vehicle into a concrete sign. His passenger died from injuries caused by the accident. The State charged Becker with one count of motor vehicle homicide.[1] Becker pleaded guilty to the charge, and the court sentenced Becker to 5 years of probation. One of the conditions of Becker's probation was that he successfully complete a program at a work ethic camp. The court also imposed a condition that Becker not drive and revoked his driver's license for 5 years from the date of sentencing.

Although Becker successfully completed his 125-day term at the work ethic camp, he eventually violated his probation by testing positive for alcohol, missing drug-testing dates, skipping Alcoholics Anonymous meetings, and failing to attend mental health counseling. Becker admitted to violating his probation.

After Becker had admitted his probation violation, the court sentenced Becker to 5 years in prison. The court gave Becker credit for 128 days he had served in jail, but did not give him credit for the 125 days served in the work ethic camp.

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[1] See Neb. Rev. Stat. § 28-306 (Cum. Supp. 2002).

The court also revoked Becker's driver's license for 15 years. The court gave no credit for the revocation that was a part of Becker's probation.

ASSIGNMENTS OF ERROR

Becker assigns that the court erred in:

(1) refusing to grant Becker credit for the 125 days he spent at the work ethic camp; and

(2) refusing to give Becker credit for the 5 years that his license was previously suspended.

STANDARD OF REVIEW

[1,2] Statutory interpretation is a question of law that we resolve independently of the court below.[2] Whether a defendant is entitled to credit for time served is also a question of law.[3]

ANALYSIS

Credit for Time Served at the Work Ethic Camp

Becker first argues that the court erred when it did not give him credit for the 125 days he spent at the work ethic camp. The State agrees and concedes that the court erred. We agree.

[3,4] When construing a statute, we look to give effect to the legislative intent of the enactment.[4] In doing so, we generally give words in a statute their ordinary meaning.[5]

[5] Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) states that "[c]redit against the maximum term and any minimum term shall be given to an offender for the time spent in custody . . . as a result of the conduct on which such a charge is based." We have previously defined "in custody" to mean judicially imposed confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after trial on a criminal charge.[6] Under this definition,

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[2] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[3] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[4] See *Mena-Rivera, supra* note 2.

[5] See *id.*

[6] *State v. Jordan*, 240 Neb. 919, 485 N.W.2d 198 (1992).

Becker was "in custody"; as part of his sentence, the court had ordered him to a facility run by the Department of Correctional Services for detention and supervision.[7]

[6] Moreover, the Legislature has explicitly stated that inmates are to get credit for time they spend in work camps. Neb. Rev. Stat. § 83-4,145 (Reissue 1999), which authorizes a court to sentence one who has failed to complete a work camp program to any sentence the court could have initially imposed, states that "[c]redit shall be given for time actually served in the incarceration work camp program."

The court erred in not awarding Becker credit for the time he spent at the work ethic camp. The court should have allowed Becker credit for the 125 days he served at the camp.

Credit for the Driver's License Revocation

Becker next argues that the court erred in revoking his license for an additional 15 years without granting him credit for the 5 years that his license was revoked as part of his probation. Becker argues that if the court does not give him credit for these 5 years, the total length of his revocation will be 20 years, which exceeds the statutory limit.[8]

[7] Neb. Rev. Stat. § 29-2268(1) (Reissue 2008) states that if a court finds that a probationer violated a condition of his probation, the court "may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted."

[8,9] While § 28-306 requires a license revocation regardless of whether the defendant is sentenced to probation or incarceration, the court may, in some cases, also do so as a condition of probation for a period of 5 years.[9] Under Neb. Rev. Stat. § 29-2262(2)(r) (Cum. Supp. 2004), the court may attach any condition "reasonably related to the rehabilitation of the offender" to his or her probation. We have previously held that revoking a driver's license and ordering a defendant not

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[7] See Neb. Rev. Stat. § 83-4,142 (Reissue 1999).

[8] See § 28-306.

[9] See Neb. Rev. Stat. § 29-2263 (Reissue 2008).

to drive were reasonably related to a defendant's rehabilitation after his conviction for driving under the influence.[10] Similarly, it could be viewed as reasonably related to the rehabilitation of a defendant who killed his passenger while driving drunk. The court's order makes clear that it imposed the revocation because it thought that the revocation was related to Becker's rehabilitation. Because the court's order of revocation was a condition of Becker's probation, the court could revoke his probation and impose a new sentence under § 29-2268. And at the time that the court initially sentenced Becker, § 28-306 provided that a convicted defendant's license could be revoked for anywhere from 60 days to 15 years. Applying the plain language of § 29-2268, the court had authority to revoke Becker's license for 15 years.

[10] Becker argues that the court should have given him credit for his previous license revocation. But we note that the statute allowing a court to revoke probation and impose a new sentence, § 29-2268, makes no provision for awarding credit. Further, Becker has not directed us to any other statute that would award credit and we have not found one either. Apparently, unlike for time served in custody,[11] the Legislature has not given credit for prior license revocations. As we pointed out in *State v. Nelson*,[12] "[t]he Legislature has demonstrated that it can and will specify when credit should be given for similarly imposed restrictions." It has not done so here.

Summing up, the court imposed Becker's license revocation as a condition of his probation. When Becker violated his probation, the court was free to revoke that probation and impose any sentence it could have initially imposed. This includes the 15-year license revocation under § 28-306.

CONCLUSION

The court should have given Becker credit for the time he spent at the work ethic camp. But he is not entitled to credit for

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[10] See *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991).

[11] See § 83-1,106(1).

[12] *State v. Nelson*, 276 Neb. 997, 1003, 759 N.W.2d 260, 266 (2009). See, also, Neb. Rev. Stat. § 60-6,197.05 (Reissue 2010).

his license revocation. We vacate the sentence and remand the cause for resentencing.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
JERAD N. PARKS, APPELLANT.
803 N.W.2d 761

Filed September 30, 2011. No. S-11-092.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Jurisdiction: Appeal and Error.** Jurisdictional questions can be raised by the Nebraska Supreme Court sua sponte.
4. ____: ____. A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
5. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** Under Neb. Rev. Stat. § 43-247 (Reissue 2008), when a juvenile has been charged with a felony, the district court and the juvenile court have concurrent jurisdiction.
6. **Juvenile Courts: Jurisdiction.** The juvenile court's jurisdiction over any individual adjudged to be within the provisions of Neb. Rev. Stat. § 43-247 (Reissue 2008) shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.
7. **Juvenile Courts: Words and Phrases.** For purposes of the Nebraska Juvenile Code, "age of majority" means 19 years of age and "juvenile" means any person under the age of 18.
8. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
9. **Statutes: Appeal and Error.** An appellate court will not read anything plain, direct, or unambiguous out of a statute.
10. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
11. ____. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
12. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.

13. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

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

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Jerad N. Parks appeals his convictions and sentences for attempted second degree sexual assault and felony child abuse, alleging that the district court erred when it refused to transfer his case to the juvenile court. Parks also claims that because he was a juvenile at the time of the offenses, the district court erred in finding him subject to the Sex Offender Registration Act (SORA), Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008 & Supp. 2009), and the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009). We affirm.

BACKGROUND

Parks was originally charged with first degree sexual assault on a child. The victim, E.C., is Parks' nephew, and the alleged offenses occurred between May 1 and September 16, 2000. At the time of the offenses, E.C. was 5 years old and Parks was 14 or 15 years old. E.C. first reported the assault in 2009, and Parks was arrested and charged shortly thereafter. Further details of the offenses will be discussed below.

Parks filed a motion to transfer to the juvenile court because he was a juvenile at the time of the offenses, although he was 24 years of age at the time he was charged. The district court denied the motion to transfer, and Parks filed an interlocutory appeal, which was dismissed for lack of jurisdiction.

Parks then pled no contest to one count of attempted second degree sexual assault and one count of felony child abuse. The district court sentenced Parks to 180 days in jail and 3 years' probation. The district court also ordered Parks to register as a sex offender as required by Nebraska law, to undergo a sex-offender-specific evaluation, and to comply with any treatment recommendations of the evaluation as directed by his probation officer. Parks appeals from his convictions and sentences.

ASSIGNMENTS OF ERROR

Parks assigns that the district court erred in (1) denying his motion to transfer to the juvenile court and (2) finding that he was subject to the requirements of SORA and SOCA, because he was a juvenile at the time of the offense.

STANDARD OF REVIEW

[1] A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[1]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[2]

ANALYSIS

Trial Court Did Not Err When It Denied Parks' Motion to Transfer Case to Juvenile Court.

Parks first argues that the trial court erred when it denied his motion to transfer the case to juvenile court. Parks admits that such a transfer would be tantamount to a dismissal, because under Neb. Rev. Stat. § 43-247 (Reissue 2008), the juvenile court's jurisdiction ends once the juvenile reaches the age of majority. However, Parks claims that his age at the time of the offense mandates a transfer to the juvenile court, and he alleges that a "delay in the prosecution" has "depriv[ed] him the protection of the juvenile court system."[3]

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[1] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2] *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

[3] Brief for appellant at 13.

Parks points us to *Roper v. Simmons*,[4] alleging that *Roper* sets forth the differences in adult and juvenile criminal culpability. Parks also cites *Graham v. Florida*[5] for the proposition that juveniles have lessened culpability.

Roper presents a very different issue, however: whether it is cruel and unusual punishment to impose the death penalty when the offense was committed while the defendant was a juvenile.[6] *Roper* does not require that a juvenile be tried in the juvenile court under all circumstances, or in all cases; instead, it holds that a person cannot be sentenced to death if he or she committed the crime while a juvenile, because that would be a violation of the Eighth Amendment to the U.S. Constitution. And *Graham* addressed the issue of whether the imposition of life without parole on a juvenile who had not committed homicide could be considered cruel and unusual punishment.[7] Neither *Roper* nor *Graham* gives Parks an unassailable right to be tried as a juvenile for crimes he committed while a juvenile.

[3,4] In fact, under the plain language of our statutes, the juvenile court would never have jurisdiction in a case such as this one. Although the State did not raise the issue, jurisdictional questions can be raised by the Nebraska Supreme Court sua sponte.[8] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[9]

[5-7] Under § 43-247, when a juvenile has been charged with a felony, the district court and the juvenile court have concurrent jurisdiction.[10] However, § 43-247 states that "the juvenile court's jurisdiction over any individual adjudged to

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[4] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

[5] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[6] *Roper, supra* note 4.

[7] *Graham, supra* note 5.

[8] *State ex rel. NSBA v. Krepela*, 259 Neb. 395, 610 N.W.2d 1 (2000).

[9] *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

[10] See *Goodwin, supra* note 1.

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." For the purposes of the Nebraska Juvenile Code, "[a]ge of majority means nineteen years of age" and "[j]uvenile means any person under the age of eighteen."[11]

[8-12] Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[12] An appellate court will not read anything plain, direct, or unambiguous out of a statute.[13] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[14] A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.[15] In construing a statute, an appellate court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.[16]

Under the plain language of the juvenile code, the juvenile court's jurisdiction ends when the juvenile reaches the age of majority, but the district court's jurisdiction continues. The district court therefore had sole jurisdiction over Parks, and it was not required to weigh the factors found under Neb. Rev. Stat. § 43-276 (Cum. Supp. 2010). For that reason, the district court did not err in denying Parks' motion to transfer.

SORA and SOCA.

Parks' second assignment of error is that the district court erred when it determined that he was subject to SORA and SOCA, because those laws do not apply to juveniles. Parks further claims that the main purpose of those laws is to protect

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[11] See Neb. Rev. Stat. § 43-245(1) and (7) (Cum. Supp. 2010).

[12] *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

juveniles and not to punish them, and that therefore, he should not be subject to the requirements of SORA or SOCA.

First, we note that Parks has not been found to be subject to SOCA; hence, that claim is premature. The district court did notify Parks that his conviction for attempted second degree sexual assault was an offense requiring a civil commitment evaluation under Neb. Rev. Stat. § 29-4018 (Reissue 2008). However, Parks has not claimed that anyone alleged him to be a dangerous sex offender under § 71-1205. We addressed a similar issue in *State v. Schreiner*,[17] in which the defendant appealed the finding that he was subject to lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Cum. Supp. 2006). We found that the defendant would not be subject to lifetime community supervision until after his release from prison and that therefore, his claim was not ripe for review. Similarly, Parks will not be subject to SOCA until he is released from incarceration, so that claim is not ripe for review. The district court found that Parks was required to register as a sex offender under SORA, however.

Although Parks argues that SORA does not apply to juveniles, we need not decide whether SORA may ever be applied to juveniles who are adjudicated as having committed a registrable offense under § 29-4003. As discussed above, Parks' case properly remained with the district court. Parks pled no contest to attempted sexual assault in the second degree, a registrable offense as an adult, and was found guilty of the same by the district court.

[13] We agree with the State where it points out that § 29-4003(1)(a)(i) states that SORA shall apply to "any person" who pleads guilty to, pleads nolo contendere to, or is found guilty of attempted sexual assault in the second or third degree. As we noted above, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[18] Therefore, Parks' second assignment of error is also without merit.

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

[18] *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

CONCLUSION

The district court did not abuse its discretion when it denied Parks' motion to transfer, because the juvenile court does not have jurisdiction over a person who has reached the age of majority. The mere fact that Parks was a juvenile at the time of the offenses does not automatically give him the right to be tried as a juvenile. Furthermore, because Parks pled no contest to a registrable offense under SORA, the plain language of the statute requires Parks to register as a sex offender.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEREMY R. SHIRK, ALSO KNOWN AS JEREMY MUCKEY-SHIRK, RESPONDENT.

803 N.W.2d 518

Filed September 30, 2011. No. S-11-319.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

Respondent, Jeremy R. Shirk, also known as Jeremy Muckey-Shirk, was admitted to the practice of law in the State of Nebraska on June 16, 2010, and in the State of Iowa on September 25, 2009. At all times relevant hereto, respondent was engaged in the private practice of law in Douglas County in Omaha, Nebraska. On April 19, 2011, formal charges were filed against respondent. The formal charges set forth one count and included the charge that respondent violated Neb. Ct. R. of Prof. Cond. § 3-508.4(a) through (d) (misconduct). The formal charges also allege respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue

2007), by violating Neb. Rev. Stat. §§ 28-915.01 (Reissue 2008) and 64-105 (Reissue 2009).

Respondent filed an answer to the formal charges on May 19, 2011. A referee was appointed on June 9, and on June 17, the referee filed a notice of scheduled hearing, set for July 20.

On July 18, 2011, respondent filed a conditional admission under Neb. Ct. R. § 3-313, in which he knowingly did not challenge or contest the truth of the allegations that he violated § 3-508.4(a) through (d) and waived all proceedings against him in connection therewith in exchange for a public reprimand. Upon due consideration, the court approves the conditional admission and orders that respondent be publicly reprimanded.

FACTS

In summary, the formal charges alleged as follows: In April 2008, respondent was hired by then-attorney Kim Erwin-Loncke during respondent's second year of law school to work as a law clerk in her firm. Respondent continued to work in that position through graduation, after which he became an associate in the firm. Respondent continued to work as an attorney for Erwin-Loncke through September 2010.

Beginning in January 2010, Erwin-Loncke began to work fewer hours in the office, apparently due to a severe disruption in her nonwork life. According to the allegations, Erwin-Loncke began to miss hearings and appointments. In May, Erwin-Loncke was hospitalized for a period of time as a result of stress.

Upon Erwin-Loncke's return to the office, the operations of the firm improved for approximately a week. Then, however, Erwin-Loncke again began to spend less time at work and less time supervising the office and employees, including respondent.

As the only other attorney in the office, respondent became responsible for more of the workload of the firm. Erwin-Loncke began directing respondent to sign pleadings in her name in her absence. She also authorized respondent to sign her name on checks. On at least two occasions, respondent not only signed Erwin-Loncke's name to a pleading, but then

also notarized that signature using his notary stamp. These documents were filed with the courts of Douglas County. Additionally, on July 23, 2010, allegedly with the permission of Erwin-Loncke, respondent wrote a check on the "Loncke Law Office IOLTA account," signing Erwin-Loncke's name and paying himself $500.

ANALYSIS

Section 3-313 of the disciplinary rules provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, we find that respondent knowingly did not challenge or contest the truth of the essential relevant facts outlined in the formal charges and knowingly admits that he violated § 3-508.4(a) through (d). We further find that respondent waives all proceedings against him in connection herewith. Upon due consideration, and in view of respondent's relative inexperience at the time of his misconduct, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent

review of the record, we find by clear and convincing evidence that respondent has violated § 3-508.4(a) through (d) and his oath as an attorney, § 7-104, and that respondent should be and hereby is publicly reprimanded. 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(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V.
ARTHUR P. PERINA, APPELLANT.
804 N.W.2d 164

Filed October 7, 2011. No. S-09-1021.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
2. **Criminal Law: Statutes: Legislature: Intent.** When construing a criminal statute, the existence of a criminal intent is regarded as essential, even though the terms of the statute do not require it, unless it clearly appears that the Legislature intended to make the act criminal without regard to the intent with which it was done.
3. **Criminal Law: Statutes: Intent.** If a criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy; where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person; where the penalty is relatively small; where the conviction does not gravely besmirch; where the statutory crime is not taken over from the common law; and where legislative purpose is supporting, the statute can be construed as one not requiring criminal intent.
4. **Criminal Law: Due Process: Proof.** Due process protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.
5. **Due Process: Intent.** Due process is not violated merely because mens rea is not a required element of a prescribed crime.
6. **Constitutional Law: Statutes.** A motion to quash is the proper method to challenge the constitutionality of a statute.
7. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.
8. **Homicide: Motor Vehicles: Public Policy: Intent: Proof.** Misdemeanor motor vehicle homicide is a public welfare offense which does not require proof of mens rea.

Appeal from the District Court for Sarpy County, DAVID K. ARTERBURN, Judge, on appeal thereto from the County Court for Sarpy County, TODD J. HUTTON, Judge. Judgment of District Court affirmed.

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

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

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

GERRARD, J.

The Nebraska Criminal Code provides that "[a] person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide."[1] The appellant, Arthur P. Perina, challenges that provision on the ground that it criminalizes negligent acts.

BACKGROUND

Joshua Wayland was killed in a traffic accident caused when a dump truck driven by Perina ran a red light at the intersection of Highways 50 and 370 in Sarpy County, Nebraska. Perina was driving north on Highway 50, in heavy rain, and was unable to stop when the traffic light changed at the Highway 370 off ramp. Wayland was turning south onto Highway 50 from the off ramp, and Perina's truck struck Wayland's car on the driver's side. Wayland died as a result of the injuries he sustained in the accident. Perina's blood alcohol test was negative, and there is no indication that alcohol or drugs were a contributing factor to the accident.

Perina was charged with one count of motor vehicle homicide,[2] a Class I misdemeanor, and one count of violation of a

[1] Neb. Rev. Stat. § 28-306(1) (Reissue 2008).

[2] See *id.*

traffic control device,[3] a traffic infraction. Motor vehicle homicide is punishable by up to 1 year's imprisonment, a $1,000 fine, or both.[4] Perina filed a motion to quash the motor vehicle homicide charge, asserting that § 28-306 was unconstitutional because it violated his right to due process. At the hearing on the motion, the court asked Perina's counsel whether he was making a facial challenge to the statute. Counsel explained:

> The specific claim that we're making that [Perina's] due process right is being violated is that the statute, motor vehicle homicide statute, criminalizes mere negligence. It doesn't define what level of negligence is involved. It just simply makes it a criminal act when one violates a traffic offense and a death results from that, and that's the challenge. So it's on its face.

The county court rejected Perina's constitutional argument and overruled his motion to quash. Perina pled not guilty to both charges, and a bench trial was held on a stipulated record. Perina renewed his constitutional challenge, and it was again overruled. Perina was convicted of both charges and sentenced to 24 months' probation and fines totaling $1,025. Perina appealed, reasserting his constitutional claim in the district court. But the district court affirmed Perina's convictions and sentence. Perina appealed and filed a petition to bypass the Nebraska Court of Appeals, which we granted.

ASSIGNMENT OF ERROR

Perina assigns that the district court erred by affirming the county court's denial of his motion to quash based upon the unconstitutionality of § 28-306.

STANDARD OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below.[5]

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[3] See Neb. Rev. Stat. § 60-6,119 (Reissue 2010).

[4] See Neb. Rev. Stat. § 28-106 (Reissue 2008).

[5] See, *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011); *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

ANALYSIS

We begin by noting a dispute between the parties about whether Perina is challenging § 28-306 facially or as applied. A challenge to a statute asserting that no valid application of the statute exists because it is unconstitutional on its face is a facial challenge.[6] But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.[7] The State argues that in this case, Perina's facial challenge clearly fails, because even if it is conceded that § 28-306 unconstitutionally criminalizes negligence, there would remain circumstances *not* involving simple negligence in which the statute could be constitutionally applied. And furthermore, the State argues, Perina has waived an "as-applied" challenge by not raising it below. We disagree with the State's contentions. But explaining why will require an examination of the theoretical underpinnings of Perina's argument.

Perina's constitutional argument is based on the principles articulated by the U.S. Supreme Court in *Morissette v. United States*.[8] In *Morissette*, the defendant was convicted of violating 18 U.S.C. § 641 (2006), which provided, then as now, that "[w]hoever embezzles, steals, purloins, or knowingly converts" U.S. government property is punishable by fine or imprisonment. The defendant had found spent bomb casings in a rural area of Michigan and salvaged them. He explained that he had no intention of stealing anything, but thought the property had been abandoned. Nonetheless, he was convicted, because the trial court determined that the statute required no element of criminal intent and that any necessary intent could be presumed from the defendant's act. The U.S. Supreme Court ultimately disagreed, explaining:

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[6] *State v. Liston*, 271 Neb. 468, 712 N.W.2d 264 (2006).

[7] See, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

[8] *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[9]

The Court reasoned that as the common law of crimes had been codified, even if the statute was silent regarding mens rea, courts had "assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation."[10] However, the Court recognized the principle that some crimes, which became known as public welfare offenses, can involve no mental element, "but consist only of forbidden acts or omissions."[11] Indeed, the Court had already explained in *United States v. Balint*[12] that

> in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*.

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[9] *Id.*, 342 U.S. at 250-51.

[10] *Id.*, 342 U.S. at 252.

[11] *Id.*, 342 U.S. at 253.

[12] *United States v. Balint*, 258 U.S. 250, 252, 42 S. Ct. 301, 66 L. Ed. 604 (1922).

But the *Morissette* Court clarified that such offenses did not arise from the common law, instead having been created because of changing social circumstances that required new duties and crimes that did not require any ingredient of intent. For instance, the Court noted:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.[13]

Such offenses, the Court said, do not "fit neatly" into accepted classifications of common-law offenses, because they are not in the nature of the "positive aggressions or invasions" with which the common law dealt, but instead were "in the nature of neglect where the law requires care, or inaction where it imposes a duty."[14] One accused of such an offense, although not intending the violation, "usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[15] With such legislation, criminal penalties simply serve as an effective means of

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[13] *Morissette, supra* note 8, 342 U.S. at 253-54.

[14] *Id.*, 342 U.S. at 255.

[15] *Id.*, 342 U.S. at 256.

regulation, dispensing with the conventional mens rea requirement for criminal conduct.[16] "'In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.'"[17] But, the Court found,

> we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.[18]

And based on that reasoning, the Court found that § 641, which was essentially a theft offense codified from the common law, was properly construed to require proof of criminal intent.[19] So, the Court found that the trial court had erred in concluding that such intent could be presumed from the fact of the taking, explaining that such a presumption would be inconsistent with a defendant's overriding presumption of innocence.[20]

[2,3] *Morissette* has been read as establishing, "at least with regard to crimes having their origin in the common law, an interpretive presumption that *mens rea* is required."[21] The Court has explained that "[w]hile strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in

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[16] *Morissette, supra* note 8.

[17] *Id.*, 342 U.S. at 260.

[18] *Id.*, 342 U.S. at 263.

[19] See *id.*

[20] *Morissette, supra* note 8.

[21] *United States v. United States Gypsum Co.*, 438 U.S. 422, 437, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978).

which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status."[22] As a result, the established rule is that when construing a criminal statute, "'[t]he existence of a criminal intent is regarded as essential even though the terms of the statute do not require it, unless it clearly appears that the legislature intended to make the act criminal without regard to the intent with which it was done.'"[23] But if the statute

> omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.[24]

[4,5] But it is important to note that *Morissette* was concerned with the *construction* of a statute, not the *validity* of a statute. The *Morissette* Court did not decide whether legislative elimination of the requirement of intent from common-law crimes was constitutional.[25] Although the *Morissette* Court "enunciated various factors" for courts to consider when construing statutes that arguably do not require proof of mens rea, "the Court did not establish those factors as principles of constitutional law."[26] *Morissette* implicates the Due Process Clause insofar as due process protects an accused against

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[22] *Id.*, 438 U.S. at 437-38 (citations omitted).

[23] *State v. Pettit*, 233 Neb. 436, 447, 445 N.W.2d 890, 897 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

[24] *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). Accord *Pettit, supra* note 23.

[25] See, *Stepniewski v. Gagnon*, 732 F.2d 567 (7th Cir. 1984); *State v. Gabriel*, 192 Conn. 405, 473 A.2d 300 (1984); *State v. Foster*, 91 Wash. 2d 466, 589 P.2d 789 (1979); *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988), *affirmed* 323 N.C. 703, 374 S.E.2d 866 (1989).

[26] *Stepniewski, supra* note 25, 732 F.2d at 570.

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged,[27] but it is clear that the constitutional requirement of due process is not violated merely because mens rea is not a required element of a prescribed crime.[28] The Court "has never articulated a general constitutional doctrine of *mens rea*," which "has always been thought to be the province of the States."[29] Simply put, *Morissette* is a case of statutory construction[30] that, by its own terms, only establishes "criteria for distinguishing between crimes that require a mental element and crimes that do not."[31]

[6,7] With that understood, it is apparent that the State's attempt to characterize Perina's challenge as a facial challenge and its claim that Perina waived an "as-applied" challenge are without merit. To begin with, we do not read the record as narrowly as does the State. Perina's motion to quash was a facial challenge, because a motion to quash is the proper method to challenge the constitutionality of a statute,[32] but it is not used to question the constitutionality of a statute as applied.[33] Instead, challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.[34] In

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[27] See, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003); *Gabriel, supra* note 25.

[28] See, e.g., *United States Gypsum Co., supra* note 21; *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986); *United States v. Ayo-Gonzalez*, 536 F.2d 652 (5th Cir. 1976).

[29] *Powell v. Texas*, 392 U.S. 514, 535-36, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968).

[30] See, *Stepniewski, supra* note 25; *Ayo-Gonzalez, supra* note 28; *Gabriel, supra* note 25; *Foster, supra* note 25; *Smith, supra* note 25.

[31] *Morissette, supra* note 8, 342 U.S. at 260. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); *United States Gypsum Co., supra* note 21.

[32] See *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996).

[33] See *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[34] *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

this case, the basis of Perina's constitutional claim was absolutely clear from the outset of the proceedings and reasserted by Perina at every juncture. And both the county court and the district court addressed the substance of Perina's claim.

But more fundamentally, the distinction between a facial and an "as-applied" challenge makes little sense in the context of a *Morissette* argument, because *Morissette* provides no basis for striking down a statute—just for construing it. *Morissette* is the basis for an interpretive principle explaining when mens rea should be read into a criminal offense and when it should not be. It would make little sense to hold that a statute has different elements "as applied" to a particular defendant.

So, we find no merit to the State's argument that Perina waived his *Morissette* argument by not preserving an "as-applied" challenge below. But we understand the State's confusion, because Perina's argument does seem to be that pursuant to *Morissette*, § 28-306 is unconstitutional. As explained above, this cannot be correct. In *Morissette*, for instance, the Court did not invalidate the statute at issue—it simply explained that proof of intent was required and that a jury question had been presented on that issue. Granted, the constitutional validity of a strict-liability criminal statute *may* be implicated under other circumstances: for instance, where an act is not *per se* blameworthy, such that the doer might not be alert to the consequences of the deed.[35] But such a statute is not presented here,[36] and under *Morissette*, a statute is not "unconstitutional"—it is simply construed incorrectly. Therefore, there is no merit to Perina's assignment of error.

Perina does argue, in the alternative, that § 28-306 could be construed to require proof of mens rea. It is questionable whether that argument is encompassed in Perina's assignment

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[35] See, *United States v. Freed*, 401 U.S. 601, 91 S. Ct. 1112, 28 L. Ed. 2d 356 (1971); *Powell, supra* note 29; *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957); *Engler, supra* note 28. See, also, *Stanley v. Turner*, 6 F.3d 399 (6th Cir. 1993) (Ohio involuntary manslaughter statute based on obviously wrongful and blameworthy conduct of violating traffic safety laws did not deny due process).

[36] See *Stanley, supra* note 35.

of error or was clearly raised below. But even on the merits, we are not persuaded. We refused an effectively identical argument in *State v. Mattan*.[37] It is, in fact, long established that neither intent, nor even negligence, is an element of the crime of motor vehicle homicide; instead, "[n]egligence may be and usually is a basic element in unlawful operation and may be proved but the essential element of the crime as declared by the statute is the unlawful act."[38] And other courts, applying *Morissette*, have concluded that a defendant's ordinary negligence may form the basis for a conviction of motor vehicle homicide.[39] As the Idaho Court of Appeals has explained, "[r]egulation of motor vehicle operation is an area without roots in the common law. Traffic laws are enacted for the benefit of the traveling public and it is reasonable to expect compliance with these laws."[40] The court noted that Idaho's motor vehicle homicide statute, as a misdemeanor, carried a relatively minor penalty of a fine of not more than $2,000, or a term of imprisonment of not more than a year.[41] And, the court observed, such punishment "is directed not at evil conduct but at negligent acts or omissions tragically resulting in loss of life."[42] So, the court reasoned, "[a] conviction under this statute, although deeply regrettable, does not gravely besmirch the defendant's character."[43]

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[37] See *State v. Mattan*, 207 Neb. 679, 300 N.W.2d 810 (1981).

[38] *Pribyl v. State*, 165 Neb. 691, 703, 87 N.W.2d 201, 210 (1957). Cf., *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950); *Fielder v. State*, 150 Neb. 80, 33 N.W.2d 451 (1948); *Benton v. State*, 124 Neb. 485, 247 N.W. 21 (1933); *Schultz v. State*, 89 Neb. 34, 130 N.W. 972 (1911).

[39] See, *State of Oregon v. Wojahn*, 204 Or. 84, 282 P.2d 675 (1955); *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Idaho App. 1990); *Smith, supra* note 25; *People v. McKee*, 15 Mich. App. 382, 166 N.W.2d 688 (1968). See, also, *Commonwealth v. Berggren*, 398 Mass. 338, 496 N.E.2d 660 (1986); *State v. Miles*, 203 Kan. 707, 457 P.2d 166 (1969); *State v. Russo*, 38 Conn. Supp. 426, 450 A.2d 857 (Conn. Super. 1982).

[40] *Haxforth, supra* note 39, 117 Idaho at 191, 786 P.2d at 582.

[41] See Idaho Code Ann. § 18-4007(3)(c) (Cum. Supp. 2009).

[42] *Haxforth, supra* note 39, 117 Idaho at 191, 786 P.2d at 582.

[43] *Id.*

Therefore, while the court acknowledged that misdemeanor motor vehicle homicide has some relationship to the general felony of manslaughter at common law, the court concluded that it resembles more closely a public welfare offense and, as such, need not contain a criminal negligence requirement.[44] Similarly, the Oregon Supreme Court explained that it was "convinced that the negligent homicide statute is a police regulation, and that the legislature did not intend that any form of moral culpability should be an element of the offense," because "[t]he crime created by the act is not one that casts great stigma upon those convicted, nor is the penalty prescribed by the act so great that its imposition upon those who had no evil purposes tends to shock the sense of natural justice."[45]

In arguing to the contrary, Perina relies upon *Com. v. Heck*,[46] an opinion of the Superior Court of Pennsylvania in which the court concluded that Pennsylvania's motor vehicle homicide statute violated the Pennsylvania constitution. We do not find *Heck* persuasive, for several reasons. First, Perina neglects to mention that the Supreme Court of Pennsylvania granted review of the Superior Court's decision and, while affirming it on other grounds, expressly "reject[ed] the Superior Court's analysis of the due process issue in this case."[47] Second, the Superior Court's conclusion rested upon the Pennsylvania constitution; the court expressly disclaimed any reliance on the federal Constitution,[48] the Due Process Clause of which we have held to be coextensive with that of the Nebraska Constitution.[49] And finally, the Pennsylvania statute at issue in that case, unlike Nebraska's, permitted a term of imprisonment of up to 5 years. *Heck*, to the limited extent that it stands for

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[44] See *id.*

[45] *Wojahn, supra* note 39, 204 Or. at 139, 282 P.2d at 702.

[46] *Com. v. Heck*, 341 Pa. Super. 183, 491 A.2d 212 (1985).

[47] *Com. v. Heck*, 517 Pa. 192, 194, 535 A.2d 575, 576 (1987). See *Smith, supra* note 25.

[48] *Heck, supra* note 46.

[49] See, *Keller v. City of Fremont*, 280 Neb. 788, 790 N.W.2d 711 (2010); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

the proposition urged by Perina, is plainly distinguishable from this case.

[8] As noted above, motor vehicle homicide in Nebraska is generally a Class I misdemeanor,[50] absent certain exceptions not relevant here, and as a Class I misdemeanor, it is punishable at the sentencing court's discretion by up to 1 year's imprisonment, a $1,000 fine, or both.[51] But it carries no minimum penalty.[52] Taken as a whole, the standard imposed by the statute is reasonable. While it bears some relationship to manslaughter, it is more directly related to the predicate traffic offenses upon which it is based, which are not taken from the common law and were expressly identified in *Morissette* as an example of a public welfare offense. A conviction does not gravely besmirch the character of the defendant, and the penalty, while it could potentially include a term of imprisonment, is relatively small for an offense which causes a person's death. We conclude that when *Morissette*'s interpretative principles are considered, misdemeanor motor vehicle homicide is a public welfare offense which does not require proof of mens rea. We find no merit to Perina's argument that § 28-306 should be construed differently.

CONCLUSION

The district court did not err in rejecting Perina's constitutional arguments or affirming the county court's decision to convict him of motor vehicle homicide without proof of mens rea. The district court's judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[50] See § 28-306(2).

[51] See §§ 28-106 and 28-306(2).

[52] See *id.*

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA G. ALFREDSON, APPELLANT.
804 N.W.2d 153

Filed October 7, 2011. No. S-10-295.

1. **Courts: Trial: Sentences: Juries: Appeal and Error.** Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
2. **Convicted Sex Offender: Sentences: Juries.** Because lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an aggravated offense where such facts are not specifically included in the elements of the offense of which the defendant is convicted.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, KAREN B. FLOWERS, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, 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.

NATURE OF CASE

Joshua G. Alfredson was convicted by a jury of first degree sexual assault and second degree false imprisonment. The trial court subsequently determined that an "aggravated offense" had been established, and it sentenced Alfredson to 15 to 20 years' imprisonment for first degree sexual assault and 1 year's imprisonment for second degree false imprisonment, to run concurrently. The Nebraska Court of Appeals affirmed his

convictions and sentences on direct appeal.[1] Alfredson filed a petition for further review, which we granted in part for the limited purpose of reviewing whether the trial court's error, as found by the Court of Appeals, was harmless error. The error as found by the Court of Appeals was that the trial court, rather than the jury, made the determination that Alfredson had committed an aggravated offense, subjecting him to lifetime community supervision. For the following reasons, we determine that the trial court's error was not harmless and reverse in part the decision of the Court of Appeals.

BACKGROUND

Alfredson was charged by information with first degree sexual assault, a Class II felony,[2] and first degree false imprisonment, a Class IIIA felony.[3] The charges arose out of an incident that took place on April 5, 2009, in which Alfredson initially contacted the victim, with whom he had had a previous sexual relationship, for a ride home. The victim drove to the establishment where Alfredson had been drinking with some friends, picked him up, and drove him to another location where his car was parked. The events which followed were disputed at trial.

The victim testified that she suggested to Alfredson that he return to her house to "sleep it off," because she thought he had had too much to drink and should not drive himself home. The victim explained that Alfredson smelled like alcohol and was stumbling, slurring his words, and talking about hurting or killing himself. The victim testified that Alfredson was angry and wanted to drive himself home. The victim followed him to his apartment and asked Alfredson if she could come up to his apartment with him because she was worried about his well-being.

The victim testified that, once inside the apartment, Alfredson continued to drink over the next few hours, while the two

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[1] *State v. Alfredson*, No. A-10-295, 2011 WL 1378603 (Neb. App. Apr. 12, 2011) (selected for posting to court Web site).

[2] See Neb. Rev. Stat. § 28-319 (Reissue 2008).

[3] See Neb. Rev. Stat. § 28-314 (Reissue 2008).

talked. Alfredson became increasingly angry. He had ingested cocaine, he needed help finding the bathroom, and he urinated on the floor and in the shower. The victim testified that she attempted to go home and to take the prescription bottle that Alfredson had told her contained powder cocaine, but that Alfredson would not let her leave until she returned the cocaine. The victim attempted to leave, but Alfredson took her car keys and blocked the front door of the apartment.

The victim testified that a struggle ensued and that Alfredson tackled her, pushed her face into the carpet, threatened to break her arm and her neck, and threatened to kill her and her family and friends. After several minutes, Alfredson got off of the victim and went into his bedroom. The victim testified that she followed Alfredson and that he told her that if she wanted her keys, she would have to get into bed with him. The victim then leaned over the bed to find the keys, and Alfredson grabbed her, pinned her down, and pushed himself on top of her. The victim testified that Alfredson said he was getting "horny" but that she told him they were not "going to have sex like this." The victim explained that she told Alfredson "no" several times but that Alfredson grabbed her breast and threatened to "rip it right off," pulled her pants and underwear down, and initiated sexual intercourse. After several minutes, Alfredson got off the victim and went into the living room.

The victim testified that she dressed and walked into the living room, where Alfredson blocked the door and refused to let her leave. Alfredson then came toward her and threw her on the couch, but she rolled off onto the living room floor. He then got on top of her and again pulled her pants down and bit her on the neck, cheek, and ear before again initiating sexual intercourse. The victim testified that she continued to tell Alfredson "no." When Alfredson got up, the victim dressed and told Alfredson that she was leaving. Alfredson blocked the door, urinated on the floor, and told her that she was going to bed with him and was not going to leave. Alfredson then grabbed her arm, led her to the bedroom, and told her to go to sleep. Once Alfredson fell asleep, the victim sent a text message to a friend, but she testified that she did not call anyone else or the police because she was scared. The victim testified that she

fell asleep and awoke around 7 a.m., when she got dressed, found her keys and cellular telephone, took the prescription pill bottle she believed contained cocaine, and left the apartment. The victim then contacted her friend and the human resources facilitator with her employer, and the facilitator then drove her, accompanied by her friend, to a hospital.

At the hospital, the victim underwent a sexual assault examination. The sexual assault nurse examiner testified that the victim had contusions on her right arm, left breast, and lower left jaw, in addition to an imprint of her braces on the inside of her lower lip and an impression on the inside of her cheek. The examination also revealed a contusion and multiple tears on the external genitalia caused by acute blunt force trauma.

The victim testified that she flushed the white powder contained in the prescription pill bottle and later gave the bottle to the police. The Nebraska State Patrol tested the bottle, but could not confirm or deny a presence of cocaine.

Alfredson testified that he had engaged in sexual intercourse with the victim, but it was consensual, and that he did not prevent the victim from leaving his apartment. Alfredson explained that the two engaged in sexual intercourse in the living room of his apartment and that the victim left in the early morning. He also stated that the prescription bottle contained an antidepressant prescription and that it did not contain cocaine.

After hearing the evidence presented, the jury convicted Alfredson of first degree sexual assault and second degree false imprisonment. At sentencing, the trial court determined that Alfredson was subject to the lifetime registration requirements of Nebraska's Sex Offender Registration Act.[4] The trial court also determined that Alfredson had committed an "aggravated offense" which further subjected him to lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008).

Alfredson directly appealed his convictions and sentences to the Court of Appeals. On appeal, Alfredson assigned that

[4] Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008).

(1) the trial court erred in denying his *Batson*[5] challenge made during jury selection; (2) the Sex Offender Registration Act is unconstitutional in that the lifetime community supervision requirements constitute cruel and unusual punishment; (3) the trial court erred by failing to submit to the jury the "aggravated offense" determination, pursuant to § 83-174.03; (4) the sentences imposed were excessive; and (5) he received ineffective assistance of counsel.

The Court of Appeals found merit in Alfredson's third assignment of error and determined that Alfredson was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence pursuant to § 83-174.03. However, the Court of Appeals determined that the trial court's error was harmless. The Court of Appeals noted that the State presented evidence that the victim was threatened and physically and sexually assaulted. Based upon its review of the record, the Court of Appeals concluded that any rational jury which convicted Alfredson of first degree sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. The Court of Appeals found Alfredson's remaining assignments of error to be without merit and affirmed Alfredson's convictions and sentences.

Alfredson filed a petition for further review, which we granted in part for the limited purpose of reviewing whether the trial court's error in failing to require the jury to decide a factual question pertaining to the enhancement of the sentence was harmless error.

ASSIGNMENT OF ERROR

Alfredson assigns that the Court of Appeals erred in failing to find that the trial court erroneously and unconstitutionally denied Alfredson a jury determination of the elements necessary to make an aggravated offense finding, subjecting Alfredson to lifetime community supervision pursuant to § 83-174.03.

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[5] See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

STANDARD OF REVIEW

[1] Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not the determination of guilt, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.[6]

ANALYSIS

At the sentencing hearing, the trial court found that Alfredson's sexual assault conviction constituted an aggravated offense and that Alfredson is therefore subject to lifetime community supervision pursuant to § 83-174.03. Alfredson contends that the trial court erred in making this determination. He asserts that the factual finding of an aggravated offense must be made by a jury, rather than by the court. The Court of Appeals determined that the trial court erred in failing to require the jury to decide the issue, and we agree.

Section 83-174.03 details which sex offenders are subject to lifetime community supervision. This section was revised by the Legislature, operative January 1, 2010. However, at the time of Alfredson's offense, § 83-174.03(1) read:

> Any individual who, on or after July 14, 2006, . . . is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005, shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life.

At the time of Alfredson's offense, § 29-4005(4)(a) defined aggravated offense, in relevant part, as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence."[7]

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[6] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009), *cert. denied* 559 U.S. 981, 130 S. Ct. 1708, 176 L. Ed. 2d 195 (2010).

[7] See, currently, § 29-4001.01(1) (Cum. Supp. 2010).

[2] In *State v. Payan*,[8] we determined that the imposition of lifetime community supervision pursuant to § 83-174.03 is akin to parole and is, as a result, an additional form of punishment for certain sex offenders. Because lifetime community supervision is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an "aggravated offense" where such facts are not specifically included in the elements of the offense of which the defendant is convicted.[9]

Here, Alfredson was convicted of first degree sexual assault pursuant to § 28-319. Section 28-319 provides in relevant part: "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree." While penetration is a fact specifically included as an element of first degree sexual assault, "the use of force or the threat of serious violence" is not a fact specifically included as an element of the offense. Pursuant to *Payan*, Alfredson was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence. Because the jury did not make such a determination, the Court of Appeals correctly determined that the trial court erred in finding that Alfredson committed an aggravated offense.

On further review, Alfredson asserts the Court of Appeals erred in determining that the trial court's error was harmless. The Court of Appeals correctly noted that although the trial court erred in finding that Alfredson committed an aggravated offense, such error may be harmless.[10] The appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.[11]

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[8] See *State v. Payan, supra* note 6.

[9] See *id.*

[10] See *id.*

[11] *Id.*

In determining the trial court's error was harmless, the Court of Appeals stated:

> At trial, the jury heard two very different material versions of what transpired in those early morning hours of April 5, 2009. The State presented evidence that the victim was threatened and physically and sexually assaulted by Alfredson. In Alfredson's defense, he claimed that he and the victim had consensual sexual intercourse. Based upon our review of this record, we find that any rational jury which convicted Alfredson of first degree sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Therefore, we find that the district court's error of making the aggravated offense finding instead of submitting it to the jury was harmless.[12]

In *Payan*, we concluded that the trial court committed harmless error in finding that the defendant committed an aggravated offense. There, the jury heard two different material versions of the events. In the State's evidence, the victim and a witness testified that the victim was sexually assaulted with a knife. In his defense, the defendant and his supporting witness claimed that no assault took place whatsoever. We found there was no evidence that if the assault occurred, it was done without violence or the threat thereof. Accordingly, we held:

> On this record, any rational jury which convicted [the defendant] of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.[13]

In this case, the record reflects two versions of the events which were presented to the jury. The State argues that the jury's finding of guilt establishes that the jury rejected Alfredson's version of the events and accepted the victim's version of the events. However, the jury convicted Alfredson of first degree

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[12] *State v. Alfredson, supra* note 1, 2011 WL 1378603 at *7.

[13] *State v. Payan, supra* note 6, 277 Neb. at 677, 765 N.W.2d at 204-05.

sexual assault, but acquitted Alfredson on the first degree false imprisonment charge and convicted him of second degree false imprisonment.

Section 28-314(1) states:

> A person commits false imprisonment in the first degree if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude.

Neb. Rev. Stat. § 28-315(1) (Reissue 2008) provides: "A person commits false imprisonment in the second degree if he knowingly restrains another person without legal authority."

Alfredson argues that because the jury acquitted on the first degree false imprisonment charge, the record does not demonstrate that a rational jury would have found the use of force or the threat of serious violence required to establish an aggravated offense. Rather, it was possible that the jury could have convicted on first degree sexual assault based on a lack of consent without force or threat of serious violence. Alfredson contends that the jury's acquittal on this charge establishes a reasonable doubt to this fact.

The record reflects the victim's testimony that penetration occurred, although she verbally expressed a lack of consent, and that it occurred through the use of force and the threat of serious violence. Alfredson testified that the intercourse was consensual. The victim also testified that she was restrained physically and through verbal threats. The record indicates that the jury rejected the assertion that the victim was restrained under terrorizing circumstances or under circumstances which exposed the victim to the risk of serious bodily injury. But the jury's conviction on first degree sexual assault did not require a determination of whether the offense was committed with force or the threat of violence. Accordingly, the jury's findings do not support a conclusion that the testimony of the victim was wholly accepted while Alfredson's testimony was rejected.

Based on the evidence contained in the record and the jury's findings, we cannot say beyond a reasonable doubt that the

jury would have found that Alfredson used force or the threat of serious violence in compelling the victim to engage in sexual intercourse with him. First degree sexual assault involves sexual penetration without the consent of the victim. The jury was instructed that

> "[w]ithout consent" means (a) the victim was compelled to submit due to the use of force or the threat of force or coercion, or (b) the victim expressed a lack of consent through words, or (c) the victim expressed a lack of consent through conduct, or (d) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor.

It is not clear whether the jury found that Alfredson committed first degree sexual assault because he compelled the victim to submit through force or the threat of force or whether the jury found that Alfredson committed first degree sexual assault because the victim expressed a lack of consent through her words or actions. Further, the jury's acquittal of the first degree false imprisonment charge does not support the State's assertion that the jury accepted a version of the facts necessary to establish the aggravated offense finding.

Because we cannot say beyond a reasonable doubt that the jury would have found that Alfredson used force or the threat of serious violence in compelling the victim to engage in sexual intercourse with him, we cannot say that the trial court's error in making the determination that Alfredson committed an aggravated offense was harmless. Accordingly, we reverse, and remand to the Court of Appeals with directions to remand the cause for an evidentiary hearing for a jury to determine whether Alfredson used force or the threat of serious violence in sexually assaulting the victim and, thus, whether Alfredson committed an aggravated offense and is subject to lifetime community supervision.

CONCLUSION

We find the trial court erred in determining that Alfredson committed an aggravated offense and is, as a result, subject to lifetime community supervision. We affirm the convictions and

the sentences. We reverse, and remand to the Court of Appeals with directions to reverse and remand the cause to the trial court with directions to conduct an evidentiary hearing so that the jury may make a finding regarding whether Alfredson's sexual assault conviction was an aggravated offense and, thus, whether he is subject to lifetime community supervision. In all other respects, the decision of the Court of Appeals is affirmed.

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

LAVERN LOUIS GOLDEN, APPELLANT AND CROSS-APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

804 N.W.2d 31

Filed October 7, 2011. No. S-10-596.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Federal Acts: Railroads: Evidence.** A Federal Employers' Liability Act plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one.
4. **Courts: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must assess whether the scientific evidence presented provides a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Richard J. Dinsmore and Jayson D. Nelson, of Law Offices of Richard J. Dinsmore, P.C., for appellant.

William M. Lamson, Jr., Anastasia Wagner, and Gage R. Cobb, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

LaVern Louis Golden appeals from the decision of the Lincoln County District Court, which granted to Union Pacific Railroad Company (UP) its motion for summary judgment. Primarily at issue in this case is the interpretation of our decision in *McNeel v. Union Pacific RR. Co.*[1] Golden claims that he presented sufficient evidence of a toxic exposure to overcome UP's motion for summary judgment. UP cross-appealed, alleging the district court erred by not addressing the foundational issues raised in its motion in limine when it sought to exclude the expert testimony of Golden's family physician. We reverse the decision of the district court and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

Golden claims there was a smoke incident on March 12, 2001, in the cab of the locomotive in which he was working as an engineer. This incident is the same as the incident at issue in *McNeel*.[2] On that day, Golden and Lynn R. McNeel, the conductor, left North Platte, Nebraska, at 6:15 a.m., en route to Cheyenne, Wyoming. Near Sutherland, Nebraska, near mile post 304, McNeel asked Golden whether he smelled an odor. Golden initially stated that he did not smell anything, but did notice an odor near mile post 312. Golden stated that the odor was difficult to describe and that he had not smelled anything like it before.

Around mile post 322, McNeel asked Golden to come over to McNeel's side of the cab. Golden stated that the odor was much stronger on McNeel's side of the locomotive. Golden called the dispatcher, who instructed the men to open the windows and

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[1] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[2] *Id.*

doors. The men were also instructed to continue on to Ogallala, Nebraska, where they stopped the locomotive. Golden stated that he could "taste" the odor, that his eyes began to water, and that he became dizzy and nauseated. McNeel and Golden were taken by ambulance to the emergency room. Golden was given oxygen and then released. Golden spoke to his primary care physician, Dr. Janet Bernard, by telephone 4 days later, but did not go to her office until April 2.

After the first incident, Golden stated that he experienced "head pain, dizziness, blackouts, movement in my eyes. I had had headaches for three or four days in a row." Golden stated that he also experienced memory loss. In June 2001, Bernard referred Golden to a psychologist for his memory loss. Golden stated the psychologist told him that it could take up to 3 years for the memory loss to resolve itself, if it were going to do so at all. Golden had both an MRI and a PET scan, and Bernard told Golden that the scans showed some brain damage. The record does not include any testimony from the psychologist.

A second incident occurred on January 19, 2002. Golden stated that the computer screen "just popped, blew up in the cab. Filled the cab full of smoke." Golden brought the train to a stop immediately. Golden stated that the smoke smelled like paint thinner and that he could taste the odor, his eyes burned, he felt nauseated, and he had a headache. Golden was taken to the hospital, given Tylenol, and released. Golden stated that the headaches continued for about 6 months after that incident.

Golden claims he still suffers intermittent headaches, for which his doctor is treating him. In his deposition, Golden stated that his headaches are brought on by "any type of smoke smell." Golden stated that he used to have visual disturbances with the headaches, but not any longer. Golden also stated that he has memory loss and trouble remembering what he is doing when running errands and that sometimes he has trouble remembering the names of family members.

The affidavit of Golden's expert, Leon Smith, indicated that the locomotive Golden had been riding in was repaired on March 15, 2001, 3 days after the first incident. Smith stated

that the repairs were consistent with an electrical failure and that in his experience and training, electrical failures can result in toxic fume exposures. Smith also stated that "these types of electrical failures result in strong, toxic fumes to which the locomotive crew is frequently exposed." Smith also stated that the repair records indicated the blower had been replaced and that he had "reviewed and personally investigated many reports and incidents where the blowers and cooling systems vented fumes or vapors into the cabs of diesel electric locomotives."

Regarding the second incident, Smith testified in his affidavit that in addition to the computer monitor failure, there was also a failure of the "'DC-to-DC' converter." Smith stated that "[w]hile such incidents are not as numerous as fume and vapor exposure from electrical failures, investigative reports have identified that a component failure of a monitor can result in toxic fume exposure."

In addition, Bernard, a licensed family medicine practitioner, testified in a deposition as to her treatment and diagnosis of Golden. Approximately 1 month after the first incident, Bernard saw Golden for complaints of dizziness, headaches, and short-term memory problems. Bernard stated that the blood gas results after the first incident showed that Golden had been having trouble breathing. Bernard further stated that the blood gases were in normal ranges for a venous sample after the second incident. But later in her deposition, Bernard stated that the results from the second incident were abnormal. Bernard also stated that Golden's lungs showed a mild hyperinflation after the second incident.

Bernard ordered neuropsychological testing and received the results, but when asked to interpret those results, Bernard stated she was not "any kind of expert." Bernard also stated that she could not evaluate Golden's neuropsychological results because she did not have the training to do so. Nevertheless, in her affidavit, Bernard testified to a reasonable degree of medical certainty that Golden was suffering from "post-traumatic encephalopathy" as a result of the two incidents.

UP filed both a motion in limine that sought to prevent Bernard from testifying as to ultimate causation and a motion

for summary judgment. UP argued that Bernard's testimony lacked scientific validity and did not meet the criteria for establishing causation set forth in *McNeel*. The district court found that under *McNeel*, Golden had not presented sufficient evidence of causation because he had not identified a specific toxin to which he was exposed. The district court granted UP's motion for summary judgment and motion in limine on that basis.

After summary judgment was granted, Golden filed a motion to alter or amend the court's order of March 3, 2010, or, in the alternative, a motion for new trial. Golden sought to introduce an affidavit from Dr. Michael Corbett, an expert in the fields of toxicology and chemistry. Corbett's affidavit stated that the train parts which had to be replaced after the March 12, 2001, incident were known to be insulated with "a Modified Polyester Electrical Insulating Varnish." Corbett stated that when the varnish melts, it emits isocyanates, which "are powerful irritants to the skin, mucous membranes, eyes and respiratory tract." Corbett stated that toxic encephalopathy can result from a potent exposure to isocyanates. Corbett also stated that the varnish emitted acrylamide when heated and that it is a neurotoxin. Corbett then stated that it was his expert opinion that Golden had inhaled an injurious level of toxic fumes.

The district court denied Golden's motion to alter or amend, finding that any evidence pertaining to the motion for summary judgment should have been introduced at the hearing on the motion for summary judgment. Golden appealed.

ASSIGNMENTS OF ERROR

Golden assigns that the district court erred in (1) finding that *McNeel* controls, (2) finding that *McNeel* sets an absolute standard requiring evidence of specific toxins before a treating medical expert's opinion on causation is admissible, and (3) denying his motion to alter or amend and not allowing him to introduce expert testimony as to the toxin to which he was exposed.

UP cross-appeals, assigning that the district court erred in failing to grant UP's motion in limine and motion for summary

judgment on the additional bases that Bernard's testimony lacks foundation, scientific reliability, and helpfulness.

STANDARD OF REVIEW

[1] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

McNeel *Applies to Golden's Claims.*

Golden first argues that our decision in *McNeel* is inapplicable to this case.[5] The district court applied our holding in *McNeel* to Golden's case, interpreting *McNeel* to require that Golden present evidence of a specific toxin to which he was exposed. Golden argues that since McNeel did not have objective evidence of a physical injury, in contrast to Golden, *McNeel* is inapplicable to this case.

First, we note that the incident in *McNeel* is the same as the first incident of which Golden complains here. Golden distinguishes his case by arguing that he had evidence of his injuries in the form of abnormal blood gases and an abnormal PET scan. Golden claims that in the case where McNeel was the plaintiff, McNeel failed to provide any evidence to establish the source of the unnamed toxic exposure.

McNeel was also transported to the hospital after the first incident, however, and he introduced expert testimony regarding a single photon emission computed tomographic scan, pupillography testing of the autonomic nervous system, and

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

[4] *Id.*

[5] See *McNeel, supra* note 1.

thermography. McNeel's expert stated that the test results showed that McNeel was suffering from toxic encephalopathy "caused by his inhalation of an unspecified toxin while employed by [UP]."[6] McNeel presented evidence from another expert indicating that he was suffering from a cognitive disorder resulting from a toxic injury.[7]

[3,4] We stated in *McNeel* that "a [Federal Employers' Liability Act] plaintiff bears the burden of presenting evidence from which a jury could conclude the existence of a probable or likely causal relationship, as opposed to a merely possible one."[8] We went on to find that McNeel's experts did not meet the *Daubert*/*Schafersman*[9] analytical framework because they did not "'"fit"'"; in effect, the scientific evidence presented must provide "'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'"[10] We also stated that because McNeel's experts could not identify any toxic substance which caused the symptoms they diagnosed as toxic encephalopathy, their reasoning on causation was reduced to nothing more than post hoc, ergo propter hoc, which is not helpful to the trier of fact.[11]

Our decision in *McNeel* addressed the requirements for utilizing expert testimony to establish a causal connection between an event and a diagnosis of toxic encephalopathy. This case presents the same issue. We find that *McNeel* is applicable to Golden's case, and Golden's first assignment of error is without merit.

District Court's Interpretation of McNeel.

Golden next argues that the district court's interpretation of *McNeel* was incorrect. Golden claims that while *McNeel*

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[6] *Id.* at 146, 753 N.W.2d at 326.

[7] *McNeel, supra* note 1.

[8] *Id.* at 150, 753 N.W.2d at 329.

[9] *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).

[10] *McNeel, supra* note 1, 276 Neb. at 153, 753 N.W.2d at 330.

[11] *McNeel, supra* note 1.

presented no other evidence of exposure to toxic fumes than a temporal relationship between the event and his symptoms, Golden presented far more evidence of exposure to a toxic substance. Golden claims that he offered sufficient evidence of an exposure to a toxic substance to present a genuine issue of material fact and overcome UP's motion for summary judgment. We agree.

Keeping in mind that we must view the evidence in a light most favorable to Golden and draw all reasonable inferences deducible from the evidence, we review the testimony presented prior to the motion for summary judgment.[12] Golden presented testimony from his primary care physician, Bernard, as to her diagnosis and treatment. In Bernard's deposition, she stated that she had ordered neuropsychological testing after Golden complained of headaches and memory loss after the first incident. Bernard stated that after the first incident, Golden had abnormal blood gas results that were consistent with toxic inhalation. Bernard also stated that Golden had an immediate onset of physical and neuropsychological symptoms after the first incident. And according to Bernard, after the second incident, Golden had a mild hyperinflation of the lungs, which indicated smoke inhalation. In her affidavit, Bernard stated that it was her opinion, to a reasonable degree of medical certainty, that Golden suffers from posttraumatic toxic encephalopathy as a result of the two incidents.

Golden also presented expert testimony from Smith regarding the equipment failure on the locomotive involved in the first incident. Smith stated in his affidavit that he had reviewed the various depositions as well as the repair records for the two locomotives involved. Smith stated that if there is an equipment failure, wiring and cabling can overload and heat and that "these types of electrical failures result in strong, toxic fumes to which the locomotive crew is frequently exposed." Smith stated that it was his opinion that Golden "was more likely than not exposed to fumes which resulted from the overheating and failure of electrical components on [the locomotive]." Smith also stated that the repair records indicated the blower

[12] See *King, supra* note 3.

had been replaced and that he had investigated many reports where the blowers and cooling systems vented fumes or vapors into the cabs.

Although no specific toxin was identified, Bernard's and Smith's testimony, viewed as a whole in the context of summary judgment, presents a genuine issue of material fact as to whether Golden was exposed to a toxic substance emitted from within the locomotive that caused his alleged injuries. We therefore reverse the decision of the district court and remand the cause for further proceedings. For that reason, we need not reach Golden's third assignment of error.

UP's Cross-Appeal.

We next turn to UP's cross-appeal. UP argues that the district court erred when it failed to address the foundational issues it raised in its motion in limine. In that motion, UP argued that Bernard's testimony lacked sufficient foundation to testify as to ultimate causation. However, we note that the district court granted UP's motion in limine *because* it had granted UP's motion for summary judgment. As such, it was unnecessary, in the district court's view, to address the foundational issues. Because we hold that the district court erred when it granted summary judgment and, accordingly, reverse, and remand for further proceedings, the district court now has the opportunity to address the foundational issues that UP raised in its motion in limine.

CONCLUSION

Although *McNeel* is applicable to Golden's case, Golden presented sufficient evidence of a toxic exposure to present a genuine issue of material fact. The district court erred in granting summary judgment, and we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLANT, V. CESAR PENADO, APPELLEE.

804 N.W.2d 160

Filed October 7, 2011. No. S-10-1049.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
4. **Criminal Law: Judgments: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review.
5. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.
6. **Judgments: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Appeal dismissed.

Joe Kelly, Lancaster County Attorney, and Lory A. Pasold for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Cesar Penado was charged with murder in the first degree, use of a weapon to commit a felony, and burglary. Following Penado's request for a hearing to determine competency, the Lancaster County District Court found that Penado was not competent to stand trial and determined that there was not a substantial likelihood that Penado may become competent in the foreseeable future. The State of Nebraska appeals.

BACKGROUND

The State charged Penado with murder in the first degree, use of a weapon to commit a felony, and burglary. Penado was arraigned and entered pleas of not guilty on all three counts. Prior to trial, Penado filed a motion for a competency evaluation pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2008). The district court granted Penado's motion and ordered him to be evaluated at the Lincoln Regional Center.

On July 9, 2008, a hearing to determine Penado's competency to stand trial was held. Following the hearing, on July 22, the district court entered an order finding that Penado was not competent to stand trial, but that there was a substantial probability that Penado will become competent to stand trial within the foreseeable future. The court ordered Penado to be committed to the regional center for appropriate treatment "until such time as the disability may be removed." The court further ordered that a hearing to review competency would be held in January 2009.

On January 15, 2009, a hearing to review competency was held. Penado's admission to the regional center had been delayed due to a lack of beds available. Penado was admitted in September 2008. Because Penado's treatment had been delayed, the court concluded that additional time should be given to the treating physicians at the regional center to determine whether their efforts were likely to restore Penado's competency. The court again ordered Penado to remain in the custody of the regional center "until such time as the disability may be removed."

On September 14 and 24, 2009, a hearing to review competency was held. In a September 29 order, the court again determined that additional time should be given, and ordered Penado to remain in the custody of the regional center. Penado perfected an appeal from the September 29 order. In case No. A-09-1081, the Nebraska Court of Appeals issued a mandate to the district court on May 5, 2010. Citing Neb. Ct. R. App. P. § 2-107(B)(3) (rev. 2008) and *State v. Jones*,[1] the Court of Appeals vacated the September 29, 2009, order, and

[1] *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

remanded the cause with directions for the district court to enter an order in compliance with § 29-1823. Upon remand, the district court entered an amended order on competency on May 13, 2010. The amended order found that Penado remained not competent to stand trial, but that there was a substantial likelihood that Penado will become competent within the foreseeable future.

On August 3 and 24, 2010, the final hearing to review Penado's competency was held. The court heard testimony and received evidence regarding Penado's competency. On September 16, the district court entered an order on competency, finding that Penado was not competent to stand trial and that there was not a substantial probability that Penado will become competent in the foreseeable future. The court noted a number of complications impeding competency and restorability, including Penado's psychosis, his anxiety toward the court process, and his degree of mental retardation.

The September 16, 2010, order did not dismiss the charges against Penado. The court gave the State 10 days to commence civil commitment proceedings pursuant to § 29-1823(3). The order directed Penado to be released from custody if a temporary or final civil commitment order was not entered within 10 days. The State thereafter sought and obtained civil commitment of Penado.[2]

On October 5, 2010, the State presented an application for leave to docket an appeal in the district court, which was reviewed by the district court. Also on October 5, the State filed its notice of intention to prosecute an appeal. On October 15, the State filed its application for leave to docket an appeal in the Court of Appeals. The State filed its appeal pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). We moved the case to our docket on our own motion.

Penado sought summary dismissal of the State's appeal for lack of jurisdiction. In his motion for summary dismissal, Penado contended that the State failed to comply with the requirements of Neb. Rev. Stat. §§ 25-1912 (Reissue 2008)

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[2] See memorandum brief for appellee in support of motion for summary dismissal at 14.

and 29-2315.01 to perfect a timely appeal. We denied Penado's motion for summary dismissal.

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in finding (1) Penado was not competent to stand trial and (2) there was not a substantial likelihood that Penado will become competent in the foreseeable future.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[3]

ANALYSIS

[2] In his motion for summary dismissal, Penado raises the issue of whether this court has jurisdiction over the State's appeal. Penado argues, among other things, that the order from which the State appealed does not constitute a final, appealable order as required by § 29-2315.01. In light of Penado's assertions and in light of the timing of the State's application for leave to docket an appeal, we must first determine whether we have jurisdiction to decide the issues presented in the present 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]

[3,4] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.[5] Section 29-2315.01 grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review.[6] This court has consistently maintained that strict compliance with § 29-2315.01 is required to confer jurisdiction.[7] Section 29-2315.01 provides in relevant part:

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[3] *In re Interest of D.H.*, 281 Neb. 554, 797 N.W.2d 263 (2011).

[4] *Id.*

[5] *State v. Johnson*, 259 Neb. 942, 613 N.W.2d 459 (2000).

[6] See, *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

[7] See *State v. Johnson, supra* note 5.

> 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. Such application shall be presented to the trial court within twenty days after the final order is entered in the cause, and upon presentation, if the trial court finds it is in conformity with the truth, the judge of the trial court shall sign the same and shall further indicate thereon whether in his or her opinion the part of the record which the prosecuting attorney proposes to present to the appellate court is adequate for a proper consideration of the matter. The prosecuting attorney shall *then* present such application to the appellate court within thirty days from the date of the final order.

(Emphasis supplied.)

Section 29-2315.01 does not permit an appeal by the State from any interlocutory ruling of the trial court in a criminal proceeding. This is consistent with the longstanding principle of avoiding piecemeal appeals arising out of one set of operative facts.[8] And it is well established that a party may appeal from a court's order if the decision is a final, appealable order.[9]

In this case, the State filed its application for leave to docket an appeal and notice of appeal on October 5, 2010. The court's September 16 competency order, from which the State appealed, did not dismiss the charges against Penado. The record does not contain an order dismissing the charges against Penado. And at oral argument, the State conceded and Penado stipulated that the charges against Penado have yet to be dismissed.

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[8] See *State v. Wieczorek, supra* note 6.

[9] *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

[5,6] A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.[10] The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment.[11]

The September 16, 2010, order did not terminate the proceedings below, and further action is required to completely dispose of the cause in the district court. The competency order entered by the district court was therefore not a final order as required by § 29-2315.01, and the State's application was premature. The State failed to comply with the jurisdictional requirements of § 29-2315.01. Therefore, we lack jurisdiction over the present appeal.

CONCLUSION

Because the State did not appeal from a final order as required by § 29-2315.01, we lack jurisdiction over this appeal. When an appellate court is without jurisdiction to act, the appeal must be dismissed.[12] Accordingly, the State's appeal is dismissed.

APPEAL DISMISSED.

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[10] *State v. Dunlap, supra* note 6.

[11] *Id.*

[12] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY MCCAVE, APPELLANT.
805 N.W.2d 290

Filed October 14, 2011. No. S-10-232.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.

3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court does not acquire jurisdiction of an appeal unless a party is appealing from a lower tribunal's final order or judgment.
7. **Jurisdiction: Appeal and Error.** If the district court, sitting as an intermediate appellate court, lacked jurisdiction over a party's appeal, a higher appellate court also lacks jurisdiction to decide the merits of the appeal.
8. ____: ____. An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
9. **Criminal Law: Final Orders.** Generally, an order entered during the pendency of a criminal case is final only when no further action is required to completely dispose of the pending case.
10. **Criminal Law: Final Orders: Sentences.** Before a criminal conviction is a final judgment, the trial court must pronounce sentence.
11. **Final Orders: Indictments and Informations: Motions for Mistrial.** No final judgment occurs when a trial court declares a mistrial that applies to every count in the charging instrument.
12. **Constitutional Law: Criminal Law: Appeal and Error.** Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases.
13. **Constitutional Law: Criminal Law: Due Process: Appeal and Error.** Although the U.S. Constitution does not guarantee the right to appeal a criminal conviction, if a state provides an appeal as a matter of right, its appellate procedures must comport with due process.
14. **Indictments and Informations: Joinder: Motions for Mistrial: Appeal and Error.** When the trial court has declared a mistrial as to one or more counts in a multicount charging instrument, those counts should be treated as severed—to be resolved in a new proceeding. The defendant may appeal his conviction and sentence without waiting until a court enters judgment on every count.
15. **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.
16. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

17. **Arrests: Search and Seizure: Probable Cause: Words and Phrases.** An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.
18. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Probable cause to support a warrantless arrest exists only if the officer has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
19. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
20. **Probable Cause: Police Officers and Sheriffs.** Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed.
21. ____: ____. Implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.
22. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
23. **Drunk Driving.** Under Neb. Rev. Stat. § 60-6,108(1) (Reissue 2008), Nebraska's driving under the influence statutes do not apply to a person's operation or control of a vehicle on private property that is not open to public access.
24. **Words and Phrases.** Under Neb. Rev. Stat. § 60-649 (Reissue 2010), a residential driveway is not private property that is open to public access.
25. **Drunk Driving.** Criminal liability under Neb. Rev. Stat. § 60-6,196 (Reissue 2010) does not extend to intoxicated persons in control of a vehicle on a residential driveway, regardless of whether part of the vehicle crosses a sidewalk.
26. **Drunk Driving: Circumstantial Evidence.** In driving under the influence cases, circumstantial evidence can establish a person's operation of a motor vehicle.
27. **Criminal Law: Eyewitnesses: Presumptions.** A citizen informant who has personally observed the commission of a crime is presumptively reliable.
28. **Constitutional Law: Arrests: Police Officers and Sheriffs.** Before officers invoke the power of a warrantless arrest, the Fourth Amendment requires them to investigate the basic evidence for the suspected offense and reasonably question witnesses readily available at the scene, at least when exigent circumstances do not exist. This is particularly true when the circumstances the officers encounter are consistent with lawful conduct.
29. **Arrests: Evidence.** An illegal arrest does not bar the State from prosecuting a defendant for the charged offenses with evidence that was untainted by the illegal arrest.
30. **Evidence: Appeal and Error.** The improper admission of evidence, even tainted evidence, is a trial error subject to harmless error analysis.
31. **Trial: Evidence: Appeal and Error.** An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
32. **Verdicts: Juries: Appeal and Error.** 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.

33. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, an appellate court generally considers whether the error, in the light of the totality of the record, influenced the outcome of the case.
34. **Evidence: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict. If it was not, then double jeopardy forbids a remand for a new trial.
35. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
36. **Arrests: Blood, Breath, and Urine Tests.** The validity of a refusing to submit charge under Neb. Rev. Stat. § 60-6,197(3) (Reissue 2010) depends upon the State's showing a valid arrest under § 60-6,197(2).
37. **Drunk Driving: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Under Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010), a peace officer can require a person to submit to a chemical test of his or her blood, breath, or urine when the following circumstances are present: (1) The officer has arrested the person for committing an offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle and under the influence of alcohol or drugs; and (2) the officer has reasonable grounds to believe that the person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). In addition, the person's conduct must not have occurred on private property that is not open to public access.
38. **Drunk Driving: Probable Cause: Police Officers and Sheriffs.** Law enforcement officers must have probable cause to arrest a person for driving under the influence.
39. **Drunk Driving: Arrests: Probable Cause: Police Officers and Sheriffs: Blood, Breath, and Urine Tests: Convictions.** If law enforcement officers lack probable cause to arrest a person for driving under the influence, they lack authority to require the person to submit to a chemical test and a conviction for refusing to submit to the test is unlawful.
40. **Criminal Law: Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.
41. **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. 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.

42. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination, whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
43. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
44. **Rules of Evidence: Hearsay.** Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.
45. **Hearsay.** Words that constitute a verbal act are not hearsay even if they appear to be.
46. **Hearsay: Words and Phrases.** A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken.
47. **Hearsay.** A statement offered to prove its impact on the listener, instead of its truth, is offered for a valid nonhearsay purpose if the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.
48. **Trespass.** Under Neb. Rev. Stat. § 28-522 (Reissue 2008), a defendant is not required to have believed that every owner or every person empowered to license access would have consented to his presence at the premises.
49. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Sarah Newell for appellant.

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

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

CONNOLLY, J.

I. SUMMARY

Jeffrey McCave was in his car, parked in the driveway of his father's house. While he was listening to music on the car radio, his father told him to turn the volume down and leave.

After he refused, his father called the police. The police, after a confrontation, arrested McCave for trespass and driving under the influence of alcohol (DUI). Later, the State additionally charged him with resisting arrest, refusing to submit to a chemical breath test, and possessing an open container of alcohol in a vehicle.

A jury convicted McCave of DUI, refusing to submit, and trespass. It deadlocked on the resisting arrest charge. The county court then convicted him of possessing an open container. It declared a mistrial, however, on the resisting arrest charge. On appeal to the district court, the court affirmed the judgments in all respects.

This appeal presents several interrelated issues:

1. Did the evidence show that McCave had operated or was in actual physical control of his vehicle on a public highway or on private property that is open to public access?

2. Did the evidence show that McCave possessed an open container of alcohol on a public highway or in a public parking area?

3. Does an officer's lack of probable cause for a DUI arrest bar a prosecution for refusing to submit to a chemical test?

4. In the criminal trespass prosecution, was evidence showing that McCave's stepmother had consented to McCave's presence at her house admissible?

II. BACKGROUND

Police officers arrested McCave at his father's house in the early morning hours. The arrest stemmed from a family dispute between McCave and his father, John McCave (John). The officers came to the house at John's request after McCave refused to leave the property as John had requested. The officers initially arrested McCave for trespass; afterward, they informed him that he was under arrest for DUI. He claimed that he had not been driving and refused to submit to a chemical test of his breath.

At the suppression hearing and at trial, McCave argued that the officers lacked probable cause for his arrest. The county court overruled McCave's motion to suppress evidence at both proceedings. At trial, the court sustained the State's hearsay

objections to Ashleigh Kudron's testimony and struck her testimony. Kudron was McCave's girlfriend. Her testimony would have shown that McCave's stepmother, Susan McCave (Susan), had consented to McCave's staying at the house. The court overruled McCave's motion for a directed verdict at the close of the State's case.

The jury found McCave guilty of DUI, refusing to submit to a chemical test, and trespass. It failed to reach a verdict on the resisting arrest charge, and the court declared a mistrial. After dismissing the jury, the court found McCave guilty of possessing an open container in a motor vehicle.

For the DUI and refusing to submit convictions, the county court sentenced him to 30 days in jail and 2 years of probation, and to pay a $1,000 fine. The court ordered him not to operate a vehicle as a term of his probation. For the trespassing conviction, the court sentenced him to 10 days in jail. The court fined him $50 for the open container conviction.

III. ASSIGNMENTS OF ERROR

McCave assigns, restated and renumbered, that the district court erred in affirming the county court's judgment because the county court improperly (1) overruled his motion to suppress evidence, (2) excluded as hearsay testimony intended to show that he was or believed that he was licensed to remain on the property, (3) overruled his motion for a directed verdict, (4) instructed the jury, and (5) imposed excessive sentences.

IV. STANDARD OF REVIEW

[1,2] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[2]

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[1] See, *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010).

[2] See *Lamb, supra* note 1.

[3-5] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] But we independently review questions of law in appeals from the county court.[4] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[5]

V. ANALYSIS

1. Jurisdiction

We first address the district court's conclusion that McCave had appealed from a final order. Despite the pending charge for resisting arrest, the court concluded that because the county court had sentenced McCave on his three convictions for DUI, trespass, and open container violations, there was a final judgment for those charges.

[6-8] We do not acquire jurisdiction of an appeal unless a party is appealing from a lower tribunal's final order or judgment.[6] And if the district court, sitting as an intermediate appellate court, lacked jurisdiction over a party's appeal, we also lack jurisdiction to decide the merits of the appeal.[7] We determine jurisdictional questions that do not involve a factual dispute as a matter of law.[8] Although the State does not dispute

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

[4] See, *Lamb, supra* note 1; *Prescott, supra* note 1; *Royer, supra* note 3.

[5] See, *Lamb, supra* note 1; *Prescott, supra note* 1; *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008); *Royer, supra* note 3.

[6] See *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007).

[7] See, *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *MBNA America Bank v. Hansen*, 16 Neb. App. 536, 745 N.W.2d 609 (2008); *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

[8] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

our jurisdiction to decide this appeal, we must determine whether we have jurisdiction over the matter before us.[9]

[9-11] Generally, an order entered during the pendency of a criminal case is final only when no further action is required to completely dispose of the pending case.[10] And before a criminal conviction is a final judgment, the trial court must pronounce sentence.[11] So no final judgment occurs when a trial court declares a mistrial that applies to every count in the charging instrument.[12] But here, the trial court declared a mistrial for only the charge on which the jury deadlocked. So the question is whether a conviction and sentence for some counts of a multicount complaint or information can be final and appealable when the court declares a mistrial on one of the counts, leaving that count still pending. It appears that we have not decided this issue.

The district court relied on two federal appellate decisions to conclude that it had jurisdiction: *U.S. v. Abrams*[13] and *U.S. v. King*.[14] In *Abrams*, a jury convicted the defendant of three counts in a 13-count indictment. But the trial court declared a mistrial on the remaining 10 counts for which the jurors failed to reach a unanimous decision. The government represented that it did not intend to retry those counts if the three convictions were affirmed. The Second Circuit concluded that it had jurisdiction over a final judgment. It relied on the general rule that a judgment of conviction which includes the sentence is final. It reasoned that even if "the litigation as framed in the indictment may not yet have run its course, the counts of conviction have been resolved and the sentence is ready for execution. The unresolved counts have in effect been severed, and will be resolved another time in a separate judgment."[15]

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[9] See *id.*

[10] See *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

[11] *Id.*

[12] See *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

[13] *U.S. v. Abrams*, 137 F.3d 704 (2d Cir. 1998).

[14] *U.S. v. King*, 257 F.3d 1013 (9th Cir. 2001).

[15] *Abrams, supra* note 13, 137 F.3d at 707.

The Second Circuit in *Abrams* concluded that requiring a defendant to delay an appeal until a court renders judgment for every count would result in one of two undesirable outcomes. First, if the trial court executed the sentence, then a defendant would be serving the sentence with no right to appeal the judgment. Alternatively, a trial court's stay of a sentence's execution pending an appeal would "substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense."[16]

In *King*, the defendant pleaded guilty to, and the court sentenced him on, 19 counts of a 50-count indictment. The Ninth Circuit concluded that it had jurisdiction over his appeal even though the remaining counts were still pending. The Ninth Circuit concluded that the defendant's guilty pleas to a subset of the charges had created a de facto severance of the case. It concluded that permitting a defendant to begin serving a sentence before obtaining the right to appeal would violate due process. It determined that "the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review."[17]

In contrast, the minority rule generally depends upon a stay of the execution of sentence. The First Circuit's decision in *U.S. v. Leichter*[18] is illustrative. The trial court had, on its own, severed a conspiracy charge from over 390 other counts against the three defendants. After a jury convicted them, the government dismissed all but 38 of the remaining counts. The court then stayed execution of the sentence pending the defendants' appeal. The First Circuit concluded that the trial court had not formally severed the cases and reasoned that in that circumstance, "[t]he prevailing practice has been to treat 'the case'

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[16] *Id.*

[17] *King, supra* note 14, 257 F.3d at 1021. See, also, *U.S. v. Richardson*, 817 F.2d 886 (D.C. Cir. 1987).

[18] *U.S. v. Leichter*, 160 F.3d 33 (1st Cir. 1998). But see *U.S. v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20 (1st Cir. 1989).

as the basic unit for an appeal."[19] In concluding that it lacked jurisdiction, the court emphasized that the trial court had stayed execution of the sentences.

The other leading federal case adopting the minority rule also depended upon a stay of execution. In *U.S. v. Kaufman*,[20] the jury convicted the defendant of one count, acquitted him of two counts, and deadlocked on two counts. The trial court granted a mistrial as to the deadlocked counts and sentenced the defendant for his conviction, but stayed execution of the sentence. The Seventh Circuit determined that the unresolved counts prevented it from exercising jurisdiction over the defendant's appeal because the litigation was not terminated until there was a judgment on every count. It reasoned that exercising jurisdiction would encourage piecemeal appellate review. But it also held that the trial court could not execute the sentence for the defendant's one conviction until there was a final judgment on all counts of the indictment: "A judgment which lacks finality cannot authorize the imprisonment of a defendant."[21]

[12,13] The majority approach is more persuasive and more consistent with Nebraska law. As stated, a conviction is a final judgment for appeal purposes after the trial court pronounces the sentence.[22] More important, Neb. Const. art. I, § 23, guarantees the right to appeal in all felony cases.[23] Although the U.S. Constitution does not guarantee the right to appeal a criminal conviction, if a state provides an appeal as a matter of right, its appellate procedures must comport with due process.[24] We believe that requiring a defendant to delay an appeal until the State retries a remaining count (assuming that the State intends to retry the remaining count) could unnecessarily

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[19] *Leichter, supra* note 18, 160 F.3d at 36.

[20] *U.S. v. Kaufman*, 951 F.2d 793 (7th Cir. 1992).

[21] *Id.* at 795.

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

[23] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

[24] See, *id.*, citing *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

interfere with a defendant's right to appeal while he or she is serving a sentence.[25]

Moreover, the majority approach also avoids trial management issues. The potential for delays could pressure the State to dismiss those counts on which the jury has deadlocked.[26] Conversely, as the Second Circuit noted, even if a prolonged delay because of a retrial is not a concern, staying execution of the sentence could result in unnecessary trials.[27] From the State's perspective, future proceedings may be unnecessary if a court affirms the conviction on appeal.[28]

[14] We conclude that when the trial court has declared a mistrial as to one or more counts in a multicount charging instrument, the better course is to treat those counts as severed—to be resolved in a new proceeding. This rule will permit a defendant to appeal his conviction and sentence rather than waiting until a court enters judgment on every count. The district court did not err in exercising jurisdiction over McCave's appeal. We now turn to the merits of his appeal.

2. County Court Erred in Failing to Suppress Evidence

(a) Parties' Contentions

McCave argues that the county court erred in failing to suppress evidence derived from his DUI arrest. He argues that the officers lacked probable cause to believe that he had operated or been in actual physical control of a vehicle while intoxicated. He argues that he was not on property open to public access because he was sitting in a car which was parked on a residential driveway with its motor not running.

The State views it differently. It argues that McCave was in physical control of the vehicle and that the vehicle was not entirely on private property. Relying on *State v. Prater*,[29] the

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[25] Compare *Kaba v. Fox*, 213 Neb. 656, 330 N.W.2d 749 (1983).

[26] Compare *U.S. v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993).

[27] See *Abrams, supra* note 13.

[28] See *Leichter, supra* note 18 (Campbell, J., dissenting).

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

State also argues that an officer should not have to wait until a driver enters a public highway before stopping the driver to determine whether the driver is impaired. It argues that Officer Benjamin Faz testified that McCave had his hand on the ignition switch and was about to start the vehicle after stating that he was leaving.

(b) Standard of Review

[15] 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.[30] 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.[31]

(c) Facts

Two officers responded to John's complaint. Faz testified at the suppression hearing. He stated John told him that McCave was intoxicated and causing a disturbance and that he wanted the officers to remove him. Faz stated that John said that McCave had been at his house earlier, left, and then returned intoxicated and caused a disturbance. After speaking to John, the officers walked around to the side of the house, where the detached garage and driveway abutted a side street. Faz stated that the vehicle was parked in the driveway, straddling the sidewalk.

Faz recognized McCave from previous complaints and saw him sitting in the driver's seat. The motor was not running, but the keys were in the ignition. Faz saw a beer can in the console. When Faz asked McCave what he was doing, he first responded, "'Nothing,'" but then stated that he was leaving. Faz stated that McCave was about to start the engine, but he never turned the motor on, and he stepped out of the car when asked to do so.

In exiting the car, McCave backed away from the officers, yelling that they had no right to contact him on private

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[30] *State v. Sharp*, 281 Neb. 130, 795 N.W.2d 638 (2011).

[31] *Id.*

property. The officers believed that he was intoxicated and arrested him for trespass. From his conversation with John, Faz did not know how long McCave had been in the vehicle on the driveway. He also did not know the means by which McCave had left the house or whether he was driving. Faz saw Kudron and knew that she was McCave's girlfriend. But he did not speak to her or ask whether she had driven the vehicle.

After arresting McCave for trespass, Faz returned and spoke to John and Susan. John stated that he had been asleep. Susan stated that McCave had returned about a half-hour to an hour before John woke up. Faz did not ask Susan whether she had allowed McCave to be on the property. Later, Faz read McCave the postarrest advisement form for DUI. McCave refused to submit to a chemical breath test.

The county court concluded that the circumstantial evidence was sufficient to show that McCave had been driving. It reasoned that the officers could infer that he had been driving because he had stated that he was leaving when the officers first approached him.

(d) Analysis

Under Neb. Rev. Stat. § 60-6,196(1) (Reissue 2010), it is unlawful for a person to operate or be in the actual physical control of any motor vehicle while under the influence of alcohol or a drug. Here, the police initially arrested McCave for trespass. But the postarrest chemical test advisement form that Faz later read to McCave informed him that he was also under arrest for DUI.

(i) Probable Cause Standard

[16-18] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[32] An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.[33] Probable cause to support a warrantless arrest exists only if the officer

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[32] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[33] See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[34]

[19-22] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[35] Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed.[36] But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.[37] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[38]

(ii) McCave Was Not in Actual Control of a Vehicle on Private Property Open to Public Access

[23] Under Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010), Nebraska's DUI statutes do not apply to a person's operation or control of a vehicle on private property that is not open to public access. So we first address whether McCave was in actual physical control of a vehicle on private property with public access when he was sitting in a parked vehicle which was on a residential driveway but overhanging a public sidewalk.

In *Prater*,[39] we affirmed the trial court's ruling that an apartment building parking lot was private property with public access. We defined "open to public access" as follows:

> The word "access" is defined as "permission, liberty, or ability to enter, approach . . . or pass to and from,"

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[34] See, *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006), citing *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[35] See, *Smith, supra* note 32; *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

[36] See *Smith, supra* note 32.

[37] See *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

[38] See *Smith, supra* note 32.

[39] *Prater, supra* note 29.

> "a way by which a thing or place may be approached or reached," and "the action of going to or reaching . . . passage to and from." . . . Thus, the phrase "open to public access" means that the public has permission or the ability to enter.[40]

We concluded that whether the apartment building parking lot was open to public access was "primarily a question of fact."[41] Although in *Prater*, a sign warned motorists that unauthorized vehicles would be towed, the residents' testimony established that the lot was available to guests, workers, and delivery people. We cited cases from other jurisdictions in which the courts upheld DUI convictions when the public was permitted to use a private parking lot. We concluded, "Public safety requires that DUI statutes and ordinances apply to any property to which the public has access. The purpose of these laws is to protect the public—not to provide a safe harbor for the intoxicated driver in a private parking lot."[42]

But *Prater* is not controlling here. When §§ 60-6,108 and 60-6,196 are read consistently, they show that the Legislature intended to prohibit intoxicated persons from operating or being in control of a vehicle even on private property if other motorists might access that property and be endangered by their conduct. But Neb. Rev. Stat. § 60-649 (Reissue 2010) defines a private road or driveway to mean "every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons."

[24] So, unlike the question presented in *Prater*, the public access question here presents a question of statutory interpretation. As a matter of law, we conclude that under § 60-649, a residential driveway is not private property that is open to public access.[43] Members of the general public have no right or implied permission to use a private residential driveway.

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[40] *Id.* at 657-58, 686 N.W.2d at 898.

[41] *Id.* at 658, 686 N.W.2d at 898.

[42] *Id.* at 660, 686 N.W.2d at 900.

[43] See *State v. Haws*, 869 P.2d 849 (Okla. Crim. App. 1994). Compare *State v. Day*, 96 Wash. 2d 646, 638 P.2d 546 (1981) (en banc).

Nor do they have the "ability to enter" the driveway in the same sense that a member of the public might drive through or use a private parking lot by custom.[44] So neither a property owner nor the owner's guest would reasonably expect that the public might use the owner's driveway. To extend *Prater* to these facts would render the limitation on the statute's reach meaningless.

Nor do we think that the driveway's characterization as private property without public access changed just because McCave's vehicle overhung the sidewalk. Neb. Rev. Stat. § 60-662 (Reissue 2010) defines a sidewalk as "that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use by pedestrians." Because a sidewalk is not intended for use by vehicles, an intoxicated person in a parked vehicle on a private driveway does not endanger other motorists merely because the vehicle overhangs the sidewalk. We do not believe the Legislature intended to make a citizen drinking a beer while cleaning out his vehicle parked in his driveway guilty of a crime because the vehicle is overhanging the sidewalk.

[25] We reject the State's argument that criminal liability under § 60-6,196 extends to intoxicated persons in control of a vehicle parked on a residential driveway, regardless of whether part of the vehicle crosses a sidewalk. Accordingly, the arresting officers did not have probable cause to believe that McCave was an intoxicated person in actual control of a vehicle on private property open to public access. We next address the county court's conclusion that based on circumstantial evidence, the officers had probable cause to believe that McCave had been driving while intoxicated.

(iii) Officers Did Not Have Probable Cause to Believe McCave Had Driven a Vehicle on a Public Highway While Intoxicated

The county court concluded that because McCave had stated that he was leaving while he was in his vehicle with the keys in the ignition and the motor off, the officers could infer that

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[44] See *Prater, supra* note 29, 268 Neb. at 658, 686 N.W.2d at 898.

McCave drove to John and Susan's house intoxicated. We disagree. Obviously, if McCave had committed an offense in front of the officers, they would have had grounds for an arrest. But his statement that he was leaving, even if his hand was on the key in the ignition, showed only that he had considered driving but changed his mind.

[26] These facts are distinguishable from the majority of cases in which an officer stops a motorist for a traffic violation or driving erratically and then observes physical signs of intoxication. It is true that in DUI cases, circumstantial evidence can establish a person's operation of a motor vehicle.[45] But the evidence here falls short of the evidence presented in the few cases where the officer did not see the defendant operating a motor vehicle but the circumstantial evidence was sufficient to show that the defendant had been driving while intoxicated.

In most of those cases, the facts showed that the defendant, who exhibited signs of intoxication, was found alone in a vehicle in a place where the vehicle could not have been unless the defendant drove it there.[46] In a case relevant for its contrasting facts, we reversed the Court of Appeals' decision that the circumstantial evidence was insufficient to support a DUI conviction.[47] There, an officer arrested the defendant, whom he had found in the ditch of a rural road, lying beside his motorcycle. The defendant claimed that he had lost control of his motorcycle when another vehicle passed him. The Court of Appeals agreed that the officer had found the defendant in an intoxicated state but concluded that there was no evidence to indicate how long the defendant had been in the ditch. It concluded the evidence failed to show that the defendant had been intoxicated and driving at the same time.

In reversing, we emphasized the circumstances that precluded an inference that the defendant became intoxicated after the accident, when he was no longer driving:

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[45] See *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970).

[46] See, *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987); *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986); *Eckert, supra* note 45. Compare *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996).

[47] See *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

> There is no evidence in the record of other persons, liquor, or liquor containers in the area where [the defendant] was found by the officer, nor is there any other evidence which would support an inference that [the defendant] had the means or opportunity of ingesting alcohol from the time he lost control of the motorcycle until the officer found him lying beside it in the ditch.[48]

It is true that the circumstances the officers encountered when they arrested McCave gave them probable cause to believe that he was intoxicated. According to Faz, when the officers arrived, John told them that McCave was intoxicated and causing a disturbance. When the officers approached McCave in the vehicle, his conduct and a beer in the vehicle's console supported a reasonable belief that he was intoxicated. But unlike in our earlier cases, the facts known to the officers were insufficient to support a conclusion that McCave had operated his vehicle while intoxicated.

[27] A citizen informant who has personally observed the commission of a crime is presumptively reliable.[49] But John did not state that he had seen McCave driving while intoxicated or driving at all. He told the officers only that McCave had been at his house earlier, had left, and later returned intoxicated. Moreover, the officers should have known that John was not a reliable source of information for concluding that McCave had returned intoxicated. John was asleep when McCave returned. He told Faz this, and Susan told Faz that McCave came back about a half-hour to an hour before John woke up.

[28] More important, the fact that John and Susan told the officers that McCave had left the house and returned did not indicate the means by which he had left or returned. No witness reported that McCave was driving a vehicle at any time, and the officers did not pose this critical question to McCave or any witness. Before officers invoke the power of a warrantless arrest, the Fourth Amendment requires them to investigate the basic evidence for the suspected offense and reasonably question witnesses readily available at the scene, at least when

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[48] *Id.* at 949, 580 N.W.2d at 551.

[49] *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010).

exigent circumstances do not exist.[50] This is particularly true when the circumstances the officers encounter are consistent with lawful conduct.[51] As previously discussed, it is not unlawful for a person to be intoxicated in a vehicle on private property not open to public access.

John's statement that McCave had left and returned to the house and the officer's observation of McCave in his vehicle gave the officers reasonable suspicion to temporarily detain McCave while they investigated whether he had been driving while intoxicated. But the officers did not attempt to determine the relevant facts. They did not ask McCave or the witnesses how he had left the house or returned; they saw Kudron but did not speak to her; and they did not attempt to discover from a reliable source whether McCave was intoxicated when he returned to the house or if he had been drinking alcohol after he returned to the house. Instead, Faz stated, "I guess I just inferred with the beer being in the car that him and the beer got there by the vehicle."

But the facts did not support this inference when two other possibilities were equally plausible. McCave could have left and returned to the house intoxicated without driving. Or he could have become intoxicated after returning to the house. In contrast to events in our previous cases, the officers did not encounter a suspect in his or her vehicle who admitted to driving at some point before the encounter[52]; no citizen informant had reported that the suspect was driving while intoxicated[53] or driving erratically; no witness at the scene reported that the suspect had driven the vehicle immediately before the police

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[50] See, *Kuehl v. Burtis*, 173 F.3d 646 (8th Cir. 1999); *Romero v. Fay*, 45 F.3d 1472 (10th Cir. 1995); *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988); *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988); *BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *vacated on other grounds sub nom. City of Lawton, Okla. v. Lusby*, 474 U.S. 805, 106 S. Ct. 40, 88 L. Ed. 2d 33 (1985).

[51] See *BeVier, supra* note 50.

[52] See, e.g., *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). Compare *Blackman, supra* note 47.

[53] See *Wollam, supra* note 49.

arrived[54]; and the officers did not encounter the suspect in a location where the suspect could not have been unless the suspect had driven the vehicle while intoxicated.[55] Finally, no exigent circumstance existed because the police had already arrested McCave for trespassing.

Instead, the evidence shows that the officers focused on removing McCave from the property because of his alleged trespass. Their arrest of McCave for DUI appears to have been an afterthought to the trespass arrest because they did not investigate the relevant facts that were readily available. As stated, officers do not lack probable cause because in hindsight they were wrong about a suspect's unlawful conduct. But here, because the circumstances that the officers encountered were consistent with lawful conduct, the officers unreasonably failed to gather more facts from a reliable source before arresting McCave for DUI. So the arrest was unlawful, and the court erred in failing to suppress as fruit of an unreasonable seizure any evidence or statements tainted by the arrest.[56]

(iv) Failure to Suppress Tainted Evidence Was Not Harmless Error

[29,30] McCave's illegal arrest did not bar the State from prosecuting him for the charged offenses with evidence that was untainted by the illegal arrest.[57] But the improper admission of evidence, even tainted evidence, is a trial error subject to harmless error analysis.[58] Because the court failed to suppress the tainted evidence, we consider whether the error was harmless.

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[54] See *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992).

[55] See cases cited *supra* note 46.

[56] See, *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010); *State v. Abdouch*, 230 Neb. 929, 434 N.W.2d 317 (1989).

[57] See, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), citing *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991).

[58] See, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003).

The State contends that suppressing tainted evidence would not have made a difference in the outcome. It argues that the only improperly admitted evidence would have consisted of the beer can that the police seized from McCave's vehicle. But the evidence that the court should have suppressed also included McCave's statements to officers after his arrest and his refusal to take the chemical breath test.[59] The State used this evidence at trial to cast McCave in an unfavorable light.

[31-33] An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[60] 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.[61] When determining whether an alleged error is so prejudicial as to justify reversal, we generally consider whether the error, in the light of the totality of the record, influenced the outcome of the case.[62]

Here, we cannot conclude that the admission of this evidence did not materially influence the outcome of the case. Because the county court did not suppress this evidence, we reverse the judgment of conviction for the DUI charge.[63]

3. Evidence Was Insufficient to Support Conviction for DUI

[34] Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.[64] If it was not, then double jeopardy forbids a remand for a new trial.[65]

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[59] See *Tingle, supra* note 57.

[60] See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[61] See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

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

[63] See *Tingle, supra* note 57.

[64] See, *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011); *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[65] See *Nero, supra* note 64.

(a) Facts

At trial, the direct evidence established that McCave never drove his vehicle after arriving at John and Susan's house in the afternoon before his arrest. Kudron had been staying with McCave at his mother's house, where he lived. She testified that Susan invited her and McCave to come over for a visit in the afternoon. John and Susan lived a couple of blocks from McCave's mother. McCave drove his vehicle over and parked in John and Susan's driveway. The witnesses disputed whether or by how much the vehicle hung over the sidewalk while parked in the driveway. Only the officers testified that the vehicle was straddling the sidewalk.

McCave did not consume any alcohol during the day, before or after arriving at John's house. Soon after arriving at John and Susan's house, he gave Kudron his car keys. She testified that he frequently did this so he would not be tempted to drive if he drank a couple of beers. At some point, McCave's mother came over to visit also. Close to evening, McCave walked her home and stated that he was going out with his friends afterward to a bar about five blocks away. John told McCave not to come back if he was intoxicated. Kudron stayed at the house, visiting Susan.

McCave was gone until around 11:30 p.m. or midnight, and John had retired to his room before McCave returned. Kudron did not believe that McCave was intoxicated when he returned. McCave told her that he was going to the "bottle shop" to get a couple of beers and some cigarettes and that he did not know whether he would walk or get a ride. Kudron stated that she still had his car keys. When he returned, McCave told Kudron that he had gotten a ride to the bottle shop and walked back. He had purchased two cans of beer.

McCave drank one beer in the house while watching television with Susan and Kudron. At some point, John observed McCave drinking a beer in the house and argued with Susan, but then went back to his room. After an hour or so of watching television, McCave, Kudron, and Susan went outside to listen to music from McCave's car stereo. Kudron stated that she put the keys in the ignition so they could listen to the radio while they stood outside the car. After about 45 minutes, Kudron and Susan went inside to get cigarettes.

John testified that he went outside and asked McCave to turn the music off and walk home. John stated that the motor was not running, the lights were off, and no one was in the vehicle with McCave. He also stated that McCave turned the music up louder after he went in, so he went back out to say that he would call the police if McCave did not turn it off and go home. John called the police around 1 or 1:30 a.m. He testified that he told the officers that he thought McCave had been drinking but did not say that he was drunk. He never saw McCave drinking any alcohol until after McCave had returned to the house.

The officers testified to basically the same facts that the State presented at the suppression hearing. They arrested McCave for trespass. Because they smelled alcohol on his breath and he was belligerent, they did not perform field sobriety tests. Faz testified that they were afraid that if they took McCave's handcuffs off, he would hurt someone. Instead, they took him to the police station for a chemical breath test. During the transport, McCave continually yelled at them, called them names, and insisted that he had not been driving. Faz read McCave the postarrest chemical test advisement form at the police station. McCave refused to submit to the test because he was still insisting that he had not been driving.

(b) Analysis

[35] In reviewing the sufficiency of the evidence for this conviction, we consider whether the evidence would have been sufficient if the court had properly admitted evidence of the beer seized from McCave's vehicle and his subsequent statements to the officers. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[66] We conclude that this condition is met here.

First, McCave was on private property as a matter of law, not on a public highway and not on private property open to public access. The State spent considerable time establishing the position of the vehicle on the driveway. But as discussed, even if

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

the officers were correct that the vehicle completely crossed the sidewalk, the sidewalk did not change the private character of the residential driveway. So the State could not support the DUI conviction by showing that McCave was in actual control of a vehicle on a public highway or private property that was open to public access.

Moreover, the State offered no new evidence that McCave had been operating a vehicle on a public highway while intoxicated. We have already determined that the circumstantial evidence failed to give the officers probable cause for his arrest for this charge. So without any new evidence offered at trial establishing that he had driven his vehicle, we also conclude that the State's circumstantial evidence failed as a matter of law to establish McCave's operation of vehicle on a public highway. Thus, double jeopardy does not permit a retrial on this charge.

4. McCave Was Unlawfully Convicted of Refusing to Submit to a Chemical Breath Test

At the start of the suppression hearing, McCave tied the "refusing to submit" charge to whether the officers had probable cause for an arrest. He argued that the issue was whether the private driveway was open to public access and "whether or not they had probable cause to arrest him for a DUI and make him submit to a chemical test." The court overruled the motion but agreed that if the officers did not have probable cause for an arrest, then McCave's refusal to submit to a test would not be at issue. We interpret McCave's argument, under his failure to suppress assignment of error, to be that the officers lacked authority to require him to submit to a chemical test because they lacked probable cause for the DUI arrest.

[36] We agree that the unlawful arrest barred the State from prosecuting McCave for refusing to submit to a chemical breath test, in violation of Neb. Rev. Stat. § 60-6,197(3) (Reissue 2010). To be prosecuted for refusing to submit to a chemical test under § 60-6,197(3), the person must be an arrestee as described in subsection (2):

> Any person arrested as described in subsection (2) of this section may, upon the direction of a peace officer,

> be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the concentration of alcohol or the presence of drugs. . . . Any person who refuses to submit to such test or tests required pursuant to this section shall be subject to the administrative revocation procedures . . . and shall be guilty of a crime . . . .[67]

So the validity of a refusing to submit charge under § 60-6,197(3) depends upon the State's showing a valid arrest under § 60-6,197(2).

[37] Under § 60-6,197(2), a peace officer can require a person to submit to a chemical test of his or her blood, breath, or urine when the following circumstances are present: (1) The officer has arrested the person for committing an offense arising out of acts alleged to have been committed while the person was driving or in actual physical control of a vehicle and under the influence of alcohol or drugs; and (2) the officer has reasonable grounds to believe that the person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs, in violation of § 60-6,196. In addition, the person's conduct must not have occurred on "private property which is not open to public access."[68]

[38,39] Law enforcement officers must have probable cause to arrest a person for driving under the influence.[69] A valid arrest was a condition precedent to requiring McCave to submit to a chemical breath test.[70] We have determined that the officers' arrest of McCave for DUI was unlawful because they lacked probable cause. So one of the statutory conditions for requiring McCave to submit to a chemical breath test was not satisfied. Therefore, the officers lacked authority to take this action and McCave's conviction for refusing to submit to a chemical test was unlawful. We reverse this conviction.

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[67] § 60-6,197(3).

[68] See § 60-6,108(1).

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

[70] See *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986).

5. Evidence Was Insufficient to Support Conviction for Possessing an Open Container

[40] McCave assigns that the trial court erred in failing to sustain his motion for a directed verdict. In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.[71]

[41] 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.[72] 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.[73]

Nebraska's open container statute provides in part that "[i]t is unlawful for any person in the passenger area of a motor vehicle to possess an open alcoholic beverage container while the motor vehicle is located in a public parking area or on any highway in this state."[74] For this statute, "[h]ighway means a road or street including the entire area within the right-of-way."[75]

The State concedes that the evidence did not support this conviction. It submits that there is no evidence that McCave's vehicle was located in a public parking area or on a public highway as required by the open container statute. We agree.

After the jury found McCave guilty of the DUI charge, the county court separately convicted him of possessing an open container. We agree with the State that a public sidewalk is

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[71] See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

[72] *Nero, supra* note 64.

[73] *Id.*

[74] Neb. Rev. Stat. § 60-6,211.08(2) (Reissue 2010).

[75] § 60-6,211.08(1)(b).

not a public parking area. The county court apparently relied on the DUI conviction to conclude that the circumstantial evidence was sufficient to show that McCave had possessed an open container while on a public highway. But the jury instruction permitted the jury to convict McCave because it found that he had operated or been in control of a vehicle on a highway or private property open to public access. Thus, the verdict failed to show that the jury believed that McCave had operated a vehicle on a highway. Under the State's arguments, it could have concluded that a residential driveway was private property open to public access.

We need not reach here, however, the issue whether circumstantial evidence can support an open container conviction. We have already determined that the circumstantial evidence was insufficient as a matter of law to prove that McCave had driven his vehicle on a public highway. Obviously, it necessarily follows that the State's circumstantial evidence could not have proved that he had possessed an open container of alcohol on a public highway. We also reverse this conviction.

6. County Court Erred in Failing to Admit Susan's Out-of-Court Statements Giving McCave Permission to Be on the Property

(a) Parties' Contentions

McCave assigns that the district court erred in affirming the county court's ruling that Susan's statements were inadmissible hearsay. McCave argues that her statements, permitting him to be at the house, were offered not for the truth of the matter asserted but to show the effect that they had on him. That is, the statements explain why he reasonably believed he was licensed to be at the property. He also argues that proof of Susan's consent would have negated the knowledge and communication elements of the trespass charge.

McCave relies on the withdrawn portion of our opinion in *State v. Parker*[76] and a concurrence to that opinion.[77] He argues

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[76] See *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), *modified* 276 Neb. 965, 767 N.W.2d 68 (2009).

[77] See *id.* (Gerrard, J., concurring).

that the authorities cited in these opinions show that statements which are admissible to show their effect on a listener include statements relevant to explain the course of events or to provide context to the evidence presented.

The State contends that the withdrawn portion of *Parker* is not authority for any subsequent case. It also contends that Susan's statements were offered for the truth of the matter asserted—to show that she had licensed McCave to be on the premises. The State argues that because McCave offered Susan's statements for their truth, only Susan could have testified to what she said to McCave without the statements' being inadmissible as hearsay. The State also contends that Susan's statements were not authority for McCave to be on the property after John revoked it by telling McCave to leave.

We agree that the county court's hearsay ruling excluding Susan's statements involved the knowledge element of the trespass charge and the "reasonable belief" component of the statutory defense.

(b) Relevant Statutes

The State could convict McCave of second degree criminal trespass only if it proved that he knew he was not licensed or privileged to be at John and Susan's residence: "A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by: (a) Actual communication to the actor . . . ."[78]

Neb. Rev. Stat. § 28-522(3) (Reissue 2008) provides an affirmative defense against a prosecution for this trespass charge if "[t]he actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain."

(c) Facts

At trial, Kudron testified that close to evening, McCave told her that he was going to walk his mother, Patricia, home and then go to the bar. Kudron stated that he gave her his car keys

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[78] Neb. Rev. Stat. § 28-521(1) (Reissue 2008).

and was gone for a couple of hours. She did not believe that he was intoxicated when he returned. Upon his return, he had told her that he was going to walk or get a ride to the bottle shop to get beer. But the court sustained the State's hearsay objection to Kudron's testimony that Susan told McCave that he could have only a couple of beers. Kudron then testified that McCave returned after 25 minutes with two cans of beer. At this point, John came out of his bedroom and became upset when he saw McCave drinking a beer. When Kudron stated that Susan told John that she had given McCave permission to be there, the court sustained the State's motion to strike the statement.

Later, McCave made an offer of proof, asserting that if the court had permitted Kudron to testify, she would have stated the following: When McCave returned from the bar, he asked Susan for permission to go to the bottle shop and buy a couple of beers. Susan stated that he could do that, but that he could have only two beers. When John came downstairs and was angry because McCave was drinking a beer, Susan told him that she had given McCave permission to stay there.

McCave argued that Susan's statement was not hearsay because it had legal significance and was relevant to whether he reasonably believed he was licensed to remain on the property. But the court again sustained the State's objection. It concluded that the purpose for offering the statements was blurred but that, to some extent, the statements were offered for the truth of the matter asserted.

The district court affirmed the ruling. It did not specifically address whether Susan's statements had legal significance apart from whether they were relevant to showing that McCave reasonably believed he was licensed to remain on the property. But it concluded that in other cases where we had affirmed the admission of out-of-court statements to show their impact on the listener, the truth of the matter asserted could be separated from the statement itself. It did not believe that was true in this case. It also reasoned that unlike some of our other cases, Susan's statements were not necessary to explain why Kudron and McCave had stayed at the house when Susan had socialized with them. Finally, the court concluded that even if the county court's ruling was incorrect, it was harmless error. It

reasoned that John had revoked Susan's consent for McCave to enter or remain on the property.

(d) Standard of Review

[42] 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.[79] But our reasoning for adopting a de novo standard applies equally to a court's exclusion of evidence on hearsay grounds. That is, whether the underlying facts satisfy the legal rules governing the admissibility of out-of-court statements presents a question of law.[80] So we clarify our standard of review to include both types of rulings: Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination, whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.

(e) Analysis

(i) A Witness' Out-of-Court Statements Can Be Hearsay

We first address the State's argument that because Susan's statements were offered for the truth of the matter asserted, only Susan could have testified to what she had previously stated without raising a hearsay problem. The State's argument is inconsistent with Nebraska's statutory definition of hearsay: "Hearsay is a statement, other than one made by the declarant *while testifying* at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[81]

Susan's previous statements to McCave and John were a declarant's out-of-court statements, not statements that Susan made while she was testifying as a witness. And she was not a party. Thus, if the State were correct that her statements were

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[79] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

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

[81] Neb. Rev. Stat. § 27-801(3) (Reissue 2008) (emphasis supplied).

offered for the truth of the matter asserted, then—even if she had testified to her previous statements—they would have been hearsay unless they fell within a definitional exclusion under § 27-801(4)(a) or a statutory exception.[82] We conclude, however, that the statements were not hearsay because they were not offered for the truth of the matter asserted.

(ii) Susan's Statements Were Admissible for Nonhearsay Purposes

[43,44] If an out-of-court statement is not offered for proving the truth of the facts asserted, it is not hearsay.[83] But it does not necessarily follow that such a statement is admissible in a particular case. Apart from statements falling under the definitional exclusions and statutory exceptions, the admissibility of an out-of-court statement depends upon whether the statement is offered for one or more recognized nonhearsay purposes relevant to an issue in the case.[84] McCave correctly contends that Susan's statements had legal significance for the trespass charge independent of the truth of the matter asserted. But we clarify that the statements fell within the recognized nonhearsay purpose of showing a "verbal act."

[45,46] We have previously explained that words that constitute a verbal act are not hearsay even if they appear to be.[85] A verbal act is a statement that has legal significance, i.e., it brings about a legal consequence simply because it was spoken.[86] To explain why such statements are not hearsay, we have previously set forth the advisory committee notes to Fed. R. Evid. 801(c), the federal counterpart to § 27-801(3):

> "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not

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[82] See, *People v. Lawler*, 142 Ill. 2d 548, 568 N.E.2d 895, 154 Ill. Dec. 674 (1991); G. Michael Fenner, The Hearsay Rule ch. 1(II)(C)(3) (2003).

[83] *Baker, supra* note 79.

[84] See *id.*

[85] See *Schmidt v. Schmidt*, 228 Neb. 758, 424 N.W.2d 339 (1988).

[86] *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986); *State v. McSwain*, 194 Neb. 31, 229 N.W.2d 562 (1975).

> hearsay. . . . The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[87]

We stated that "where testimony is offered to establish [the] existence of a statement rather than to prove [the] truth of that statement, the hearsay rule does not apply."[88]

This statement does not mean that any out-of-court statement is admissible to show that it was made.[89] But a nonhearsay purpose for offering a statement does exist when a statement has legal significance because it was spoken, independent of the truth of the matter asserted.

So the county court and district court incorrectly reasoned that Susan's statements were inadmissible because offering them to show her consent could not be separated from the truth of the matter asserted. Common examples of verbal acts are words that constitute contractual agreements or terms, or words that establish an agency relationship.[90] Whether such words have a legal effect does not depend upon the out-of-court declarant's credibility.[91] And whether the trier of fact finds that the words were spoken depends upon the in-court witness' credibility. But that finding is a separate issue from whether the words had legal significance independent of their truth.

Additionally, the district court erred in concluding that a verbal act can be admitted only to clarify a defendant's or witness' ambiguous acts or statements. McCave did not offer Susan's statements to clarify circumstantial evidence that Susan had impliedly consented to McCave's presence by socializing with him. Instead, he offered her statements to show that she had

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[87] *Alliance Nat. Bank, supra* note 86, 223 Neb. at 409, 390 N.W.2d at 491-92.

[88] *Id.* at 409, 390 N.W.2d at 492.

[89] See *Baker, supra* note 79.

[90] See, e.g., R. Collin Mangrum, Mangrum on Nebraska Evidence 707-08 (2011); 2 McCormick on Evidence § 249 (Kenneth S. Broun et al. eds., 6th ed. 2006).

[91] See Fenner, *supra* note 82, ch. 1(III)(A)(10).

explicitly consented to his presence at the premises. Because her statements were a license for him to be on the premises, they had a legal significance because they were spoken, independent of any other conduct or statements.

Susan's statements were obviously relevant to the central issues. Remember, the State could convict McCave of second degree criminal trespass only if it proved that he intended to be on the property knowing that he was not licensed or privileged to do so. If the trier of fact had believed that Susan had made the offered statement, it would have negated the State's claim that McCave knew he was not licensed to be on the property. Because her statements to McCave were verbal acts that were relevant to the central issue in the case, they were not inadmissible as hearsay.

Similarly, Susan's statements authorizing McCave to be at the residence and informing John that she had done so were relevant under § 28-522 (the statutory affirmative defense) to determine whether McCave reasonably believed that she would have licensed him to enter or remain on the premises. Section 28-522 appears to apply mainly when a defendant cannot show an explicit license to be on the premises. But there is obviously an overlap between negating the knowledge element of the trespass charge and proving the affirmative defense, and McCave was entitled to assert both defenses. So in addition to showing that she consented to McCave's presence at her residence, Susan's statements were also relevant to show the effect that they had on McCave: i.e., to show that because of her statements, he reasonably believed that she would have licensed him to remain.

[47] We agree with the State that the withdrawn portion of our decision in *Parker*[92] is not authority for any purpose. But the implicit holdings of other cases in which we have admitted statements to show their impact on the listener are summed in the following rule, which is applicable here: A statement offered to prove its impact on the listener, instead of its truth, is offered for a valid nonhearsay purpose if the listener's

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[92] *Parker, supra* note 76.

knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.[93]

Because this recognized rule applies, we decline McCave's invitation to consider whether or when the "impact on the listener" category of nonhearsay statements should include more general statements to explain the course of events or to provide context to the evidence presented.[94] It is sufficient here that we hold that Susan's statements were relevant for more than one nonhearsay purpose independent of the truth of the matter asserted. In addition to being admissible as a verbal act, they were admissible to show why McCave reasonably believed he was licensed to be at the premises. We conclude that the district court erred in affirming the county court's exclusion of Susan's statements as hearsay.

(iii) John's Statements Did Not Revoke Susan's Authorization

As noted, the district court also concluded that even if the county court's hearsay ruling was incorrect, it was harmless error. The district court reasoned that John had revoked Susan's authorization of McCave to enter or remain on the property. We disagree because this conclusion is inconsistent with the plain language of the affirmative defense under § 28-522.

[48] Under § 28-521(1)(a), an actor must know that he is not licensed or privileged to enter because of an actual communication to the actor. But the statute does not specify who must make the communication. In contrast, the affirmative defense under § 28-522 applies if the defendant reasonably believed that "*the owner* of the premises *or other person* empowered to license access thereto would have licensed him to enter or remain."[95] It does not require the defendant to have believed

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[93] See, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997); *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977). See, also, Mangrum, *supra* note 90, 709-11.

[94] See, *Parker, supra* note 76 (Gerrard, J., concurring); 2 McCormick on Evidence, *supra* note 90.

[95] § 28-522(3) (emphasis supplied).

that *every* owner or *every* person authorized to license access would have consented to his presence. And § 28-522 anticipates that more than one person will have authority to license access to a property. That is frequently the case, so we construe the statute to mean that license from "the owner" to access the premises is satisfied by showing license from "any owner" or other person authorized to license access to the premises.[96]

[49] Moreover, allowing one owner to revoke the consent of another co-owner is inconsistent with cotenancy principles that permit a cotenant to license access to the property without the consent of another cotenant, at least absent an agreement to the contrary.[97] Finally, a rule that a person entering a property must have consent from every owner or every person authorized to license access to the property to avoid a trespass prosecution would obviously lead to absurd results.[98] And when possible, we will try to avoid a statutory construction that would lead to an absurd result.[99] We conclude that the district court erred in concluding that Susan's consent, if proved, was revoked by John's subsequent statement telling McCave to leave.

In sum, both the county court and the district court erred in concluding that Susan's statements were inadmissible hearsay. And we cannot conclude that the improper exclusion of evidence central to the knowledge element of the trespass charge and McCave's reasonable belief under the affirmative defense did not prejudice his right to a meaningful opportunity to present a complete defense.[100]

7. Double Jeopardy Does Not Preclude a Retrial for Trespass

Because we have found that the county court's exclusion of Susan's statements was reversible error, we must also consider

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[96] See *Kapler v. Kapler*, 755 A.2d 502 (Me. 2000).

[97] See *Kresha v. Kresha*, 220 Neb. 598, 371 N.W.2d 280 (1985). See, also, *Verdier v. Verdier*, 152 Cal. App. 2d 348, 313 P.2d 123 (1957).

[98] See *Kapler, supra* note 96.

[99] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[100] See *Nero, supra* note 64.

whether the admitted evidence was sufficient to sustain the guilty verdict for the trespass charge. The same sufficiency of the evidence principles apply in determining whether double jeopardy permits a retrial of this charge.[101]

The State presented evidence that John had told McCave to leave the premises twice. As discussed, John's statements did not revoke Susan's license to McCave to be on the premises if proved. But John told McCave to leave, and Susan's statements were not admitted into evidence. Moreover, the State may have rebutted evidence of Susan's statements if the court had admitted them. So we conclude that double jeopardy does not preclude a remand for a new trial on the trespass charge.

8. Remaining Assignments of Error

Because we have reversed McCave's DUI conviction, we need not reach his assignment that the county court erred in failing to instruct the jury on the definition of a driveway. Because we have reversed his convictions and remanded for a new trial on the only remaining charge, second degree trespass, we need not reach his assignment that the sentences for his convictions were excessive.

VI. CONCLUSION

We conclude that the lower courts erred in failing to determine that the officers lacked probable cause to arrest McCave for DUI. Because they lacked probable cause, McCave's arrest for DUI was unlawful and the county court erred in failing to suppress evidence derived from the arrest. This error was not harmless. And because the evidence was insufficient as a matter of law to support the guilty verdict, double jeopardy precludes a retrial on this charge. The unlawful arrest also rendered McCave's conviction for refusing to submit to a chemical test unlawful.

We conclude that the evidence was insufficient as a matter of law to sustain McCave's conviction for possessing alcohol in an open container.

Finally, the county court erred in excluding evidence relevant to the second degree trespass charge and the statutory

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[101] See *id.*

defense to that charge. Although the evidence was sufficient to support the guilty verdict, the erroneous evidentiary ruling was not harmless. We reverse this conviction and remand for a new trial only on that charge.

We reverse the judgments of conviction for DUI, refusing to submit to a chemical test, and possessing an open container. We remand the cause with directions to vacate these convictions and sentences and to dismiss the charges.

REVERSED AND REMANDED WITH DIRECTIONS.

REBECCA L. DRESSER AND KRISTA A. ROSENCRANS, APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

809 N.W.2d 713

Filed October 14, 2011. No. S-10-645.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.
3. **Railroads: Motor Vehicles: Right-of-Way.** Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.
4. **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.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

7. **Railroads: Claims.** A state law claim based upon a railroad's duty to avoid a specific, individual hazard at a grade crossing is not preempted by 49 U.S.C. § 20106 (2006).
8. **Summary Judgment: Affidavits.** The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 2008) is to provide an additional safeguard against an improvident or premature grant of summary judgment.
9. ____: ____. A Neb. Rev. Stat. § 25-1335 (Reissue 2008) affidavit that a party submits in support of a continuance need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Derek A. Aldridge and Corey L. Stull, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants.

William M. Lamson, Jr., Anne Marie O'Brien, and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

STEPHAN, J.

Krista A. Rosencrans was severely injured when a train collided with a motor vehicle in which she was a passenger. She and her mother, Rebecca L. Dresser (collectively appellants), brought this negligence action against Union Pacific Railroad Company (Union Pacific) and the operator of the motor vehicle and her mother. Appellants appeal from an order of the district court for Lancaster County granting summary judgment in favor of Union Pacific.

I. FACTS

On March 19, 2005, 18-year-old Rosencrans was a passenger in a motor vehicle driven by 17-year-old Chanda McDonald. The vehicle was traveling north on Thayer County Road 26 near Belvidere, Nebraska, and the teenagers were talking and listening to music. About 11:40 a.m., the vehicle approached a two-track railroad grade crossing that had no automatic gate or flashing lights, but was protected by a stop sign and crossbucks

on each side of the tracks. The stop sign and crossbucks were respectively located approximately 30 feet and 15 feet south of the tracks.

McDonald came to a complete stop at the stop sign. It was a clear day, and when Rosencrans looked in both directions at the stop sign, she saw a train coming down the tracks from her left. During her deposition, Rosencrans indicated on a photographic exhibit that the train was quite close to the crossing when she first saw it, but in a subsequent affidavit, she stated she could not quantify how far away the train was. Rosencrans testified she listened for but did not hear a train horn or bell. Rosencrans did not know whether McDonald looked in both directions at the stop sign. After stopping at the stop sign, McDonald drove the vehicle into the railroad crossing and onto the tracks. When Rosencrans began screaming, McDonald tried to back the vehicle off the tracks, but was unable to get off the tracks in time, and the vehicle was struck by the train. Rosencrans suffered severe injuries in the accident.

The locomotive engineer testified that he sounded the locomotive horn as the train approached the crossing. He observed the McDonald vehicle slowing as it approached the stop sign south of the crossing. The engineer testified he could see the occupants of the vehicle and noted they were not paying attention to him. The engineer testified that when he saw the vehicle pulling onto the tracks, he immediately applied the emergency brake and took cover on the floor of the locomotive. Before taking cover, the engineer noticed the nose of the vehicle was roughly in the center of the railroad tracks.

The conductor testified that he saw the McDonald vehicle approaching the railroad crossing and thought it was slowing down to stop at the stop sign. He then looked away to check for traffic from the other direction. When he looked back, the vehicle was coming into the crossing and the engineer was yelling "No, no, no." The conductor testified that at this time, he could see the occupants of the vehicle. He heard the engineer apply the emergency brake and then took cover on the floor prior to impact.

In compliance with Federal Railroad Administration requirements, each of the three locomotives powering the train was

equipped with an event recorder, similar to an airplane's "black box," which captures information as to the speed of the train, braking applications, throttle position, and other locomotive and train functions. Data from these devices showed the train was traveling at 45 m.p.h. at the time of the accident, well within the 80-m.p.h. federally mandated speed limit for this type of train and track. Event recorder data also established the train was 189 feet past the center of the railroad crossing before the emergency brake was activated. After the brake was applied, the train traveled between 2,732 feet (.517 miles) and 2,798 feet (.530 miles) before coming to a stop.

The event recorder data also disclosed when the locomotive horn was activated. Union Pacific's expert averred that the horn was activated 4,902 feet (.928 miles) before the train came to a stop, for a period of 35 seconds. An expert retained by appellants opined that the locomotive horn was activated as one uninterrupted blast 577 feet from the center of the crossing, for a period of 10 seconds before impact. This expert also explained that the event recorder shows only that an electrical impulse was sent to the horn, and does not record whether the horn in fact sounded when the impulse was sent.

Appellants brought this negligence action against Union Pacific, McDonald, and McDonald's mother, seeking to recover medical expenses incurred by Dresser on Rosencrans' behalf and general damages sustained by Rosencrans. The operative second amended complaint alleges Union Pacific was negligent in part because the train crew failed to maintain a proper lookout, failed to slow or stop the train to avoid the collision, and failed to properly sound the locomotive horn. In its answer, Union Pacific denied that it was negligent and alleged that any injuries or damages sustained by Rosencrans were proximately caused by the negligence of McDonald. It also alleged the negligence claims were preempted by local, state, and federal laws.

Approximately 17 months after the action was commenced, Union Pacific filed a motion for summary judgment and a motion to stay discovery while that motion was pending. After conducting a hearing on the motion to stay, the district court ordered that "[a]ll discovery not related to issues raised by the

pending motion for summary judgment of the defendant Union Pacific is stayed until resolution of that motion or further order of the court." The district court later entered summary judgment in favor of Union Pacific. It determined that the claims that the train crew failed to maintain a proper lookout and failed to slow or stop the train to avoid a specific, individual hazard were preempted by the Federal Railroad Safety Act of 1970 (FRSA).[1] It also determined there was no genuine issue of material fact on whether the train crew properly sounded the locomotive horn prior to the collision. After the court sustained a motion to dismiss the claims against McDonald and her mother without prejudice, appellants perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Appellants assign, restated and renumbered, that the district court erred in (1) finding no genuine issue of material fact existed as to whether the Union Pacific locomotive horn was sounded at the crossing; (2) dismissing the claims of negligence identified in paragraphs 8(c), (j), (l), (q), (r), and (t) of the second amended complaint; (3) finding no genuine issue of material fact existed as to whether the locomotive horn signalization was a proximate cause of the accident; (4) finding federal law preempted their claim that Union Pacific was negligent in failing to maintain a proper lookout and to slow or stop its train; and (5) limiting the scope of their discovery.

III. STANDARD OF REVIEW

[1] 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 such party the benefit of all reasonable inferences deducible from the evidence.[2]

IV. ANALYSIS

1. Summary Judgment

[2,3] Union Pacific's general defense is that McDonald's negligent operation of the vehicle in which Rosencrans was a

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[1] See 49 U.S.C. § 20101 et seq. (2006 & Supp. III 2009).

[2] *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

passenger was the sole proximate cause of the accident. The respective duties of motorists and train engineers approaching a grade crossing are well settled. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.[3] Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision.[4] At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.[5]

[4,5] The respective duties of parties in a summary judgment proceeding are also well settled. 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.[6] 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.[7]

For Union Pacific to be successful on its motion for summary judgment, the record must show as a matter of law either

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[3] *Whitaker v. Burlington Northern, Inc.*, 218 Neb. 90, 352 N.W.2d 589 (1984); *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 306 N.W.2d 902 (1981); *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 279 N.W.2d 369 (1979). See, also, Neb. Rev. Stat. § 60-6,170 (Reissue 2010).

[4] *Whitaker v. Burlington Northern, Inc., supra* note 3; *Wyatt v. Burlington Northern, Inc., supra* note 3.

[5] *Id.*

[6] *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011); *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009).

[7] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011); *Tolbert v. Jamison, supra* note 6.

that it owed appellants no duty, that any duty owed was not breached, or that any breach was not the proximate cause of the accident.[8] Appellants argue there are genuine issues of material fact related to their claim that Union Pacific was negligent in failing to sound the locomotive horn and their claim that Union Pacific was negligent for failing to slow or stop the train once it became apparent to the engineer that to proceed would probably result in a collision. We turn to these arguments.

(a) Claims Pertaining to Sounding Horn

(i) Activation

The operative complaint alleged Union Pacific was negligent because it "fail[ed] to properly sound the locomotive's horn and bells." Evidence presented to the district court on this issue primarily focused on when and how the horn was sounded and whether such sounding complied with federal regulations and Union Pacific's internal protocol. Relying on this evidence, the district court initially found that "any causal connection between when the locomotive horn began sounding and whether the horn was sounding in one uninterrupted blast or in a succession of short blasts and the occurrence of the accident" was a jury question. On Union Pacific's motion for reconsideration, the court concluded that because the horn actually sounded, "reasonable minds could only conclude that the accident . . . was not proximately caused by any negligence on the part of Union Pacific relating to the sounding of the locomotive's horn and bells."

In this appeal, appellants no longer focus on when and how the horn sounded. Instead, they argue there is a genuine issue of material fact as to whether the horn was sounded at all. Although Union Pacific contends that this is a new theory of the case, we consider a claim that the horn was not sounded at all to be encompassed within the allegation in the complaint that Union Pacific failed to "properly" sound the horn. We further note that appellants argued to the district court that the horn was not sounded at all.

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[8] See, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011); *Tolbert v. Jamison*, *supra* note 6.

The evidence on whether the horn was sounded consists of data from the train's event recorder, which shows the horn was activated, and testimony from both the train engineer and the train conductor that the horn was activated. Appellants contend this evidence is not sufficient to entitle Union Pacific to summary judgment, because their expert testified that activating the horn does not necessarily make the horn sound. They also contend the evidence supports an inference that the horn did not sound, because Rosencrans testified she did not hear the horn and McDonald indicated the same in an interrogatory answer.

[6] We, of course, view the evidence in the light most favorable to the party against whom the summary judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.[9] But we are mindful that conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[10] On this specification of negligence, the focus of the inquiry is whether the engineer activated a working horn and not whether the occupants of the vehicle heard the horn. Here, the testimony from the engineer and the conductor and the event record data show that the horn was activated. And no evidence supports a reasonable inference that there was some defect which prevented the horn from sounding when activated. To the contrary, the record shows the horn was working properly when it was tested 2 days after the accident. Thus, despite Rosencrans' and McDonald's statements that they did not hear the horn, there are no facts upon which a finder of fact could reasonably conclude that the horn did not sound when it was activated. Because we conclude there is no genuine issue of material fact on this issue, we do not reach appellants' argument that the alleged failure to sound the horn was a proximate cause of the accident.

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[9] *Radiology Servs. v. Hall*, *supra* note 2.

[10] *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004); *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

(ii) Other Claims Pertaining to Horn

The operative complaint alleged Union Pacific failed to operate the train in a safe and prudent manner, failed to properly train the crew, failed to adequately supervise the crew, failed to follow its internal rules, failed to follow the General Code of Operating Rules, and failed to follow proper train-handling methods. In its initial summary judgment order, the district court denied Union Pacific's motion for summary judgment with respect to any of these alleged acts of negligence that "relat[ed] to" the horn signalization issue. It specifically noted, however, that the motion for summary judgment was "granted in all other respects, regardless of whether specifically discussed in this order." In ruling on Union Pacific's motion for reconsideration, the district court determined that summary judgment was also appropriate as to "any alleged acts of negligence encompassed" in the above-stated allegations that related to the horn signalization issue.

Appellants argue this was error because (1) there remains a genuine issue of material fact as to whether the horn was sounded at all and (2) the district court "made no specific findings with respect to these claims."[11] As noted, we agree with the district court that no genuine issue of material fact exists as to whether the horn was sounded. And if there is no request for specificity, a district court may enter summary judgment without articulating its reasons.[12] We affirm the district court's grant of summary judgment on these allegations.

(b) Claim Pertaining to Avoiding Accident

Appellants contend genuine issues of material fact exist as to whether Union Pacific negligently failed to avoid the accident once it became apparent that to proceed would probably result in a collision.[13] Specifically, they claim that issues of fact exist as to whether Union Pacific breached its duty to

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[11] Brief for appellants at 18.

[12] See *Wells Fargo Ag Credit Corp. v. Batterman*, 229 Neb. 15, 424 N.W.2d 870 (1988).

[13] See, *Whitaker v. Burlington Northern, Inc., supra* note 3; *Wyatt v. Burlington Northern, Inc., supra* note 3.

exercise ordinary care to avoid the accident by failing to take timely action to slow or stop the train. The district court did not address this claim because it concluded it was "speed-related" and preempted by federal law.[14] Before engaging in a preemption analysis, we address whether genuine issues of material fact exist on this claim.

(i) Duty

Pursuant to long-established Nebraska law, Union Pacific's engineer had the right-of-way at the grade crossing.[15] He had a duty to exercise ordinary care to avoid an accident, including yielding the right-of-way, when it appeared to a reasonably prudent person that to proceed "'would probably result in a collision.'"[16]

It is undisputed that McDonald stopped the vehicle at the stop sign south of the railroad crossing and then proceeded into the crossing. Precisely when the engineer's duty to exercise ordinary care to avoid the accident arose in this case may be subject to dispute, but it is clear that it arose. For purposes of this summary judgment motion and giving appellants all reasonable inferences, we assume that the duty arose at the time McDonald's vehicle left the stop sign.

(ii) Breach

Union Pacific is entitled to summary judgment if the record shows as a matter of law that the engineer's duty to exercise ordinary care to avoid the accident was not breached. In arguing that it does, Union Pacific relies on the engineer's testimony that he activated the emergency brake after he saw the vehicle begin to pull onto the train tracks, which he stated was sometime before the train entered the crossing. If this evidence were uncontroverted, we would agree with Union Pacific. But

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[14] See *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993).

[15] See, *Whitaker v. Burlington Northern, Inc., supra* note 3*; Wyatt v. Burlington Northern, supra* note 3.

[16] *Whitaker v. Burlington Northern, Inc., supra* note 3, 218 Neb. at 95, 352 N.W.2d at 593.

it is not. Contrary to the engineer's testimony, the train event recorder shows the emergency brake was not activated until the train had traveled 189 feet past the center of the railroad crossing. There is thus a genuine issue of material fact as to when the engineer activated the emergency brake, an issue that relates to whether he breached his duty to exercise ordinary care to avoid the accident.

(iii) Proximate Cause

Any factual dispute about whether a duty was breached is immaterial if the record shows as a matter of law that any breach by Union Pacific was not the proximate cause of the accident. Without specific citation to the record, Union Pacific continually asserts that even if the engineer had reacted by activating the emergency brake immediately after McDonald's vehicle left the stop sign, the accident could not have been avoided.

We agree that on this record, no reasonable fact finder could conclude that even immediate action by the engineer could have stopped the train before it reached the crossing. After the engineer applied the emergency brake, the train traveled between 2,732 and 2,798 feet before it came to a stop, a distance of approximately one-half mile. There is no evidence in this record that could support a reasonable inference that the train was at least 2,731 feet away from the crossing at the time the McDonald vehicle left the stop sign. Both the engineer and the conductor testified that at the time the vehicle pulled onto the tracks, they were so close they could see the faces of the vehicle's occupants. And during her deposition, Rosencrans marked an exhibit with her approximation of where the train was when she first saw it; her mark is quite close to the crossing. Based on this evidence, no reasonable fact finder could conclude that the engineer could have stopped the train before it reached the crossing if he had activated the emergency break the instant the vehicle left the stop sign, which is the first possible moment that his duty to take evasive action could have arisen. The record therefore shows as a matter of law that the train's failure to *stop* was not a proximate cause of the accident.

But the record does not show as a matter of law that the train's failure to *slow* was not a proximate cause of the accident. As noted, in reviewing a summary judgment, we give all inferences to the nonmoving party, and we thus assume that the duty to exercise ordinary care arose the instant McDonald's vehicle left the stop sign and that slowing or stopping the train was encompassed in the duty to exercise ordinary care. Although the record shows as a matter of law that the train could not have been stopped before it reached the crossing, it is silent on what effect activation of the emergency brake would have had on the speed of the train. It is thus impossible to conclude on this record that the train's speed could not have been reduced had the engineer pulled the emergency brake immediately after the vehicle left the stop sign. Union Pacific did not meet its burden to show it is entitled to summary judgment on this issue.[17]

While this deficiency may not be relevant in every case, it is here. The engineer testified that the nose of McDonald's vehicle was in approximately the center of the track just prior to impact. Rosencrans testified that McDonald was attempting to back off the tracks when the collision occurred, and an exhibit shows the train's impact with the McDonald vehicle was quite near the front of the driver's side of the vehicle. On this record, the amount of time McDonald would have had to get off the tracks and avoid the accident is a critical factor which is dependent in part upon the engineer's reaction when it became evident that a collision could occur. The record does not permit us to conclude as a matter of law that earlier application of the emergency brake would not have prevented the collision. Therefore, unless preemption principles apply, Union Pacific was not entitled to summary judgment on the claim that the engineer failed to exercise ordinary care to avoid the accident, because there are genuine issues of material fact as to whether he breached his duty and whether that breach was a proximate cause of the accident. We therefore address whether the claim is preempted by federal law.

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[17] See *Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789 (S.D. W. Va. 1999).

(c) Claim Is Not Preempted

The district court found the claim that the engineer failed to exercise ordinary care to avoid the accident by failing to slow or stop the train was an excessive speed claim and was preempted by 49 U.S.C. § 20106, a provision of the FRSA. Congress enacted the FRSA in 1970 with the purpose of promoting "safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents."[18] The FRSA grants the Secretary of Transportation broad authority to prescribe regulations and issue orders for every area of railroad safety.[19] Section 20106 is entitled "Preemption" and displaces a state's authority to regulate railroad safety when the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement." Section 20106(a)(2) further provides that a state may adopt or continue in force an additional or more stringent law as long as it "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce."

The U.S. Supreme Court addressed federal preemption under the previous version of § 20106 in *CSX Transp., Inc. v. Easterwood*.[20] In *Easterwood*, the Court reasoned the issue before a court in a FRSA preemption analysis is "whether the Secretary of Transportation has issued regulations covering the same subject matter as [state] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings."[21] It stated that to prevail on the claim that the regulations have preemptive effect, the proponent must establish more than that they "'touch upon'" or "'relate to'" the subject matter, "for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially

[18] 49 U.S.C. § 20101.

[19] 49 U.S.C. § 20103(a).

[20] *CSX Transp., Inc. v. Easterwood, supra* note 14.

[21] *Id.*, 507 U.S. at 664.

subsume the subject matter of the relevant state law."[22] The *Easterwood* Court held that legal duties imposed on railroads by state common law fall within the scope of state laws that are subject to federal preemption.

The precise issue addressed in *Easterwood* was whether a state law wrongful death claim based on excessive train speed was preempted by federal regulations that set maximum allowable operating speeds for all freight and passenger trains for each class of track. The Court reasoned that these limits were adopted only after the hazards posed by track conditions were taken into account and that thus, all state law claims for excessive speed were subsumed by the regulations. A footnote in *Easterwood* noted that although the railroad in that case was "prepared to concede" that the "pre-emption of [the] excessive speed claim [did] not bar suit for [its] breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard," that issue was not presented and thus would not be decided by the Court.[23]

We do not agree with the district court that appellants' state law negligence claim based on Union Pacific's alleged failure to exercise ordinary care once it appeared that a collision would probably occur is speed based and thus preempted. State tort law is not preempted "until" a federal regulation "cover[s]" the same subject matter,[24] and we are not presented with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent. The mere fact that the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim. Nebraska tort law duties to exercise reasonable care could be violated even if the federal train speed limits are being followed.[25]

[7] Instead, we find that the state law claim against a railroad at issue here is akin to a duty to avoid a "specific, individual

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[22] *Id.*

[23] *Id.*, 507 U.S. at 675-76 n.15.

[24] 49 U.S.C. § 20106(a)(2).

[25] See *Murrell v. Union Pacific R. Co.*, 544 F. Supp. 2d 1138 (D. Or. 2008).

hazard" at a grade crossing, and we agree with the various federal and state courts that have concluded that such claims are not preempted by § 20106.[26] Appellants' claim relates to an event which is not a fixed condition or feature of the railroad crossing and was not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations.[27] Appellants' claim is based on a unique occurrence which was likely to result in a collision, specifically the vehicle's forward advance from the stop sign into the path of the oncoming train.[28] We note that a "specific, individual hazard" in this context is not to be confused with the preemption exception in § 20106(a)(2)(A) for an "essentially local safety or security hazard,"[29] and to that extent, we disagree with the analysis employed in *Van Buren v. Burlington Northern Santa Fe Ry. Co.*[30]

2. Discovery Order

Union Pacific filed its motion for summary judgment on December 11, 2006. The motion was generic in nature and stated only that it sought summary judgment because there were no genuine issues of material fact and it was entitled to judgment as a matter of law. On January 5, 2007, Union Pacific moved to stay discovery while the summary judgment was pending. A hearing was held on January 12, and on June 4, the court ordered that "[a]ll discovery not related to issues raised by the pending motion for summary judgment of the defendant

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[26] See, e.g., *Peters v. Union Pacific R. Co.*, 455 F. Supp. 2d 998 (W.D. Mo. 2006); *Liboy ex rel. Liboy v. Rogero ex rel. Rogero*, 363 F. Supp. 2d 1332 (M.D. Fla. 2005); *Stevenson v. Union Pacific R. Co.*, 110 F. Supp. 2d 1086 (E.D. Ark. 2000); *Bashir v. National R.R. Passenger Corp. (Amtrack)*, 929 F. Supp. 404 (S.D. Fla. 1996); *Myers v. Missouri Pacific R. Co.*, 52 P.3d 1014 (Okla. 2002); *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. 2001).

[27] *Myers v. Missouri Pacific R. Co., supra* note 26.

[28] See *id.*

[29] See *Stevenson v. Union Pacific R. Co., supra* note 26. See, also, *Myers v. Missouri Pacific R. Co., supra* note 26.

[30] *Van Buren v. Burlington Northern Santa Fe Ry. Co.*, 544 F. Supp. 2d 867 (D. Neb. 2008).

Union Pacific is stayed until resolution of that motion or further order of the court."

The parties agree that in its initial brief in support of its summary judgment motion, Union Pacific asserted that several of appellants' claims were preempted, but did not specifically refer to the claim regarding lookout and failure to stop or slow the train. Union Pacific first specifically asserted this claim was preempted in its reply brief on the motion for summary judgment. Appellants argue that because they did not know Union Pacific was seeking summary judgment on this claim until the reply brief was filed, they were unaware this claim was included in the summary judgment proceeding and therefore had not engaged in discovery on the claim.

At the final hearing on the summary judgment motion, appellants' counsel argued to the district court that the effect of its stay was to deny them the opportunity to conduct discovery on this claim. But they did not request a continuance, and instead argued to the court that the evidence before it was insufficient to prove as a matter of law that Union Pacific did not proximately cause the accident.

[8,9] According to Neb. Rev. Stat. § 25-1335 (Reissue 2008):

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The language of this statute is a counterpart to Fed. R. Civ. P. 56(f), and we have interpreted it in accordance with the federal rule.[31] The purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment.[32] The affidavit that a party submits in support of a continuance need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain

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[31] See *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

[32] *Id.*

a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.[33]

If appellants believed they could not present evidence on the failure to keep a lookout and/or failure to slow or stop the train claim because they had not conducted discovery in that area, they could have requested a continuance under § 25-1335 at the time of the summary judgment final hearing. They did not. Under these circumstances, the issuance of the discovery order was not an abuse of discretion and did not result in reversible error.

V. CONCLUSION

The district court erred in finding that appellants' claim based on failure to slow the train was preempted and in finding that no genuine issue of material fact existed on that claim. We therefore reverse, and remand for further proceedings on that claim, but affirm the judgment of the district court in all other respects.

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

WRIGHT, J., not participating.

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[33] *Id.*

MARLENE BEDORE, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE JOHN VLASIN, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS, V. RANCH OIL COMPANY, A COLORADO CORPORATION, AND BELLAIRE OIL COMPANY, A COLORADO CORPORATION, APPELLANTS AND CROSS-APPELLEES.

805 N.W.2d 68

Filed October 14, 2011. No. S-10-912.

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. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is 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.
3. **Damages: Judgments: Appeal and Error.** With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.
4. **Judgments: Costs: Appeal and Error.** The standard of review for an award of costs is whether an abuse of discretion occurred.
5. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
6. **Contracts: Mines and Minerals.** Where the parties have bargained for and agreed on a time period for a temporary cessation clause, the agreed-on time period will control over the common-law doctrine of temporary cessation allowing a reasonable time for resumption of drilling operations.
7. **Leases: Mines and Minerals.** Oil and gas leases are to be strictly construed against the lessee and in favor of the lessor.
8. **Contracts.** The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
9. **Evidence: Appeal and Error.** An appellate court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record.
10. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
11. **Leases: Mines and Minerals: Waiver: Time.** In oil and gas leases, it is well established that the acceptance of royalties by a lessor after the expiration of the primary term does not waive expiration of the lease or estop the landowner from claiming the lease is no longer valid.
12. **Damages: Appeal and Error.** An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
13. **Damages.** The trier of fact may award only those damages which are the probable, direct, and proximate consequences of the wrong complained of.
14. **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.
15. ____: ____. A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.
16. **Attorney Fees.** If an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.
17. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** A ruling under Neb. Ct. R. Disc. § 6-326(b)(4)(C)(i) is reviewed for an abuse of discretion.

Appeal from the District Court for Hayes County: David Urbom, Judge. Affirmed.

R.K. O'Donnell and James R. Korth, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellants.

Nancy S. Johnson, of Conway, Pauley & Johnson, P.C., and Thomas M. Rhoads, of Glaves, Irby & Rhoads, for appellees.

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

McCormack, J.

I. NATURE OF CASE

George John Vlasin and Betty L. Vlasin, husband and wife, leased the oil and gas rights to their land to Bellaire Oil Company and its affiliate, Ranch Oil Company (collectively Ranch Oil). Ranch Oil operated on one-half of the land described in the lease. Byron E. Hummon, Jr., owner of Hummon Corporation (collectively Hummon), operated on the other one-half of the lease. After the primary term of the lease expired and the wells stopped producing oil, George and Betty entered into a new lease agreement with Hummon which encompassed the entirety of their land. Upon learning of the agreement, Ranch Oil took action to revive one of its dormant wells by drilling out the plug and inserting pumping equipment. Ranch Oil relied on a savings provision of the lease, which stated that "this lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation." George and Betty did not believe Ranch Oil's actions saved the lease and, joined by Hummon, brought suit against Ranch Oil in 2005 for declaratory judgment, trespass, and conversion. After George's death in October 2008, Marlene Bedore was appointed as personal representative of George's estate. We will collectively refer to George (later Bedore), Betty, and Hummon as "the plaintiffs." The court ruled in favor of the plaintiffs, but awarded only nominal damages. Ranch Oil appeals, and the plaintiffs cross-appeal.

II. BACKGROUND

1. Leases

In 1980, George and Betty entered into an oil and gas lease with Murphy Minerals Corporation for approximately 1,052 acres of their land in Hayes County, Nebraska (Murphy-George/Betty lease). The Murphy-George/Betty lease was for a term of 10 years,

> and as long thereafter as oil, gas, casinghead gas, casinghead gasoline, condensate, or any of the products covered by [the Murphy-George/Betty] lease is, or can be, produced, and as long as provided in paragraphs 11, 12 and 14, and as long as any of the rights granted hereby are being exercised by lessee.

Paragraph 14 subjects the Murphy-George/Betty lease to all federal and state laws and regulations. Paragraph 11 provides:

> Notwithstanding anything in [the Murphy-George/Betty] lease contained to the contrary, it is expressly agreed that if lessee shall commence operations for drilling at any time while [the Murphy-George/Betty] lease is in force, [it] shall remain in force and its term shall continue so long as such operations are prosecuted and, if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

Paragraph 12 states:

> If within the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided operations for the drilling of a well shall be commenced before or on the next ensuing rental paying date; or provided lessee begins or resumes the payment of rentals in the manner and amount hereinbefore provided. If after the expiration of the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation, and [the Murphy-George/Betty]

> lease shall remain in force during the prosecution of such operations, and if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

At the same time, George's brother, Joseph Peter Vlasin, and his wife, Doris M. Vlasin, entered into a similar lease agreement with Murphy Minerals Corporation for their adjoining land.

2. Assignment of Leaseholds

In 1986, Harvard Petroleum Corporation, successor in interest to Murphy Minerals Corporation, assigned its lease with Joseph and Doris to Hummon (Hummon-Joseph/Doris interest). Harvard Petroleum Corporation also assigned to Hummon approximately one-half of the 1980 Murphy-George/Betty lease (Hummon-George/Betty interest). The other one-half of the Murphy-George/Betty lease was retained by Harvard Petroleum Corporation. In 1999, this one-half interest of the Murphy-George/Betty lease was conveyed to Ranch Oil (Ranch Oil-George/Betty interest).

3. Pooling Agreement and Wells

Hummon drilled and operated two wells on the Hummon-George/Betty interest: well No. 1, drilled in 1985, and well No. 2, drilled in 1987. Hummon drilled one well on the Hummon-Joseph/Doris interest, well No. 1-34, in 1987. Hummon also drilled and maintained other wells in the area under leases with neighboring landowners.

Ranch Oil operated three wells on the Ranch Oil-George/Betty interest. Well No. 34-22 was drilled in 1989. Well No. 34-23 was drilled in 1986. Well No. 34-31 was drilled in 1990. These wells were drilled by its predecessor in interest, Harvard Petroleum Corporation.

(a) Pooling Agreement

Before Hummon was able to drill well No. 1-34 in 1987, the Vlasin parties entered into a pooling agreement so that well No. 1-34 would be within a 40-acre legal subdivision, as required by the rules and regulations of the Nebraska Oil and

Gas Conservation Commission (NOGCC).[1] The pooling agreement created a 40-acre "communitized area" for the production, storage, processing, and marketing of the oil and gas produced from the land on which well No. 1-34 would be located. The royalty proceeds from the oil production on communitized areas would be divided in proportion to the parties' relative acre contributions. The pooling agreement stated:

> It is understood and agreed that . . . well [No. 1-34] as previously described, if completed as a producing oil and/or gas well m[a]y be produced for the benefit of the parties hereto under the provisions of this pooling agreement . . . and the production of oil and/or gas from said land shall constitute production in commercial quantities under the terms and conditions of each of the Oil and Gas Leases committed hereto.

Well No. 1-34 was drilled on land owned by Joseph and Doris and covered by the Hummon-Joseph/Doris interest. However, approximately 11 acres of the communitized area for well No. 1-34 was land described in the Hummon-George/Betty interest.

(b) Ranch Oil Well No. 34-31

Ranch Oil's well No. 34-31 appears to have been the last of the Ranch Oil wells to produce oil on the Ranch Oil-George/Betty interest. It became inactive in 1997. Well No. 34-31 became the subject of the trespass and conversion action currently before us, when it was reopened by Ranch Oil in 2005.

According to the director of NOGCC, before becoming inactive, well No. 34-31 was a "producing oil well from the Basal Sand from the openhole interval of 4,324 to 4,335 feet." Because of concerns that leaks from the well were invading and damaging the basal sand oil reservoir for the area, the operator of well No. 34-31 at that time positioned a sand plug in the well from 4,315 to 4,335 feet. The operator subsequently also placed a drillable cast iron bridge plug at a depth of 4,000 feet. In order to return well No. 34-31 to production following

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[1] See 267 Neb. Admin. Code, ch. 3, § 13(b) (1981). See, also, Neb. Rev. Stat. §§ 57-908 and 57-909 (Reissue 2010).

installation of the plugs, it would be necessary to drill out the cast iron plug at 4,000 feet and then drill out the sand plug from 4,315 to 4,335 feet.

(c) Hummon Wells Nos. 1-34 and 2

Hummon's well No. 1-34, located on the Hummon-Joseph/Doris interest, but within the 40-acre communitized area covering land on the Hummon-George/Betty interest, was plugged and abandoned sometime around April 14, 2005. It is unclear when, prior to that time, well No. 1-34 had ceased production. Hummon's well No. 2 was the last working well located on the Hummon-George/Betty interest. It ceased production and, in December 2005, was plugged.

4. New Lease Between George and Betty and Hummon

Upon closure of well No. 1-34 on April 14, 2005, George and Betty considered all interests conveyed under the Murphy-George/Betty lease to be expired. Although Ranch Oil did not expressly acknowledge the Ranch Oil-George/Betty interest had expired, Ranch Oil did attempt to negotiate a new lease during the first week of April. According to George and Betty, when Ranch Oil told them that it intended only to pump a preexisting well and had no intention of drilling new wells on the land, they declined to enter into a new lease agreement with Ranch Oil.

Hummon, having concluded that the Hummon-George/Betty interest had expired through nonproduction, attempted to negotiate a new lease with George and Betty around the same time. On April 14, 2005, George and Betty entered into a new lease agreement with Hummon which gave Hummon exclusive drilling and operating rights on all of George and Betty's land previously described in the Murphy-George/Betty lease. This included the part of the land that had been the subject of the Ranch Oil-George/Betty interest.

The new lease agreement between Hummon and George and Betty (hereinafter Hummon-George/Betty lease) was recorded in the office of the Hayes County clerk. George sent Ranch Oil correspondence on April 14, 2005, advising Ranch Oil of the Hummon-George/Betty lease and that Ranch Oil's rights as

lessee had expired. On April 21, Hummon sent correspondence to the NOGCC explaining its understanding that Ranch Oil had failed to further extend its lease by production and that the Ranch Oil-George/Betty interest in George and Betty's land was null and void. Hummon advised the NOGCC that Hummon had negotiated the Hummon-George/Betty lease and that Hummon would be reporting to the NOGCC as the new lessee.

5. Attempts to Preserve Ranch Oil-George/Betty Interest

Ranch Oil immediately attempted to take action to preserve the Ranch Oil-George/Betty interest and to prevent the Hummon-George/Betty lease from going into effect. Ranch Oil sent correspondence to Hummon, as well as George and Betty, asserting that the Ranch Oil-George/Betty interest was still in full force and effect and that George and Betty could not lease that land to Hummon. Ranch Oil relied on paragraph 12 of the Murphy-George/Betty lease, which stated that it "shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation." Ranch Oil claimed the relevant cessation of operations occurred on April 14, 2005, when Hummon plugged well No. 1-34 and that Ranch Oil was in the process of reestablishing production operations within 60 days from that date.

(a) Drilling

Without seeking permission to do so, on May 3, 2005, Ranch Oil moved a drilling rig to the location of well No. 34-31, with the intention of removing the cast iron and sand plugs and restoring well No. 34-31 to production. Hummon immediately sent Ranch Oil a letter, dated May 4, 2005, asserting that Ranch Oil was trespassing on the land.

Ranch Oil refused to vacate the property. On May 13, 2005, Ranch Oil began swabbing the well and recovered three barrels of swab oil. Ranch Oil recovered four barrels of swab oil on May 14. Ranch Oil filed reports with the NOGCC reflecting "production" as of May 13, 2005.

On May 16, 2005, Ranch Oil began using the drill rig to break up the bridge plug into small pieces. A bailer was then

used to drill out the debris and remove the debris from the wellbore. At one point, the drilling was halted because the drill was unable to remove the hard fill at 4,315 feet. Ranch Oil eventually was able to use a "cutrite mill" to drill it out. The president of Ranch Oil described this as "the remaining 20 feet of fill." He stated that the "drilling operation" in well No. 34-31 "opened up the productive oil sand from 4324 to 4335 feet." According to the testimony of the director of the NOGCC, Ranch Oil's operations did not drill well No. 34-31 any deeper than it was before, explaining that "basal sand is about as deep as anybody is going to drill there."

During June 2005, Ranch Oil continued swabbing oil from well No. 34-31. The swab oil initially contained small percentages of oil. It progressed to larger percentages until, by June 18, Ranch Oil swabbed 10 barrels of 100-percent oil. On June 29, Ranch Oil was able to place an insert pump in well No. 34-31. Ranch Oil started pumping the well on July 1.

(b) Production

Lease operating statements for the period from May 2005 to May 2006 show that Ranch Oil did not sell any oil extracted from well No. 34-31 until August 2005, when it sold 122 barrels for $7,149. No sales were recorded for September or October. In November, Ranch Oil sold 139 barrels for $7,421. After that, the next sale was not until May 2006, when Ranch Oil sold 128 barrels for $7,928. From those sales, Ranch Oil paid $2,812 in royalties, $472 in severance tax, and $5,334 in operating expenses, not including the investment involved in reopening the well.

From June to December 2006, lease operating statements show no oil revenue and show $18,622 in operating expenses. Lease operating statements appear to show production of 4 barrels of oil in July, 34 in August, 15 in September, 1 in October, 13 in November, and 1 in December.

6. The Plaintiffs File Suit Against Ranch Oil

In June 2005, affidavits were filed with the Hayes County clerk's office averring that no well had been drilled and that

there had been no production of oil or gas since April 14, 2005, on the Murphy-George/Betty lease. On August 25, the plaintiffs filed suit against Ranch Oil seeking declaratory judgment that the Murphy-George/Betty lease and the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease were null, void, and of no further force and effect. The plaintiffs also alleged damages from trespass and conversion.

Ranch Oil raised several affirmative defenses to the lawsuit, including waiver, laches, estoppel, unclean hands, consent, and accord and satisfaction. Ranch Oil counterclaimed for quiet title of their leasehold interest, injunctive relief, breach of contract, conspiracy to defraud, and tortious interference with contract rights.

George and Betty accepted a royalty payment from Ranch Oil on October 4, 2005, in the amount of $872.18 for production on well No. 34-31. On October 26, George and Betty's attorney advised Ranch Oil that George and Betty's acceptance of royalty payments was not to be construed as a ratification or endorsement of the validity of the Ranch Oil-George/Betty interest; it was simply acknowledgment of their right to be compensated for minerals severed from their land. Also on October 26, George and Betty's attorney requested that the distributor of the oil suspend the further payment of proceeds attributable to the working interest and overriding royalty interest in production from well No. 34-31, until the dispute concerning lease rights was resolved. George and Betty accepted two more royalty checks from Ranch Oil: $905.35 on January 19, 2006, and $967.24 on July 12.

(a) Declaratory Judgment for the Plaintiffs

Ranch Oil filed a motion for partial summary judgment asking the court to determine that the Ranch Oil-George/Betty interest had been held in production until April 15, 2005, by virtue of the operation of Hummon's well No. 1-34 and that well No. 34-31 began producing oil on May 13, within the 60-day period referred to by paragraph 12 of the Murphy-George/Betty lease. Ranch Oil asked that the court declare the Murphy-George/Betty lease in effect and the April 14, 2005, Hummon-George/Betty lease void. Ranch Oil also filed a motion for

partial summary judgment in favor of the affirmative defenses that the plaintiffs' claims were barred by waiver and estoppel, based on George and Betty's acceptance of royalty payments. Finally, Ranch Oil filed a general motion for summary judgment in its favor and against the plaintiffs.

The plaintiffs filed a general motion for summary judgment in their favor and against Ranch Oil as to all issues except for damages. The plaintiffs argued that Ranch Oil's commencement of operations was not for "'the drilling of a well'" and that, in any event, the cessation of production in well No. 1-34 did not inure to the benefit of Ranch Oil and did not provide the relevant date for the 60-day period described in paragraph 12. The plaintiffs also considered the small amounts of oil produced from well No. 34-31 to be insufficient "production" to maintain the Murphy-George/Betty lease, but they considered the facts of production contested and inappropriate for summary judgment. All parties agreed that there was no factual dispute as to most matters except damages and possibly the issue of whether Ranch Oil's operations of well No. 34-31 produced oil in paying quantities or were profitable in nature.

The district court denied Ranch Oil's motions and granted partial summary judgment in favor of the plaintiffs, concluding that the plaintiffs were entitled to a judgment declaring that the Murphy-George/Betty lease and Ranch Oil's interest therein were no longer in effect and that the new Hummon-George/Betty lease was valid and in effect. The court explained that there was no material issue of fact as to the activities conducted on well No. 34-31. Even assuming that April 14, 2005, was the relevant date from which the 60-day period began, under the plain meaning of the contract, the reworking operations conducted in this case did not qualify as "'operations for the drilling of a well.'" Because "'operations for the drilling of a well'" did not occur within 60 days from April 14, Ranch Oil failed to hold the Ranch Oil-George/Betty interest through the savings clause of paragraph 12, and the Murphy-George/Betty lease had expired.

The court denied Ranch Oil's motions for summary judgment based on waiver and estoppel and denied the plaintiffs'

motion for summary judgment as to their trespass and conversion claims. Various subsequent motions by Ranch Oil relating to the order for summary judgment were overruled, and the matter was set for a bench trial on the plaintiffs' claims for trespass and conversion. The record fails to demonstrate that, at any time, the plaintiffs sought to bifurcate their damages and attorney fees claims.

(b) Trial on Trespass and Conversion Claims

At the trial on the plaintiffs' action for trespass and conversion, the plaintiffs presented expert and lay witness testimony as to surface damage surrounding well No. 34-31 and the estimated cost of remedying that damage. They also testified as to the cost of ripping up a roadway to the well and lost revenue over the course of 3 years of $195 from 5 acres of land not able to be grazed as a result of the damage surrounding the well.

(i) Restoration of Land

On cross-examination, the plaintiffs' witnesses admitted that they were unable to identify when the alleged surface damage occurred. Ranch Oil presented testimony disputing the estimated price of restoring the land. Ranch Oil also presented testimony from the director of the NOGCC, who explained that the NOGCC had the authority and mandate to compel the bonded operator of the well, Ranch Oil, to conduct cleanup operations upon closure of the well. The director testified that the end result of these operations, supervised by the NOGCC, would be to restore the land to be capable of being used in the manner it was used prior to drilling the well.

(ii) Lost Interest Income

Hummon presented evidence, over Ranch Oil's objection, of interest income that it would have made had it been able to drill a well on the land occupied by Ranch Oil. The calculations were made by Tyler Sanders, a petroleum geologist who works for Hummon. Sanders admitted there would have been no profits because any well drilled on the land would have operated at a loss. Sanders also admitted that the oil from the undrilled well is still in place, producible, and not lost.

Nevertheless, Sanders sought to demonstrate damages using monthly posted oil prices from May 2005 to the time of trial, adding a 5-percent annual percentage rate, deducting estimated expenses, and assuming production of 11 barrels a day with no decline. Sanders' calculations resulted in an asserted loss of $18,179.77. In essence, this amount represented the estimated interest value of the estimated sales of oil from a well Hummon would have drilled on the land occupied by Ranch Oil.

The estimate of 11 barrels a day was based on what Sanders asserted were similar wells to the south, which share production from a common reservoir—although Sanders admitted on cross-examination that those wells had a higher cumulative production than wells located on land under the Murphy-George/Betty lease. The president of Bellaire Oil Company testified that the wells to the south are structurally different due to thicker sands and more water. They produce oil more efficiently than wells on George and Betty's land. He also noted that it would be impossible to estimate the production output without knowing the exact location of the well. It was undisputed that Hummon had not yet applied for a permit to drill on George and Betty's land.

The 5-percent annual percentage rate was described by Sanders as a simple annual interest. During cross-examination, Sanders conceded he did not know the average interest rate for deposits in Hayes County, either presently or during the time which Hummon would have operated a well. And the president of Bellaire Oil Company contested the methodology Hummon presented on lost interest income, asserting that the calculations omitted royalties and taxes and that they were based on noncomparable lease expenses.

(iii) Costs of Plugging Wells

Hummon also presented evidence of how much it would cost to plug Ranch Oil's wells, while Ranch Oil presented evidence that the figures presented by Hummon were inflated. Hummon had not been ordered to plug the wells that had been operated by Ranch Oil, nor was any evidence presented that Hummon would need to plug the wells to effectively operate on the Hummon-George/Betty lease. But Hummon was concerned

about future liability for this cost. Ranch Oil presented the testimony of the director of the NOGCC who explained that, in accordance with law and policy, the NOGCC would hold the current bonded operator of the wells in question, Ranch Oil, responsible for any cleanup and plugging costs to the NOGCC's satisfaction. Hummon conceded that it would not have a claim for damages relating to the cost of plugging the wells if the NOGCC determined that plugging the wells was Ranch Oil's responsibility.

(c) Order of Nominal Damages for the Plaintiffs

The court, as the trier of fact, ruled that the plaintiffs had failed to show that any damage to the property was caused during the time of Ranch Oil's trespass and conversion. The court explained that the plaintiffs failed to show when the damage occurred and who caused the damage. The court also concluded that pursuant to Neb. Rev. Stat. § 57-905 (Reissue 2010), the NOGCC had exclusive authority to compel any cleanup of the well site. Thus, while Ranch Oil is legally required to restore the premises, the plaintiffs failed to prove their claim for damages for restoration of the premises. The court similarly found that the NOGCC had the exclusive authority to require Ranch Oil to plug the wells and that this was not a matter for which the plaintiffs were entitled to damages.

The court found that the plaintiffs failed to prove their claim for lost profits. The court noted that Sanders assumed production and interest rates that were not based in fact and concluded that Sanders' methodology for determining lost profits was not valid. In addition, the court noted that Neb. Rev. Stat. § 57-205 (Reissue 2010) allows only the owner of the leased premises to recover damages and that there was no evidence of lost profits suffered by the landowners.

The court found that the plaintiffs failed to meet their burden of proof on the issue of attorney fees, because no evidence was submitted to the court on attorney fees. Because of the failure to prove any damages, the court issued an order dismissing the plaintiffs' claims for trespass and conversion and Ranch Oil's counterclaim. The court awarded George and Betty

costs and nominal damages in the amount of $100, pursuant to § 57-205.

The plaintiffs filed a motion to alter or amend the judgment, or, in the alternative, for new trial. The plaintiffs principally took issue with the district court's failure to award the amount of damages to which their witnesses attested. The plaintiffs also asserted that the issue of attorney fees was whether they were recoverable, not their amount, since the fees were ongoing. The court overruled the motion for new trial, and the parties filed the present appeal and cross-appeal.

III. ASSIGNMENTS OF ERROR

Ranch Oil assigns that the district court erred in failing to find that (1) the plaintiffs were required to give notice to Ranch Oil of any alleged breach of the Murphy-George/Betty lease with a demand that the terms of the implied covenant of production be complied with within a reasonable time as a condition precedent to the filing of the subject lawsuit demanding forfeiture of the Murphy-George/Betty lease; (2) all that was required under the Murphy-George/Betty lease was commencement of drilling operations and that Ranch Oil's activities had, in fact, been a commencement of drilling operations within 60 days of April 14, 2005; and (3) the plaintiffs' acceptance of royalty payments from the production of the well waived any alleged breach of the Murphy-George/Betty lease and estopped the plaintiffs from asserting such claims and bringing this lawsuit.

On cross-appeal, the plaintiffs assign that the district court erred in failing to (1) find liability for trespass and conversion, (2) award sufficient damages, (3) award Hummon damages for the cost of plugging abandoned wells, and (4) award costs and attorney fees.

IV. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts

and that the moving party is entitled to judgment as a matter of law.[2]

[2] The meaning of a contract is 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.[3]

[3] With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[4]

[4] The standard of review for an award of costs is whether an abuse of discretion occurred.[5]

V. ANALYSIS

Generally, an oil and gas lease consists of a definite term and an indefinite term beyond which the definite term of the lease may be extended.[6] The definite term is a specified exploratory period within which the lessee invests in discovering oil and establishing production.[7] Thereafter, the lease may be continued into an indefinite term, so long as production continues, through a continuous production clause.[8]

When such continuous production ceases, the lease automatically terminates unless there is some other provision which would prevent termination.[9] A cessation of production clause, also referred to as a "resumption of operations" or "savings clause," may make it possible for the lessee to preserve the

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[2] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[3] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[4] *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 736 N.W.2d 737 (2007).

[5] See *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

[6] 38 Am. Jur. 2d *Gas and Oil* § 211 (2010).

[7] See, e.g., *Fremont Lbr. Co. v. Starrell Pet. Co.*, 228 Or. 180, 364 P.2d 773 (1961).

[8] See *id.*

[9] 2 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 26.8 (1989 & Cum. Supp. 2009). See, also, *Kirby v. Holland*, 210 Neb. 711, 316 N.W.2d 746 (1982).

lease beyond the primary term by resumption of operations if production should cease.[10] The various clauses of an oil and gas lease are designed to complement one another and to be mutually exclusive in operation.[11]

[5] The Murphy-George/Betty lease contained a primary definite term of 10 years, with a provision for extension by continuous production.[12] The parties agree that, at the latest, production ceased by April 14, 2005. In their pleadings and at the hearings on the motions for summary judgment, Ranch Oil asserted that the Murphy-George/Betty lease was still valid, because it had met the requirements of paragraph 12. Now, on appeal, it also argues that its operations satisfied paragraph 11. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[13] Nevertheless, we find the language of the Murphy-George/Betty lease to be clear. Because production ceased after expiration of the primary term, the relevant provision is the savings clause found in paragraph 12:

> If after the expiration of the primary term of [the Murphy-George/Betty] lease, production on the leased premises shall cease from any cause, [the Murphy-George/Betty] lease shall not terminate provided lessee commences operations for drilling a well within sixty (60) days from such cessation, and [the Murphy-George/Betty] lease shall remain in force during the prosecution of such operations, and if production of any of the minerals covered by [the Murphy-George/Betty] lease results therefrom, then as long as such production continues.

[6] Where the parties have bargained for and agreed on a time period for a temporary cessation clause, the agreed-on time period will control over the common-law doctrine of temporary cessation allowing a "reasonable time" for resumption of

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[10] See 4 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 47.3 at 98 (1990 & Cum. Supp. 2009).

[11] See *id.*, § 47.4(f)(3).

[12] See 2 Kuntz, *supra* note 9, § 26.4.

[13] See *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

drilling operations.[14] Thus, Ranch Oil needed to "commence[] operations for drilling a well" no more than 60 days from the date of cessation of production. Because we find the issue of what acts qualify as "commenc[ing] operations for drilling a well" is decisive, we, like the district court, will assume, without deciding, that production on Murphy-George/Betty lease ceased on April 14, 2005.

1. Commencement of Operation for Drilling Well

[7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[15] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[16] As for clauses of special limitation, or so-called unless clauses, controlling the duration of a lessee's interest in an oil and gas lease, we have held that such clauses give rise to a strict construction in favor of the lessor and against the lessee.[17] This conforms to the general rule that oil and gas leases are to be strictly construed against the lessee and in favor of the lessor.[18]

[8] When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.[19] The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[20]

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[14] *Hoyt v. Continental Oil Co.*, 606 P.2d 560, 564 (Okla. 1980). Accord, *Wilson v. Talbert*, 259 Ark. 535, 535 S.W.2d 807 (1976); *Greer v. Salmon*, 82 N.M. 245, 479 P.2d 294 (1970).

[15] *Katherine R. Napleton Trust v. Vatterott Ed. Ctrs.*, 275 Neb. 182, 745 N.W.2d 325 (2008).

[16] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P., supra* note 3.

[17] See *Valentine Oil Co. v. Powers*, 157 Neb. 71, 59 N.W.2d 150 (1953).

[18] See *id.*

[19] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008).

[20] See *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

Ranch Oil argues that any operations preparatory to restoring an old well to production would constitute "commenc[ing] operations for drilling a well." The plaintiffs read the phrase more narrowly and argue that the end result of the operations must be the making of a new hole in the ground. The meaning of "commence[] operations for drilling a well" is a question of first impression for our court.

(a) Commencement

In its reading of the Murphy-George/Betty lease, Ranch Oil first relies on the fact that the term "commencement" has been held to encompass preparatory activity, such as making and clearing a location and delivering equipment to the well site. We agree that it is the general rule that activities preparatory to the specified operation are sufficient to satisfy commencement clauses.[21] However, the literal provisions of the clause in question will govern what type of operation must be commenced or resumed.[22]

Thus, if the clause specifically provides for the resumption or commencement of drilling, no other operation will satisfy the clause.[23] If the clause is to commence drilling operations, then the preparatory acts must be "'preliminary to the beginning of the actual work of drilling'" and performed with "'the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of th[e] clause of the lease.'"[24] In the case of a provision requiring that the lessee commence to drill a well, it is not necessary that the lessee actually be penetrating the surface with drilling equipment within the period of time specified by the clause,[25] but it has been said that "the preparatory activity must

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[21] See 3 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 32.1 (1989 & Cum. Supp. 2009).

[22] 4 Kuntz, *supra* note 10, § 47.5.

[23] *Id.*

[24] *Walton v. Zatkoff*, 372 Mich. 491, 498, 127 N.W.2d 365, 369 (1964), quoting 2 W.L. Summers, The Law of Oil and Gas § 349 (perm. ed. 1959).

[25] 3 Kuntz, *supra* note 21, § 32.3(b). See, also, 2 Summers, *supra* note 24.

be in good faith and must be of the type which is associated with or can be expected to precede immediately the process of making [a] hole."[26]

(b) Operations

Ranch Oil also relies on general definitions of "operations."[27] We agree with the plaintiffs that the cases relied on by Ranch Oil are inapposite to the issue of what "commence[] operations for drilling a well" means. In *Bargsley v. Pryor Petroleum Corp.*,[28] the oil and gas lessee made similar arguments. The lessee noted that he had "long-strok[ed]" the existing well to increase its pumping capabilities; laid pipeline to the well; performed electrical work; maintained electricity; and installed, checked, and repaired flow lines.[29] He argued that the lease remained in force under the language in the contract allowing for extensions if "'drilling operations'" were being prosecuted.[30] But the court disagreed, explaining that "[w]hile these activities under certain circumstances might be considered to be 'operations,' that is a question we do not address as these 'operations' are not 'drilling operations' as a matter of law."[31] The operations undertaken, the court concluded, were not preliminary to the actual work of drilling.[32]

(c) Drilling of Well

The terms "commence" and "operations," as used in the Murphy-George/Betty lease, plainly refer to the act of "drilling a well." The phrase "drilling a well" is not defined in the Murphy-George/Betty lease itself. The Oil and Gas Lien Act[33]

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[26] 4 Kuntz, *supra* note 10, § 47.4(3) at 125.

[27] See, e.g., *Walton v. Zatkoff, supra* note 24; *Breaux v. Apache Oil Corporation*, 240 So. 2d 589 (La. App. 1970).

[28] *Bargsley v. Pryor Petroleum Corp.*, 196 S.W.3d 823 (Tex. App. 2006).

[29] *Id.* at 826.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] See Neb. Rev. Stat. § 57-801 et seq. (Reissue 2010).

defines "drilling" as "drilling, digging, torpedoing, acidizing, cementing, completing, or repairing,"[34] but it does not define "drilling a well." Neither do the NOGCC's rules and regulations define "drilling a well."

The Concise Oxford American Dictionary defines the verb "drill" as to "produce (a hole) in something by or as if by boring with a drill," to "make a hole in (something) by boring with a drill," and to "make a hole in or through something by using a drill."[35] As Ranch Oil points out, other courts have held that the use of the simple phrase "drilling operations" in an oil and gas lease can encompass the activity of drilling through a cement plug of an old well—since the lessee is making a hole, with a drill, through something.[36] But here, the relevant phrase defining the operations which must be commenced is "drilling a well."

The word "well" is defined as "a shaft sunk into the ground to obtain water, oil, or gas."[37] Thus, under these definitions, "drilling a well" would be to produce, by using a drill, a long, narrow hole sunk into the ground to obtain water, oil, or gas. We conclude that this definition generally conforms to the plain meaning of the phrase as used in the Murphy-George/Betty lease. And we conclude that using a drill to simply remove cast iron and sand plugs from an old well is not "operations for drilling a well" as contemplated by the Murphy-George/Betty lease.

The weight of authority agrees that general reworking operations, which do not involve making a new hole, are not "operations for drilling a well." One commentator states that "reworking operations will not satisfy a clause that requires the resumption of 'operations for drilling a well.'"[38] While cases on this issue are rare, in *Petroleum Engineers Producing*

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[34] § 57-801(8).

[35] Concise Oxford American Dictionary 275 (2006).

[36] See, *Huhn v. Marshall Exploration, Inc.*, 337 So. 2d 561 (La. App. 1976); *Browning v. Cavanaugh*, 300 S.W.2d 580 (Ky. 1957).

[37] Concise Oxford American Dictionary, *supra* note 35 at 1029.

[38] 4 Kuntz, *supra* note 10, § 47.5 at 137.

Corp. v. White,[39] the Supreme Court of Oklahoma held that the drilling of input wells and other repressuring operations designed to produce additional oil from an old well were not "'"commenc[ing] to drill a well"'" within the terms of the lease. Similarly, in *French v. Tenneco Oil Co.*,[40] the court held that reworking operations, which included "swabbing the well, blowing the well to the atmosphere, acidizing, injecting [a chelating agent], and pulling tubing, reperforating and sand fracturing," did not satisfy a clause providing that the lease will not terminate if "'operations for drilling a well'" are resumed within 60 days of cessation of operations.

[9] Ranch Oil points out that one court has considered "reworking or redrilling" an old well to be "drilling" a well, as that term was used in an oil and gas lease,[41] but we note that one of the wells in that case was "redrill[ed]" to a significantly greater depth than it had been before.[42] Although counsel for Ranch Oil has asserted in oral arguments that Ranch Oil drilled well No. 34-31 deeper than it had been prior to being closed, we find no evidence of that fact from the record. This court cannot consider as evidence statements made by the parties at oral argument or in briefs, as these are matters outside the record.[43] A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[44] All the evidence in the record, viewed in a light most favorable to Ranch Oil, indicates that drilling equipment was used to remove the fill and bridge that had been placed in the well and that the depth of well No. 34-31 was approximately the same after these reworking operations as before—4,335 feet deep.

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[39] *Petroleum Engineers Producing Corp. v. White*, 350 P.2d 601, 603 (Okla. 1960).

[40] *French v. Tenneco Oil Co.*, 725 P.2d 275, 276-77 (Okla. 1986).

[41] Brief for appellants at 16, quoting *Kothmann v. Boley*, 158 Tex. 56, 308 S.W.2d 1 (1957).

[42] See *Kothmann v. Boley, supra* note 41, 158 Tex. at 59, 308 S.W.2d at 7.

[43] See *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

[44] *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002).

[10] While the parties to the Murphy-George/Betty lease could have written the savings provision of paragraph 12 to include both the "commenc[ing] of operations for drilling a well" and reworking—or even general "drilling operations"—they did not. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.[45] On the face of the instrument, the parties did not intend that restoring an old well to production, through use of drilling equipment to remove fill and a bridge plug, would be sufficient to save the Murphy-George/Betty lease once there had been a cessation of production. This is presumably because the parties anticipated that an old well, reopened, would not produce sufficient quantities of oil for the lessors to have an interest in prolonging the Murphy-George/Betty lease. We find that the phrase "commence[] operations for drilling a well" is unambiguous and that, viewing the evidence in a light most favorable to Ranch Oil, Ranch Oil did not "commence[] operations for drilling a well" within 60 days of cessation of production.

2. Waiver and Estoppel

[11] Even if its actions did not satisfy the terms of the savings clause, Ranch Oil argues that we should reverse the district court's grant of declaratory judgment for the plaintiffs, because George and Betty accepted royalty payments and have thereby waived the breach. Ranch Oil relies on landlord-tenant case law addressing the acceptance of rent after a lessee's default. But, in oil and gas leases, it is well established that the acceptance of royalties by a lessor after the expiration of the primary term does not waive expiration of the lease or estop the landowner from claiming the lease is no longer valid.[46] It has been explained that it would be improper to estop the lessor from denying that the lease has terminated based merely on the acceptance of a royalty, because the royalty is but a

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[45] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[46] See, e.g., 2 Summers, *supra* note 24, § 305. See, also, 3 Kuntz, *supra* note 21, § 43.2.

fraction of the total production to which the lessor would be entitled to receive if the lessee were not occupying the land.[47] The district court did not err in denying Ranch Oil's estoppel claim.

Ranch Oil's assignment of error regarding the district court's failure to find that George and Betty were required to give notice of any alleged breach of the Murphy-George/Betty lease does not appear to have been argued in its brief. In order to be considered by an appellate court, the alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[48] Nevertheless, we note that it is also well established that if the lessee fails to act under a clause of special limitation in an oil and gas lease to keep the lease in force, then "the lease terminates without any action being required by the lessor or the lessee."[49] In other words, termination of the lease is "automatic and self-operating."[50] Accordingly, the lessor is under no obligation to give notice of termination to the lessee.[51]

We conclude that the district court properly denied Ranch Oil's affirmative defenses. Because Ranch Oil failed to satisfy the savings clause of the Murphy-George/Betty lease as a matter of law and failed to raise any issue of material fact as to its affirmative defenses of waiver and estoppel, we affirm the partial summary judgment of the district court declaring the Murphy-George/Betty lease to no longer be in force and effect. We turn now to the plaintiffs' counterclaims.

3. Plaintiffs' Cross-Appeal

[12] We next address the plaintiffs' cross-appeal, asserting that the district court erred in failing to award Hummon the cost of plugging Ranch Oil's wells, and in failing to award

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[47] See 3 Kuntz, *supra* note 21, § 43.2.

[48] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[49] *Valentine Oil Co. v. Powers, supra* note 17, 157 Neb. at 85, 59 N.W.2d at 159.

[50] *Id.*

[51] See *id.*

the plaintiffs damages resulting from trespass and conversion, costs and attorney fees, and deposition expenses. With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[52] The fact finder's determination is given great deference[53] and will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.[54] An award of damages may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.[55] We affirm the district court's judgment on all matters except deposition expenses.

(a) Surface Damage and Estimated Cost of Plugging

[13] Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages.[56] The trier of fact may award only those damages which are the probable, direct, and proximate consequences of the wrong complained of.[57] As the district court noted, none of the witnesses were able to testify that the alleged surface damage occurred during the time of Ranch Oil's unlawful occupancy. Thus, they were unable to prove surface damages caused as a result of the trespass and conversion theories under which the plaintiffs sought relief.

Moreover, claims for restoration of surface damage sustained through reasonable use of the surface estate do not sound in tort, but are instead recoverable in an action in

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[52] *ADT Security Servs. v. A/C Security Systems, supra* note 4.

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

[54] See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

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

[56] *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 639 N.W.2d 88 (2002).

[57] See *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003).

contract for breach of express covenants in the lease—and sometimes, under implied covenants of the lease.[58] In this case, the plaintiffs made no argument for damages based on breach of contract.

The duty to plug abandoned or disused oil and gas wells is most often found to be a creature of statutory or regulatory enactment.[59] Indeed, as the director of the NOGCC testified, the NOGCC has been given the authority to regulate and compel the plugging of wells and to order surface restoration.[60] NOGCC regulations state that the person who drilled or caused to be drilled any well for oil or gas shall be liable and responsible for the plugging thereof in accordance with the rules and regulations of the NOGCC.[61] The director of the NOGCC testified that Ranch Oil, as assignee, would be responsible under NOGCC rules and regulations for plugging the wells in question and performing any necessary surface remediation. Regulations provide that all pits shall be backfilled within 1 year after completion of drilling operations and that biodegradable mulch may be required if establishment of vegetation is determined to be a problem by the director,[62] that all soil containing over 1-percent petroleum hydrocarbons must be remediated or disposed of,[63] and that the NOGCC shall have final authority to determine if the affected land has been restored to its prior beneficial use.[64]

We need not determine whether the NOGCC's jurisdiction over these matters is exclusive to conclude that the district court did not err in denying damages to the plaintiffs. "[U]nder any theory of action the plaintiff will have the burden of

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[58] See, 38 Am. Jur. 2d, *supra* note 6, § 302; Annot., 62 A.L.R.4th 1153 (1988); Annot., 50 A.L.R.3d 240 (1973). See, also, e.g., *Exxon Corp. v. Tyra*, 127 S.W.3d 12 (Tex. App. 2003).

[59] 50 A.L.R.3d, *supra* note 58.

[60] § 57-905.

[61] 267 Neb. Admin. Code, ch. 3, § 029 (1994).

[62] *Id.*, §§ 012.14 and 012.15.

[63] *Id.*, § 022.03.

[64] *Id.*, § 022.10.

proving that the alleged damage was, in fact, caused by the failure of the defendant to plug."[65] The allegation of damages which might arise in the future is premature and fails to sustain this burden.[66] The plaintiffs did not present any evidence that Ranch Oil's failure to plug has caused them direct harm. Indeed, it appears to be Ranch Oil's intention to plug the wells and restore the property to the NOGCC's satisfaction once it is finally determined that the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease has expired and that it is required to abandon the wells. The plaintiffs seem concerned only that they *might*, in the future, be required to pay for plugging the wells if Ranch Oil fails to do so. Since those events have not and possibly may not ever come to be, any claim based thereon is premature.

(b) Lost Income

The district court likewise did not clearly err in concluding that the evidence of lost interest income was speculative. Hummon admitted that the oil itself was still there to be extracted. Hummon's representative explained that any well Hummon would have operated on the land would have operated at a loss once expenses were considered. The plaintiffs sought only the interest on the investment of gross production from a well Hummon would have allegedly drilled, based on hypothetical production rates and on an assumed interest rate that admittedly had no correspondence to any known interest rate. The plaintiffs sought to demonstrate these lost "profits" through the testimony of Sanders, the petroleum geologist who worked for Hummon.

[14,15] A plaintiff's burden to prove the nature and amount of its damages cannot be sustained by evidence which is speculative and conjectural.[67] A claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and

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[65] 50 A.L.R.3d, *supra* note 58, § 2[b] at 252.

[66] See *Fulk v. McLellan*, 243 Neb. 143, 498 N.W.2d 90 (1993).

[67] *Liberty Dev. Corp. v. Metropolitan Util. Dist.*, 276 Neb. 23, 751 N.W.2d 608 (2008).

exactness.[68] We have explained that, in many instances, lost profits from a new business are too speculative and conjectural to permit recovery of damages.[69] Such was the case here. Without having drilled a well or even knowing the exact location of the well Hummon would have allegedly drilled if Ranch Oil had not been occupying the land, the production estimates presented by Sanders were too tenuous. Even if production rates could be established, Hummon failed to adequately demonstrate how it would have invested the proceeds from the sales and what interest rate would have been applicable to the investments.

(c) Lease Extension Payment

Hummon further argues on appeal that the district court erred in granting Ranch Oil's pretrial motion to exclude lease extension costs as an element of damages in their trespass and conversion claim. Hummon allegedly paid $5,260 for the Hummon-George/Betty lease for another 5 years. According to Hummon, this payment should be recoverable as a necessary expenditure to protect Hummon's rights as lessee, given Ranch Oil's occupation of the land and the protracted nature of the litigation. The district court concluded that Hummon, as lessee, did not have any right to recover damages under § 57-205.

For reasons different from those articulated by the district court, we affirm its ruling.[70] While a lessee is not listed as a party who may sue under § 57-205, that statute does not indicate that common-law remedies are no longer available to lessees. And it is generally recognized that the lessee acquires an interest in the land under an oil and gas lease and that the lessee will be protected in the enjoyment of such interest.[71] Nevertheless, we can find no support for Hummon's contention that a lessee may recover as damages the cost of his or her

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[68] *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

[69] See *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[70] See, e.g., *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

[71] 2 Kuntz, *supra* note 9, § 25.1.

election to renew a lease in order to make up for time lost on the land due to a prior lessee's occupation and protracted litigation over the validity of the occupation. Hummon's attempt to introduce evidence of the amount that Hummon negotiated with George and Betty for the 5-year Hummon-George/Betty lease was, in essence, an attempt to circumvent its burden to show the nature and amount of damages that are the probable, direct, and proximate consequences of the first lessee's occupation of the land. As already discussed, the record indicates that if Hummon had been able to occupy the land, it would have lost money. The cost of a lease extension is not reflective of Hummon's actual loss directly resulting from Ranch Oil's alleged trespass and conversion, and the district court did not err in granting Ranch Oil's motion to exclude that evidence.

(d) Attorney Fees

[16] The standard of review for an award of costs is whether an abuse of discretion occurred.[72] The district court did not abuse its discretion in failing to award attorney fees and costs to the plaintiffs. We have explained that "if an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made."[73] The plaintiffs here presented no evidence to the district court regarding attorney fees. In *Lomack v. Kohl-Watts*,[74] the Nebraska Court of Appeals affirmed the trial court's denial of attorney fees when the party seeking them had similarly failed to present any evidence upon which the trial court could make a meaningful award of fees. We likewise affirm the district court's denial of attorney fees in this case.

Although the plaintiffs suggest they did not present evidence of attorney fees because they believed they would have an opportunity to provide proof of attorney fees at some later date,

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[72] See *Malicky v. Heyen, supra* note 5.

[73] *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 514, 614 N.W.2d 778, 787 (2000).

[74] *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004). See, also, *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980).

the trial was for the plaintiffs' remaining claims relating to trespass and conversion and there was no reasonable basis for the plaintiffs' silent assumption. The plaintiffs did not request, nor did the district court suggest, that the trial would be bifurcated so as to consider attorney fees at a later time. Thus, the plaintiffs' failure of proof is decisive of this issue.

(e) Deposition Costs and Fees

Finally, the plaintiffs assert that the district court erred in failing to order that Ranch Oil pay for the costs and fees of depositions called by Ranch Oil. The plaintiffs had filed a motion to compel payment of witness fees and expenses, to which they attached an invoice reflecting those costs. The district court never expressly ruled on the motion; it was implicitly denied by the final judgment which failed to award these costs.[75]

The plaintiffs' motion sought payment of witness fees and expenses under Neb. Ct. R. Disc. § 6-326(b)(4)(C)(i) and under Neb. Rev. Stat. § 25-1228 (Reissue 2008). Section 25-1228 is inapplicable. It provides that

> a witness may demand his traveling fees, and fee for one day's attendance, when the subpoena is served upon him, and if the same be not paid the witness shall not be obliged to obey the subpoena. The fact of such demand and nonpayment shall be stated in the return.

The plaintiffs' deposition witnesses appeared despite Ranch Oil's failure to pay for traveling fees, and there is no provision in § 25-1228 for a court to compel a postdeposition reimbursement of fees.

[17] Section 6-326(b)(4)(C)(i) states that unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. However, payment of discovery fees under § 6-326 is limited to discovery obtained under subdivisions (b)(4)(A)(ii) and (b)(4)(B). Subdivision (b)(4)(A)(ii) states: "Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such

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[75] See *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate." Subdivision (b)(4)(B) states:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in [Neb. Ct. R. Disc. § 6-3]35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

A ruling under § 6-326(b)(4)(C)(i) is reviewed for an abuse of discretion.[76] The plaintiffs' motion to compel payment of witness fees and expenses failed to establish that the depositions were sought or obtained pursuant to either subdivision (b)(4)(C) or subdivision (b)(4)(B). Accordingly, the district court did not abuse its discretion in denying the fees and expenses requested by the motion.

VI. CONCLUSION

We affirm the district court's determination, as a matter of law, that Ranch Oil's activities on George and Betty's land did not operate so as to extend the Ranch Oil-George/Betty interest in the Murphy-George/Betty lease. We also affirm the district court's determination that the plaintiffs had failed to prove they were entitled to damages under common-law trespass and conversion claims and that George and Betty were entitled only to the nominal amount of $100, as specified in § 57-205. Finally, we affirm the denial of the plaintiffs' motions for attorney fees and expert witness fees and expenses.

AFFIRMED.

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[76] See *Future Motels, Inc. v. Custer Cty. Bd. of Equal.*, 252 Neb. 565, 563 N.W.2d 785 (1997).

IN RE INTEREST OF LAKOTA Z. AND JACOB H., JR., CHILDREN UNDER 18 YEARS OF AGE. JERI H. AND DENNIS H., APPELLANTS, V. JACOB H., SR., APPELLEE.

804 N.W.2d 174

Filed October 14, 2011. No. S-10-1046.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
3. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
4. **Parental Rights: Guardians and Conservators: Presumptions.** In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
5. **Parental Rights: Guardians and Conservators: Proof.** An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
6. **Juvenile Courts: Parental Rights: Due Process.** Even when children are adjudicated and under the jurisdiction of a juvenile court, the Due Process Clause of the U.S. Constitution demands some showing of parental unfitness if parents are to be deprived of their interest in the care, custody, and control of their children.
7. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent that is overcome only when the parent has been proved unfit.
8. **Juvenile Courts: Parental Rights: Case Disapproved.** To the extent that *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000), holds that the parental preference principle is not applicable to an adjudicated juvenile, it is disapproved.
9. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing or which has caused, or probably will result in, detriment to a child's well-being.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Affirmed.

Jerry Fogarty for appellants.

James A. Wagoner for appellee.

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

GERRARD, J.

The children who are the subject of this guardianship case were adjudicated and placed in the care and custody of their paternal grandparents after their parents neglected them, and their grandparents were eventually appointed their guardians. But their father, after completing drug court and obtaining counseling, sought to have the guardianship terminated and his children returned to him. The county court, finding that the father was not an unfit parent, ordered that the guardianship would terminate. The question presented in this appeal is what standard of proof should have been applied to the father's request for termination of the guardianship.

BACKGROUND

This case began with a juvenile petition filed in county court on June 10, 2003, alleging that Lakota Z. and Jacob H., Jr. (Jacob Jr.), were children as defined under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), because they lacked proper parental care and were in a situation that was dangerous to their health or morals. The petition was supported by the affidavit of a child protective services worker, who averred that 21-month-old Lakota and 7-month-old Jacob Jr. were at risk due to parental neglect. Specifically, the affidavit indicated that Grand Island, Nebraska, police had found the children's home to contain drug paraphernalia, but not food or diapers, and that after a domestic dispute between their parents, the children had been moved to the home of their paternal grandparents, Jeri H. and Dennis H. The court issued an ex parte order placing Lakota and Jacob Jr. in the temporary custody of the Nebraska Department of Health and Human Services (DHHS).

The children's father, Jacob H., Sr. (Jacob Sr.), was charged with child neglect and drug possession, along with false imprisonment and assault arising out of a fight with the children's mother. Jacob Sr. admitted at trial that he had assaulted the

children's mother on several occasions. The objective of the initial case plan was reunification, and with respect to Jacob Sr., the case plan established goals of managing his anger, addressing his individual health needs, living a chemical-free lifestyle, and providing for the children's needs. Jacob Sr. did not obtain counseling and was removed from a family violence treatment program for noncompliance. But a DHHS caseworker testified that during that time, she believed Jacob Sr. and the children's mother might be able to "get their lives back on track." So, the second juvenile court case plan provided for guardianship, and not termination of parental rights.

The guardian ad litem petitioned that Jeri and Dennis be appointed as the children's guardians. The county court appointed them as guardians in an order filed under the juvenile case docket number on April 1, 2004. DHHS closed its case file on the children. DHHS, the county attorney, Jacob Sr., and the children's mother all waived any notice or participation in any further court proceedings.

Jacob Sr. was admitted to drug court in 2005 and successfully completed the program in 2006. Jacob Sr.'s relationship with the children's mother ended at about the same time he entered the drug court program. In 2008, Jacob Sr. filed a motion in county court, under the juvenile case docket number, to terminate the guardianship. He alleged that the reasons the guardianship had been established had been ameliorated, because he had completed a drug court program and drug treatment, married, obtained gainful employment and suitable housing for the children, and "emotionally reunited" with the children. By the time of trial, Jacob Sr. had been working full time for 2 years and was also working part time at another job. His employment provided insurance for the children. In his motion, Jacob Sr. alleged that he was a fit and proper person to have exclusive care and custody of his children and that it would be in the children's best interests for him to resume custodial care. A November 2008 journal entry established a visitation schedule for Jacob Sr. and the children.

Much of the evidence presented at trial was directed at Jacob Sr.'s ongoing difficulties controlling his temper. In December 2008, Jacob Sr. was involved in an argument with his parents

at their home when he arrived to pick the children up for visitation. Jacob Jr. did not want to go, and Jacob Sr. became angry when he and his parents disagreed about how to handle the situation. Jacob Sr. admitted to other angry outbursts that had occurred during 2008: specifically, an argument with his wife and another argument with a store clerk. And he admitted that his children had witnessed such outbursts. There was conflicting testimony about whether, during his argument with his wife, Jacob Sr. had knocked items off of bookshelves or broken a piece of furniture.

In October 2009, Jeri and Dennis filed a motion to suspend visitation based on an incident during a counseling session involving Jacob Sr. and his mother that resulted in Jacob Sr.'s swearing at the children's counselor, Tracy Waddington, and slamming the door as he left. The motion was granted ex parte. Jacob Sr. admitted to the incident. But afterward, Jacob Sr. sought his own mental health treatment and engaged his own counselor to treat him for his anger control problems.

Janice Rockwell, a licensed independent mental health practitioner, testified that she had begun treating Jacob Sr. for anger management in October 2009. She said that she had observed Jacob Sr. and the children during joint counseling and said they seemed comfortable with him. She said that Jacob Sr. had learned coping skills to deal with anger appropriately and opined that Jacob Sr. did not have an anger control problem at the time of trial. She also said that she had no concerns about Jacob Sr.'s being any kind of threat to the children's safety, and that she had also jointly seen Jacob Sr. and his parents and that they had made progress in that relationship.

Jacob Sr. testified that he and Rockwell had discussed ways to interact with the children and to defuse conflicts with his parents. He said that he had not had a significant argument with his parents since December 2008. Jeri testified that Jacob Sr. had originally resisted participation in counseling. But Jeri said that she, Dennis, and Jacob Sr. had participated in some joint counseling with Rockwell that Jeri thought had gone well. When asked, Jeri admitted that while she still wanted the children to live with her and Dennis pursuant to the guardianship, she did not believe Jacob Sr. was an unfit parent.

Waddington, however, who had seen Jacob Sr. twice in the context of family therapy, opined that Jacob Sr. was deficient in addressing his relationship with Jeri and Dennis, which she felt was detrimental to the children's well-being. But when asked if she believed Jacob Sr. was an "unfit" parent, she said only that she had "concerns" about him. Essentially, the record reflects a difference of opinion between the family's counselors: Waddington believed that the relationship that should be addressed first was that between Jacob Sr. and his parents, while Rockwell thought that the relationship between Jacob Sr. and the children was more important.

Visitation had resumed regularly for Lakota after the interruption pursuant to the ex parte order, but Jacob Jr. stopped going to Jacob Sr.'s home for visitation in early 2010. Generally described, the evidence establishes that Jacob Jr. is a picky eater, and he can make himself vomit when he is given something that he does not want to eat. Jacob Sr. is less willing to accommodate Jacob Jr.'s picky eating than Jeri and Dennis, or Waddington, would prefer. Waddington explained that according to Jacob Jr., Jacob Sr. took a harder line with him on his eating preferences and that that was one of the primary reasons Jacob Jr. was reluctant to visit or live with Jacob Sr.

Evidence was also adduced at trial regarding Jacob Sr.'s use of alcohol. Jacob Sr. admitted drinking alcohol, but not to excess, and estimated that he drank about 12 beers a week. He did, however, admit that he had gotten drunk on his birthday 2 years before trial. Jacob Sr. seemed surprised when confronted at trial with an exhibit suggesting that, as a part of his drug court evaluation, he had been diagnosed with both drug and alcohol dependence. There was no evidence submitted at trial to suggest that Jacob Sr. drank to excess with any regularity, nor did any evidence establish that Jacob Sr. had gotten drunk more recently than 2 years before trial.

In summary, the evidence suggested that Jacob Sr. had serious substance abuse issues and emotional problems that he began to control after his drug court experience and associated substance abuse treatment. Although Jacob Sr. had a history of physical violence toward the children's mother, she testified that during her relationship with Jacob Sr., they had been

using drugs, and that any instances of domestic abuse between them took place before Jacob Sr. was admitted to drug court. And, she said, even before then, Jacob Sr. was good with the children. The record contains no evidence of any assaultive conduct by Jacob Sr. after his completion of drug court, nor does it contain any evidence that he was abusive to the children even before then. And while the record suggests that Jacob Sr. continued to struggle with anger control even after completing drug court, the evidence also establishes that he has certainly made substantial progress on that issue since beginning his own counseling.

After trial, on October 12, 2010, the county court entered an order finding that while the court was "concerned with the shortcomings" of Jacob Sr., the court did "not believe the evidence establishes the burden necessary to show that he is unfit and has, in fact, forfeited his parental rights." The court entered an order terminating the guardianship, effective January 1, 2011. Jeri and Dennis appeal.

ASSIGNMENTS OF ERROR

Jeri and Dennis assign that the county court erred in (1) incorrectly placing the burden of proof upon them instead of upon Jacob Sr. and applying the incorrect standard of proof in focusing upon parental unfitness instead of the best interests of the children and (2) terminating the guardianship and awarding custody to Jacob Sr.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[1]

ANALYSIS

Standard of Proof

As noted above, the county court terminated the guardianship based on its conclusion that Jacob Sr. was not an unfit parent. Jeri and Dennis argue that the court incorrectly required

[1] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

proof of Jacob Sr.'s unfitness; instead, they argue, the court should have simply determined what was in the best interests of the children.

[2,3] But under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.[2] Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.[3] Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.[4]

[4,5] Consequently, in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.[5] In other words, an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.[6]

Jeri and Dennis acknowledge those principles. But, they contend, this case is different because it began as an adjudication under the Nebraska Juvenile Code. They argue that unlike the guardianships at issue in cases such as *In re Guardianship*

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[2] See, *In re Guardianship of Robert D.*, 269 Neb. 820, 696 N.W.2d 461 (2005); *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

[3] See *In re Guardianship of D.J., supra* note 2.

[4] *Id.*

[5] *Id.*

[6] *Id.*

of Robert D.[7] and *In re Guardianship of D.J.*,[8] the guardianship in this case was established pursuant to the court's authority to place a juvenile adjudged to be under § 43-247(3) in "the care of some reputable citizen of good moral character" or "the care of a suitable family."[9] They point out that a juvenile court has jurisdiction over guardianship proceedings for a child over which the juvenile court already has jurisdiction under another provision of the Nebraska Juvenile Code.[10] So, they assert that Jacob Sr.'s motion to terminate the guardianship was in effect an objection to the case plan. They argue that the burden was therefore placed on Jacob Sr., under the statute in effect at the time, to prove "by a preponderance of the evidence that [DHHS'] plan is not in the juvenile's best interests."[11] (The statutory language upon which Jeri and Dennis rely has since been repealed,[12] but, for reasons that will become clear below, that is not significant.)

Jeri and Dennis' argument requires us to examine some aspects of the rather unusual procedural posture of this case. The case began, as explained above, as a juvenile adjudication and proceeded to disposition with the establishment of the guardianship, at which point, all of the interested parties save Jeri and Dennis waived further participation in the case. It is not clear from the record whether any further dispositional review hearings were held, but that is not surprising, because all the interested parties except the guardians had waived participation. And it is not even clear who would have participated in such hearings. In other words, after the guardianship was established, the case was treated much like an ordinary probate guardianship. But the case filings, including the order terminating the guardianship, continued to occur on the juvenile court docket. Therefore, although the proceedings were somewhat

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[7] *In re Guardianship of Robert D., supra* note 2.

[8] *In re Guardianship of D.J., supra* note 2.

[9] See Neb. Rev. Stat. § 43-284 (Reissue 2008).

[10] See § 43-247(10).

[11] See Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2010).

[12] See 2011 Neb. Laws, L.B. 648.

informal, the best understanding of the record is that the guardianship was established and terminated pursuant to juvenile court authority. So, for purposes of evaluating Jeri and Dennis' argument regarding the standard of proof, we assume that to be the case.

[6,7] In making their argument, Jeri and Dennis rely upon the Nebraska Court of Appeals' decision in *In re Interest of Eric O. & Shane O.*,[13] in which the court held that the parental preference doctrine is inapplicable when children are adjudicated and under the jurisdiction of a juvenile court. But the court's decision in *In re Interest of Eric O. & Shane O.* is inconsistent with our later decision in *In re Interest of Xavier H.*,[14] in which we held that even when children are adjudicated and under the jurisdiction of a juvenile court, the Due Process Clause of the U.S. Constitution demands some showing of parental unfitness if parents are to be deprived of their interest in the care, custody, and control of their children.[15] We reasoned that the showing of "unfitness" required by the Constitution was encompassed by a determination of the child's best interests.[16] We explained:

> Although the name of the "'best interest of the child'" standard may invite a different "'intuitive'" understanding, "[t]he standard does not require simply that a determination be made that one environment or set of circumstances is superior to another."[17] Rather, as we have explained, "the '"best interests" standard is subject to the overriding recognition that the "relationship between parent and child is constitutionally protected."'"[18] There is

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[13] *In re Interest of Eric O. & Shane O.*, 9 Neb. App. 676, 617 N.W.2d 824 (2000).

[14] *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[15] See *id.* See, also, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

[16] See *In re Interest of Xavier H., supra* note 14.

[17] *In re Yve S.*, 373 Md. 551, 565, 819 A.2d 1030, 1038 (2003).

[18] *In re Guardianship of D.J., supra* note 2, 268 Neb. at 246-47, 682 N.W.2d at 245.

> a "rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent."[19] Based on the idea that "fit parents act in the best interests of their children,"[20] this presumption is overcome only when the parent has been proved unfit.[21]

[8] In short, even if Jeri and Dennis were correct in arguing that the "best interests" standard associated with juvenile adjudication somehow trumped our well-established law regarding the termination of a guardianship, the parental preference principle is still applicable, even to an adjudicated juvenile. To the extent that *In re Interest of Eric O. & Shane O.*[22] holds otherwise, it is disapproved. Jeri and Dennis' first assignment of error is without merit.

Parental Fitness

Jeri and Dennis' remaining argument is that the court erred in terminating the guardianship. They argue, based on the facts, that Jacob Sr. "did not prove by a preponderance of the evidence" that terminating the guardianship was in Lakota and Jacob Jr.'s "best interests."[23] As explained above, the correct standard of proof is actually whether there is clear and convincing evidence that Jacob Sr. is unfit. But even if we construe Jeri and Dennis' argument as questioning Jacob Sr.'s fitness as a parent, we find it to be without merit.

[9] We said in *Ritter v. Ritter*[24] that "in relation to child custody in a marital dissolution proceeding," parental unfitness "means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused,

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[19] *Id.* at 244, 682 N.W.2d at 243.

[20] *Troxel, supra* note 15, 530 U.S. at 68. See, also, *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

[21] *In re Interest of Xavier H., supra* note 14, 274 Neb. at 349, 740 N.W.2d at 25.

[22] *In re Interest of Eric O. & Shane O., supra* note 13.

[23] Brief for appellants at 14.

[24] *Ritter v. Ritter*, 234 Neb. 203, 210, 450 N.W.2d 204, 210 (1990).

or probably will result in, detriment to a child's well-being."[25] In *Ritter*, we were primarily concerned with emphasizing that evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. It is equally worth emphasizing, however, that evidence of unfitness should be focused upon a parent's *present* ability to care for a child and that evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults (although we note that in some instances, such evidence may be *very* pertinent). And we have analogized the quantum of proof necessary to prove unfitness to the proof necessary to terminate parental rights, reasoning that "[i]f the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code," then "similarly deficient evidence of parental unfitness" would prevent a court from granting child custody "to one who is a stranger to the parent-child relationship."[26]

Applying those principles, we have found on several occasions that a parent is fit, despite a history of substance abuse, where the evidence showed that the parent had made progress in addressing those issues.[27] And we have found that parents who had previously been part of a mutually abusive relationship were not unfit where there was no evidence of abuse toward the children.[28] The evidence in this case is comparable. There is little question that had we been presented with the question of Jacob Sr.'s fitness as a parent in 2005, he would not have been found fit. But it is not 2005. The evidence proves beyond reasonable dispute that since completing the drug court

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[25] See, also, *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

[26] *Uhing, supra* note 25, 241 Neb. at 377, 488 N.W.2d at 373, citing *Marcus v. Huffman*, 187 Neb. 798, 194 N.W.2d 221 (1972).

[27] See, e.g., *In re Guardianship of D.J., supra* note 2; *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992); *Robertson v. Robertson*, 217 Neb. 786, 350 N.W.2d 576 (1984); *In re Interest of Hitt*, 209 Neb. 900, 312 N.W.2d 297 (1981). Cf. *In re Guardianship of Cameron D.*, 14 Neb. App. 276, 706 N.W.2d 586 (2005).

[28] See *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

program, Jacob Sr. has made substantial progress in establishing the stability in his life that is necessary to care for his children. While this does not wholly mitigate his history of drug use and abusive behavior, it does suggest that such conduct is unlikely to recur.

The only significant deficiency identified in Jacob Sr.'s ability to parent after 2006 is his problem with controlling his temper. But the record also establishes that Jacob Sr. has recognized that problem, sought treatment for it, and made substantial progress in that area as well. And there is no evidence to suggest that any of Jacob Sr.'s abusive or angry behavior was ever directed at the children, even before treatment. In fact, there was no witness at trial who was willing to opine that Jacob Sr. was an unfit parent.

In short, while we share the county court's concern about Jacob Sr.'s shortcomings as a parent, we are mindful of the fact that "'"[t]he law does not require perfection of a parent."'"[29] There is little question that the alleged deficiencies in Jacob Sr.'s present ability to parent would not have justified removal of the children from his home had those deficiencies been the bases upon which removal had been sought in the first place.[30] Therefore, on our de novo review of the record, we do not find the required clear and convincing evidence of parental unfitness that is necessary to oppose termination of the guardianship. We find no merit to Jeri and Dennis' remaining assignment of error.

CONCLUSION

The county court correctly applied the parental preference principle and reasoned that the guardianship should be terminated in the absence of clear and convincing evidence that Jacob Sr. was an unfit parent. And the court correctly concluded that given the evidence, Jacob Sr. had not been proved unfit. The county court's decision is affirmed.

AFFIRMED.

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[29] *In re Interest of Xavier H., supra* note 14, 274 Neb. at 350, 740 N.W.2d at 26.

[30] See *In re Interest of Xavier H., supra* note 14.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN M. CARTER, RESPONDENT.

808 N.W.2d 342

Filed October 21, 2011. No. S-10-811.

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.** 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.
4. ____. The Nebraska Supreme Court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska.
5. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
6. ____. 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.
7. ____. 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.
8. ____. 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.
9. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
10. **Disciplinary Proceedings: Words and Phrases.** In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.
11. **Disciplinary Proceedings.** Absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically disbarment.

12. ____. The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.
13. **Disciplinary Proceedings: Presumptions.** Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

James Walter Crampton for respondent.

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

PER CURIAM.

On August 20, 2010, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against attorney John M. Carter, alleging Carter violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.15(a) and 3-508.4. Carter filed an answer admitting certain allegations in the formal charges but denying others. This court appointed a referee. After conducting an evidentiary hearing, the referee determined Carter violated §§ 3-501.15(a) and 3-508.4(a) and (c). Because the violations involved misappropriation of client funds and the referee found no extraordinary mitigating circumstances, he recommended disbarment. Carter filed exceptions to the referee's report. Upon our independent review of the record, we conclude that the violations occurred and that the proper sanction is disbarment.

I. FACTS

Carter graduated from law school in December 2006 and was admitted to practice law in Nebraska and Iowa in 2007. He maintained law offices in Omaha, Nebraska, and Council Bluffs, Iowa. He maintained trust accounts at Wells Fargo Bank (Wells Fargo) in Omaha for his Nebraska practice and at TierOne Bank (TierOne) in Council Bluffs for his Iowa practice.

In September 2008, Carter was retained by sisters Norma Noland and Clifettia Rose, who resided in Omaha and were the daughters of Anna Charles. Charles resided in a nursing home, and her conservator proposed to sell her Omaha home in order to meet expenses. Noland and Rose retained Carter to oppose the sale. Carter was paid $200 by Noland and Rose at the time of his retention. A written agreement dated September 17, 2008, stated Carter would be paid a fee at an hourly rate of $165. The signatures of Carter, Noland, and Rose appear on the agreement, although Noland testified that she did not recall signing it.

The sale of the house did not occur. According to Noland, this was because the conservator received funds from the sale of property in Texas which made it unnecessary to sell the Omaha property. Carter testified that the sale of the house was prevented through his legal efforts on behalf of Noland and Rose.

Upon Charles' death, which apparently occurred sometime in late 2008 or early 2009, Carter assisted Noland in preparing documents in connection with her appointment as the personal representative of Charles' estate. That appointment occurred on February 11, 2009. Carter testified that he also performed various other legal acts on Noland's behalf between September 2008 and December 2009.

On February 20, 2009, Carter deposited a check from Charles' former conservator in the amount of $7,334.61 into the Wells Fargo trust account. Whether Carter received the check from the conservator or from Noland is disputed, but there is no dispute that the check represented funds belonging to the Charles estate which were to be distributed equally to Noland and Rose under Charles' will.

On March 17, 2009, Carter withdrew $1,800 from the Wells Fargo trust account, which he later characterized as a fee earned in his representation of Noland and Rose. On April 3, Carter withdrew an additional $4,500 from the trust account, which he later characterized as an additional fee earned in his representation of Noland and Rose. Noland and Rose denied that they authorized any fee payment from the funds held in Carter's trust account. Carter admits that aside from the original hourly

fee agreement, there was no written authorization for the fee payments from Noland, Rose, or the probate court. But he testified that Noland and Rose verbally authorized the payment of fees from the trust account. As a result of the two withdrawals totaling $6,300, the balance in Carter's Wells Fargo trust account fell below $7,334.61 on 12 days between February 27 and June 22, 2009.

During the summer of 2009, Noland and Rose began demanding that Carter distribute the funds received from the conservatorship, and Noland contacted the Counsel for Discipline regarding his failure to do so. In a meeting with Noland and Rose, Carter agreed to distribute $3,300 to each of them. Carter knew that the funds in his trust account were insufficient and intended to make these distributions from his own funds, but he did not inform Noland or Rose of this fact. In a letter dated September 14, 2009, written in response to Noland's complaint, Carter advised the Counsel for Discipline that the Charles estate would be closed by the end of the month and that at that time, he would make separate distributions of $3,300 each to Noland and Rose.

In late September or early October 2009, Carter received a check payable to another client in the amount of $43,350. Carter testified that on October 12, 2009, he deposited this check plus $6,600 in cash in the trust account he maintained at TierOne in Council Bluffs. He testified that the cash was from his own funds and that he had intended to use it to make the agreed-upon distributions to Noland and Rose. According to Carter, he did not fill out a deposit slip or obtain a receipt for the cash, because the bank's computer was down at the time of his deposit. Records from TierOne reflect a deposit of $43,350 into Carter's trust account on that date. On October 22, Carter wrote separate checks to Noland and Rose in the amount of $3,300 each on the TierOne trust account. The checks were dishonored and returned because of insufficient funds on deposit. Carter initially thought he had made an accounting error, but he later realized that the cash deposit had not been recorded by the bank. Carter immediately reported the dishonored checks to the Counsel for Discipline. In December 2009, Carter's lawyer sent replacement checks drawn on certified funds remitted by

Carter in the amount of $3,300 each to Noland and Rose, who acknowledged receipt.

Carter testified he had presented Noland and Rose with a statement showing the work he had done on their behalf. Noland and Rose testified that they never received any statement or accounting from Carter. During the investigation which preceded the filing of formal charges, Carter provided the Counsel for Discipline with two statements covering the period of September 17, 2008, through December 30, 2009. The first statement, dated December 30, 2009, reflects that Carter performed 12.6 hours of work, for which he charged a total fee of $2,359. This represents an average hourly rate of $187.22, which is higher than the agreed hourly rate of $165 set forth in the retainer agreement. The second statement bears a date of April 22, 2009, but includes entries for work done after that date and reflects a total billing of $6,959.50, from September 17, 2008, through December 30, 2009. Carter testified that the dates were odd because after the disciplinary complaint was made, he added items he had not yet billed to a statement that was already started.

Carter contends that an error on the part of TierOne with respect to his deposit on October 12, 2009, resulted in the dishonor of the initial checks written to Noland and Rose. At the hearing before the referee, a former employee of Wells Fargo, appearing as a witness on Carter's behalf, testified that there were irregularities on the TierOne statement which may have been attributable to a teller's error in transposing numbers. Carter testified that he had a pending lawsuit against TierOne and its successor in interest regarding the claimed error.

II. REPORT OF REFEREE

Based upon the testimony of Noland and Rose and inconsistencies in the evidence relied upon by Carter, the referee rejected Carter's contention that Noland and Rose had verbally authorized a payment of $6,300 in fees from the trust account. The referee found that the testimony of Carter's witness regarding the claimed error on the part of TierOne was not credible and that there was no evidence of any bank error or, as alternatively claimed by Carter, that someone at the bank stole the $6,600 which he had intended to deposit.

The referee found by clear and convincing evidence that Carter deposited $7,334.61 into his trust account and then withdrew $6,300 without authorization from his clients. The referee noted:

> The conclusion is inescapable that [Carter] paid himself fees before they were earned, attempted to conceal the withdrawal by repaying the money and characterizing it as a "distribution" from the estate, and, when that ruse failed, created after-the-fact billing statements to make it appear he had fully earned the money before it was withdrawn. From April 2009 until December 2009, the $6,300.00 was in [Carter's] possession or converted to his personal use and unaccounted for.

Based upon this finding, the referee determined that Carter had violated §§ 3-501.15(a) and 3-508.4(a) and (c).

On the issue of the appropriate sanction, the referee cited our case law indicating that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is disbarment, even if the client did not suffer any financial loss. The referee concluded that although Carter had no prior record of disciplinary violations and had cooperated with the investigation by the Counsel for Discipline, there were no extraordinary mitigating circumstances which would overcome the presumption of disbarment for misappropriation or commingling of client funds. Accordingly, the referee recommended disbarment.

During the hearing, the referee overruled Carter's objection that he lacked jurisdiction because the TierOne trust account was located in Iowa. This jurisdictional issue is not discussed in the referee's report.

III. ASSIGNMENTS OF ERROR

Carter filed the following summarized exceptions to the referee's report, contending the referee (1) erroneously concluded he had not cooperated and accepted responsibility; (2) incorrectly found the sale of Charles' house was unnecessary due to the conservator's receipt of money from the sale of the property in Texas; (3) erroneously determined his explanation for withdrawing the $6,300 from the trust account was "not credible"; and (4) erroneously overruled his objection to

jurisdiction, based on the fact that the TierOne trust account was situated in Iowa.

IV. 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.[1]

V. ANALYSIS

[2,3] Disciplinary charges against an attorney must be established by clear and convincing evidence.[2] The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[3]

1. Jurisdiction

[4] Before reaching the merits, we address Carter's contention that we lack jurisdiction over this disciplinary proceeding because the trust account from which the dishonored checks to Noland and Rose were issued was located in Iowa. The referee overruled Carter's jurisdictional objection, and we conclude that he did not err in doing so. This court has inherent authority to regulate the conduct of attorneys admitted to the practice of law in the State of Nebraska,[4] and every attorney admitted to practice in Nebraska is subject to the exclusive disciplinary jurisdiction of this court. It is the conduct of a Nebraska lawyer in the representation of Nebraska residents which is before us in this case. Carter is charged with misappropriating client

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[1] *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011).

[2] *Id.*

[3] *State ex rel. Counsel for Dis. v. Tarvin,* 279 Neb. 399, 777 N.W.2d 841 (2010); *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[4] *State ex rel. NSBA v. Barnett*, 248 Neb. 601, 537 N.W.2d 633 (1995).

funds deposited in a trust account in Nebraska. The fact that he subsequently utilized another trust account in an Iowa bank in an attempt to repay the funds does not defeat our disciplinary jurisdiction.

2. Grounds for Discipline

Carter is alleged to have violated his oath of office as an attorney and §§ 3-501.15 and 3-508.4 of the Nebraska Rules of Professional Conduct.

Section 3-501.15 (safekeeping property) provides in part:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of 5 years after termination of the representation.

Section 3-508.4 (misconduct) provides in part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In his brief, Carter "admits to violating his oath of office and the Nebraska Court Rules of Professional Conduct."[5] Accordingly, we agree with the conclusion of the referee that there is clear and convincing evidence that Carter has violated §§ 3-501.15(a) and 3-508.4(a) and (c). We shall consider Carter's exceptions to various factual findings by the

[5] Brief for respondent at 7.

referee in the context of determining the appropriate disciplinary sanction.

3. Sanction

(a) Exceptions to Factual Findings

(i) Sale of Texas Property

Carter takes exception to the referee's finding with respect to a sale of property in Texas and its relationship to preventing the sale of Charles' Omaha home by her conservator. The referee found: "The house was not sold. . . . It is unclear exactly how the sale of the house was avoided. . . . Noland testified that the conservatorship received money from the sale of property in Texas, which allowed the conservator to pay . . . Charles' debts thereby making a sale of the house unnecessary." This is an accurate summary of Noland's testimony, and it is clear from the context that the referee did not make any specific finding as to whether Noland's account was correct. Carter asserts that it was incorrect, but does not point to any evidence in the record specifically refuting Noland's testimony on this point. He also challenges the relevance of this evidence. We agree with the referee's finding that "[i]t is unclear exactly how the sale of the house was avoided."

(ii) Documentation of Claimed Fees

Carter takes exception to the referee's characterization of a document that he prepared during the investigation of the disciplinary charges as an "after-the-fact accounting" for fees. This document reflects the deposit in the amount of $7,334.61, representing the conservatorship funds paid to the Charles estate, and the subsequent withdrawals of $1,800 and $4,500, which Carter claimed were earned fees. Carter testified he reconstructed this from bank records in an attempt to satisfy a request from the Counsel for Discipline. We accept it as such, and we do not regard the fact that this document was admittedly reconstructed by Carter as evidence of deception on his part.

But the referee correctly noted that the amounts of the claimed fees reflected on this document were inconsistent with billing statements subsequently produced by Carter. The billing

statements were also inconsistent with each other, and one of the statements contained entries which Carter admitted he made after the purported date of the statement. From this and other evidence in the record, the referee determined Carter's explanation that he withdrew $6,300 from the trust account to pay himself fees which Noland and Rose authorized was "not credible." After a thorough review of all the evidence concerning Carter's explanations for the trust account withdrawals, the referee concluded Carter "paid himself fees before they were earned, attempted to conceal the withdrawal by repaying the money and characterizing it as a 'distribution' from the estate, and, when that ruse failed, created after-the-fact billing statements to make it appear he had fully earned the money before it was withdrawn." This conclusion is supported by clear and convincing evidence.

(iii) Cooperation and Acceptance of Responsibility

Carter assigns and argues that the referee erred in finding that "[Carter] did not cooperate or accept responsibility,"[6] but he does not direct us to a specific portion of the record reflecting such finding. The referee stated in his report, "Relator has stipulated that [Carter] was fully cooperative with his office during his investigation of the grievance, except for the fact that he changed his explanation for why the clients' funds were not in his trust account. . . . And [Carter's] attitude was cooperative and agreeable during the hearing." Based upon our de novo review, we determine that this finding is fully supported by the record.

(b) Determination of Appropriate Sanction

[5-9] The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.[7] To determine whether and to what extent

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[6] *Id.* at 9.

[7] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009); *State ex rel. NSBA v. Hogan*, 272 Neb. 19, 717 N.W.2d 470 (2006).

discipline should be imposed in a lawyer 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.[8] For purposes of determining the proper discipline of an attorney, we will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[9] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[10] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[11] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[12]

[10-13] In the context of attorney discipline proceedings, misappropriation is any unauthorized use of client funds entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom.[13] This latter form of misappropriation clearly occurred here. We have consistently held that absent mitigating circumstances, the appropriate discipline in cases of misappropriation or commingling of client funds is typically

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[8] *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011); *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010).

[9] *Herzog, supra* note 1; *Orr, supra* note 7.

[10] *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[11] *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006); *State ex rel. Counsel for Dis. v. Widtfeldt*, 271 Neb. 851, 716 N.W.2d 68 (2006).

[12] *Id.*

[13] *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

disbarment.[14] The fact that the client did not suffer any financial loss does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[15] Mitigating factors overcome the presumption of disbarment in misappropriation and commingling cases only if they are extraordinary.[16]

The Counsel for Discipline argues that mitigating circumstances were insufficient in this case to overcome the presumption of disbarment. Carter concedes that his trust account fell below the required balance on several occasions and that discipline should be imposed, but he argues for a lesser sanction to include a suspension followed by a period of probation.

We agree with the referee that the mitigating factors in this case include the absence of a prior disciplinary record, no pattern of misconduct over an extended period of time, and Carter's generally cooperative dealings with the Counsel for Discipline. But on the other side of the balance, we cannot ignore the fact that misappropriation of client funds occurred. And, like the referee, we are troubled by Carter's conflicting and inconsistent explanations for his actions during the course of the disciplinary investigation.

In his initial correspondence with the Counsel for Discipline in September 2009, Carter stated that as the attorney for the Charles estate, he would be making a final distribution to Noland and Rose in the amount of $3,300 each by the end of the month. That could not have been true, because by that date, Carter had already withdrawn most of the estate funds from his trust account. Carter's letter did not mention that fact or assert any entitlement to the funds as payment for legal fees. Several months later, one of Carter's attorneys informed the Counsel for Discipline that Carter retained estate funds in the amount of $6,600 in the Wells Fargo trust account from February 2009 until June or July 2009, when he withdrew the funds in order to make payment to Noland and Rose. That statement conflicts

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[14] *Samuelson, supra* note 10; *Jones, supra* note 13.

[15] *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

[16] *Id.*

with Carter's reconstructed records that show he withdrew $6,300 of the estate funds from his trust account by April 2009. It further conflicts with Carter's testimony that by the summer of 2009, the money which he agreed to pay to Noland and Rose was no longer in his trust account, but was to come from his own funds. At the hearing before the referee, Carter claimed for the first time that the entire $6,300 he withdrew from the trust account was payment for fees he earned in representing Noland and Rose. But as noted above, he produced conflicting and contradictory documentation which did not support this claim.

Misappropriation alone is presumptive grounds for disbarment, but here it is aggravated by an apparent attempt to conceal what had occurred from the clients and from the Counsel for Discipline. Viewed in its entirety, Carter's conduct indicates a lack of concern for the protection of the public, the profession, and the administration of justice.[17] On this record, we cannot conclude that there are extraordinary mitigating circumstances which would justify departure from the general rule that a lawyer's misappropriation of client funds should result in disbarment. Upon due consideration, we conclude that disbarment is the appropriate sanction.

VI. CONCLUSION

It is therefore the judgment of this court that Carter be disbarred from the practice of law in the State of Nebraska, effective immediately. Carter is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, Carter shall be subject to punishment for contempt of this court. Carter 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 has been entered by this court.

JUDGMENT OF DISBARMENT.

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[17] See *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008).

Marietta Newman, Personal Representative of the Estate of Adolph J. Liebig, Jr.; Personal Representative of the Estate of Valeria K. Liebig; and in her own right, appellant, v. Paul D. Liebig and Shirley S. Liebig, husband and wife, et al., appellees.

810 N.W.2d 408

Filed October 21, 2011. No. S-10-946.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Decedents' Estates: Trusts: Property: Intent.** Where the owner of property gratuitously transfers it and properly maintains an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his or her estate.
4. **Decedents' Estates: Trusts: Time.** Upon the failure of an express trust, the trustee holds the trust estate upon a resulting trust for the heirs of the testator as of the date of the failure of the trust.
5. **Decedents' Estates: Trusts.** A resulting trust is a species of trust that attaches to a legal estate acquired by the consent of the parties, not in violation of any fiduciary duty or trust relation.
6. **Limitations of Actions: Trusts.** The statute of limitations does not begin to run in favor of the trustee of a resulting trust until some act by the trustee that is equivalent to a repudiation of the trust.
7. **Limitations of Actions.** The time when the statute of limitations commences to run must be determined on the facts in each case.
8. **Limitations of Actions: Trusts: Property.** The statute of limitations on a resulting trust will begin to run when the trustee repudiates the trust by the assertion of an adverse claim to or ownership of the trust property.
9. **Trusts: Proof: Notice.** Repudiation of a trust may be proved either by actual knowledge or notice thereof, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require the beneficiary to timely assert his or her equitable rights.

Appeal from the District Court for Platte County: Alan G. Gless, Judge. Affirmed.

George H. Moyer, of Moyer & Moyer, for appellant.

Jeffery T. Peetz and Sara L. Gude, of Woods & Aitken, L.L.P., for appellees Paul D. Liebig and Shirley S. Liebig.

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

GERRARD, J.

This appeal involves an allegedly void trust that was executed and recorded in 1979 and to which several parcels of real property were purportedly deeded. The trust terms provided that it would terminate in 2004, and in 2008, the trustees of the questioned trust deeded the property to the trust's purported beneficiaries. One of the settlor's children sued to set aside the trust and both deeds, and to quiet title in the property to the settlor's heirs at law. But the district court determined that her claims were barred by the statute of limitations. The primary question presented in this appeal is when the applicable statute of limitations began to run. Although our reasoning differs somewhat from that of the district court, we find, on our de novo review, that the statute of limitations for these claims has expired. Therefore, we affirm the district court's judgment.

BACKGROUND

Adolph J. Liebig, Jr., and his wife, Valeria K. Liebig, owned several parcels of real property in Platte County, Nebraska, either individually or as joint tenants. In 1979, Valeria executed a bill of sale purporting to convey her interests in the property to Adolph, who in turn quitclaimed all of his interest in the real estate to the trustees of the Adolph J. Liebig Trust (the Liebig Trust). Adolph also recorded a "Declaration of Trust" in Platte County, containing the terms of the Liebig Trust. The Liebig Trust, generally described, purported to create 100 "Certificates of Beneficial Interest" "as a convenience, for distribution," and the Liebig Trust provided that 25 years from the date of its creation (which would be March 30, 2004), it would terminate and the proceeds would be distributed pro rata to the beneficiaries, i.e., the holders of the 100 certificates, or units.

Adolph and Valeria also had several children: three sons (Paul, Greg, and Robert Liebig), and three daughters (Madonna Mohnsen, Marietta Newman, and Marlene Rickert). When the

Liebig Trust was created in 1979, Valeria and Paul were the trustees to whom the property was originally deeded. One hundred "units of beneficial interest" were originally issued to Adolph, but were immediately canceled and reissued to Adolph and Valeria, 50 units each. Adolph then immediately canceled his 50 units and reissued them to Paul, Greg, Robert, and Valeria.

Adolph died in 1980. Marietta and at least one of her sisters each received $7,000 from Valeria that they were told was their inheritance. They received no real property and were told that the land would go to Paul, Greg, and Robert under the Liebig Trust. Over the years, Valeria canceled and reissued her units of beneficial interest to Paul, Greg, and Robert in equal amounts until, by 1985, Paul, Greg, and Robert each purported to hold one-third of the units. Valeria died in 2006. Paul and his wife, Shirley Liebig, became the trustees of the Liebig Trust.

In the meantime, Paul had been farming the property under a 50-50 crop share oral lease, at first leasing from Adolph, then from Valeria, then from the trust. Paul's son eventually moved into the residence on the property, paying $100 per month in rent in addition to making repairs and helping Paul. Although the farm records were not complete, tax records and Farm Service Agency records entered into evidence established that Valeria and Paul, acting as trustees of the Liebig Trust, were paying the taxes on the property and accepting government payments for farm activities. Paul described, in some detail, how he operated the property as cropland and pastureland: for instance, how he planted and rotated crops and grasses, how his son was repairing and planning to reshingle the house, and how he and his son maintained the fences and power company rights-of-way.

In February 2008, Paul and Shirley, purporting to act as the trustees of the Liebig Trust, deeded the real estate to Paul, Greg, and Robert as tenants in common. In June, Paul and Shirley filed for and later obtained an order from the county court approving their administration of the Liebig Trust and a final accounting, finding that the Liebig Trust had terminated

and been wound up, and terminating their administration of the Liebig Trust.

Marietta, in her individual capacity and as personal representative of Adolph's and Valeria's estates, sued all of her other siblings and their spouses in district court, seeking a decree that would, among other things, set aside Adolph's 1979 "Declaration of Trust" and quitclaim deed to the trustees and Paul and Shirley's 2008 trustees' deed to Paul, Greg, and Robert, and would quiet title in the property to all six of Adolph's children. Marietta alleged that the Liebig Trust was defective and void; so, because the Liebig Trust failed, the property purportedly deeded to the Liebig Trust actually remained Adolph's property and passed to his heirs at law when he died. Marietta also alleged that a particular parcel of the property had been Valeria's homestead and that her interest in that particular parcel had not been properly conveyed to the Liebig Trust.

Paul and Shirley answered Marietta's complaint, denying her claim that the Liebig Trust was void. As relevant, they also alleged as an affirmative defense that Marietta's complaint was barred by the applicable statutes of limitations. The matter proceeded to a bench trial, after which the district court determined that Marietta's complaint was barred by the statute of limitations. The court reasoned that the statute of limitations began to run on April 18, 1979, when Adolph's "Declaration of Trust" and quitclaim deed had been recorded in Platte County, or, at the latest, the date of Adolph's death in 1980. So, the court found, whether a 4-year or 10-year statute of limitations was applied, Marietta's complaint was untimely filed. The court dismissed the complaint, and Marietta appeals.

ASSIGNMENTS OF ERROR

Marietta assigns, as consolidated and restated, that the district court erred in (1) concluding that the statute of limitations had run on her claim for relief, (2) concluding that her suit was one to declare the Liebig Trust void, (3) failing to set aside the 2008 trustees' deed of distribution, and (4) failing to quiet title in the property.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[1] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[2]

ANALYSIS

Validity of Trust

The basis of Marietta's argument on appeal is that the Liebig Trust was invalid. With that much, we agree. The Liebig Trust in this case is substantially indistinguishable from a "family trust" that we have declared, on several occasions, to be void because the trust instrument does not adequately identify the beneficiaries.[3] We are not persuaded by the appellees' argument that Nebraska's 2003 adoption of the Nebraska Uniform Trust Code[4] affects that conclusion. The appellees argue that under § 30-3828(a)(3), creation of a trust requires a "definite beneficiary," but that pursuant to § 30-3828(b), "[a] beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities." The appellees assert that the beneficiaries of the Liebig Trust are ascertainable by reference to the "Beneficial Interests" and trustees' records.

But § 30-3828(a)(3) did not change the law upon which our conclusions in *First Nat. Bank v. Schroeder*,[5] *First Nat. Bank v. Daggett*,[6] and *Schlatz v. Bahensky*[7] were based. In fact, *Schlatz* was decided several years after § 30-3828 was adopted. And

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[1] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[2] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[3] See, *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010); *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993); *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986).

[4] Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2008).

[5] *Schroeder, supra* note 3.

[6] *Daggett, supra* note 3.

[7] *Schlatz, supra* note 3.

§ 30-3828(a)(3) is simply a codification of the common-law rule of the Restatement (Second) of Trusts § 112,[8] which states that a trust is not created unless there is a beneficiary "who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities." In *Schroeder*, we relied upon § 112, and the comment to the relevant section of the Uniform Trust Code makes clear that the language of § 30-3828 was intended to adopt the Restatement's definite beneficiary requirement.[9]

And that requirement is not met here, because no beneficiary is designated *by the trust instrument*. The Restatement explains, for example, that a disposition fails if it identifies its beneficiaries as "the persons named in a memorandum to be found on his death in his safe-deposit box."[10] Similarly, in *Daggett*, we explained that a trust identical to the Liebig Trust failed because it

> fails, on its face, to adequately designate its beneficiaries. The trust, like the trust in *Schroeder,*[11] merely provides a method of ascertaining who owns the certificates of beneficial interest. However, nothing *in the trust instrument itself* indicates how possession and ownership shall occur. The trust provisions do not indicate who is to receive the certificates, nor do they give the trustees the power to make that determination. As was the case in *Schroeder*, the trust must fail.[12]

The same is true here, and § 30-3828(b)'s provision that a "beneficiary is definite if the beneficiary can be ascertained now or in the future" did not change the common-law rule that the beneficiary must be ascertainable *from the trust instrument*. Contrary to the appellees' suggestion, the trustees' records of who held "Certificates of Beneficial Interest" are not trust

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[8] Restatement (Second) of Trusts § 112 at 243 (1959).

[9] See Unif. Trust Code § 402, comment, 7C U.L.A. 481 (2006).

[10] Restatement, *supra* note 8, § 122, comment *e.* at 259.

[11] *Schroeder, supra* note 3.

[12] *Daggett, supra* note 3, 242 Neb. at 740, 497 N.W.2d at 363 (emphasis in original).

instruments.[13] In short, the law has not changed since our decisions in *Schroeder*, *Daggett*, and *Schlatz*.[14] So, our conclusion is also the same: the Liebig Trust is void.

Trigger for Statute of Limitations

Next, Marietta contends that the statute of limitations that applies here is the 10-year statute of limitations applicable to quiet title actions, Neb. Rev. Stat. § 25-202 (Reissue 2008).[15] With that much, we also agree: As will be explained below, although the validity of the Liebig Trust underlies Marietta's arguments, the present controversy concerns title to the property that Adolph failed to effectively transfer to the failed Liebig Trust.[16]

Marietta also argues that the district court erred in finding that the statute of limitations began to run in 1979 or 1980. She contends that the Liebig Trust's failure produced a resulting trust and that the statute of limitations did not begin to run against the trustees until they repudiated the resulting trust. And again, we agree, as will be explained in more detail below. But where we part ways with Marietta is when she concludes that the resulting trust was not repudiated until the 2008 trustees' deed to Paul, Greg, and Robert. We find, on our de novo review of the record, that the resulting trust was effectively repudiated well before then, by the actions of the trustees. But explaining that conclusion will require a more comprehensive examination of the underlying legal principles.

[3,4] To begin with, Marietta is correct in suggesting that the property at issue here was held by the trustees of the Liebig Trust—Paul and Valeria, and Shirley after Valeria's death—in a resulting trust for Adolph and, after his death, his heirs. We have explained that where the owner of property gratuitously transfers it and properly maintains an intention that

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[13] See cases cited *supra* note 3.

[14] See *id.*

[15] See, *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003); *Wait v. Cornette*, 259 Neb. 850, 612 N.W.2d 905 (2000); *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 315 N.W.2d 619 (1982).

[16] See, *Wait, supra* note 15; *Neeman, supra* note 15; *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978).

the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his or her estate.[17] "'The great weight of authority supports the view that upon the failure of an express trust as in this case, the trustee holds the trust estate upon a resulting trust for the heirs of the testator as of the date of the failure of the trust.'"[18]

This was why, in our recent decision in *Schlatz*, we explained that the failure of a trust effectively identical to the Liebig Trust produced a resulting trust in favor of the settlor.[19] In this case, the resulting trust arose in favor of Adolph, as the settlor, then his heirs at law after his death. (The record establishes some dispute over whether Adolph's estate would have passed by intestacy or a 1975 will, the validity of which is disputed in a separate proceeding. For purposes of this opinion, we assume that the estate would have passed to Marietta, at least in part, by the rules of intestacy, and we do not comment on the enforceability of the will.)

[5-7] A resulting trust is a species of trust that attaches to a legal estate acquired by the consent of the parties, not in violation of any fiduciary duty or trust relation.[20] And the statute of limitations does not begin to run in favor of the trustee of a resulting trust until some act by the trustee that is equivalent to a repudiation of the trust.[21] We have repeatedly held that "[t]he statute of limitations does not begin to run in the case of a resulting trust until the trustee clearly repudiates his trust"[22] and that the time when the statute of limitations commences to run must be determined on the facts in each case.[23]

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[17] *Applegate v. Brown*, 168 Neb. 190, 95 N.W.2d 341 (1959). See, also, *Schlatz, supra* note 3.

[18] *Applegate, supra* note 17, 168 Neb. at 203, 95 N.W.2d at 349.

[19] See *Schlatz, supra* note 3.

[20] *Hanson v. Hanson*, 78 Neb. 584, 111 N.W. 368 (1907).

[21] See *id.*

[22] *Jirka v. Prior*, 196 Neb. 416, 422, 243 N.W.2d 754, 759 (1976). Accord, *Wait, supra* note 15; *Fleury, supra* note 16.

[23] See, *Fleury, supra* note 16; *Jirka, supra* note 22.

So, for instance, the statute of limitations has been held not to run in cases where the resulting trustee did not expressly repudiate the resulting trust and the resulting trustee's use of the property was concurrent with that of the resulting trust beneficiaries.[24] For example, in *Hanson v. Hanson*,[25] we held that the trustee of a resulting trust had not repudiated the trust while his occupancy of the land was consistent with his obligation to the partnership for whom he held the land in trust. It was only when the trustee sued his partner in ejectment that his repudiation of the resulting trust was clear.[26] In *Jirka v. Prior*,[27] the trustees held and operated agricultural land in a resulting trust for a partnership, and their operation of the farming business was consistent with the resulting trust; the repudiation did not occur until the trustees sold the property without the consent of their partners. And, in *Wait v. Cornette*,[28] the holder of a life estate in a sum of trust money became the trustee of a resulting trust, in favor of the remainder beneficiaries, when she purchased real property with the money. But her possession of the land was consistent with her duties as resulting trustee until she repudiated the resulting trust by transferring the property, instead of holding it with the intention of transferring it to the beneficiaries upon her death.[29]

Facts Establishing Repudiation of Resulting Trust

It is upon authority such as *Jirka* and *Wait* that Marietta relies in contending that the resulting trust in this case was not repudiated until the 2008 trustees' deed to Paul, Greg, and Robert. But a transfer of property is not the only way in

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[24] See, *Wait, supra* note 15; *Jirka, supra* note 22; *Windle v. Kelly*, 135 Neb. 143, 280 N.W. 445 (1938); *Hanson, supra* note 20. See, also, *Wiseman v. Guernsey*, 107 Neb. 647, 187 N.W. 55 (1922).

[25] See *Hanson, supra* note 20.

[26] See *id.*

[27] See *Jirka, supra* note 22.

[28] *Wait, supra* note 15.

[29] See *id.*

which a trust can be repudiated. In *Dewey v. Dewey*,[30] a resulting trust was created when several owners of a parcel of real property agreed to convey their interests to one of the owners for the purpose of obtaining a loan to disencumber the property of mortgages and tax liens. After that, the property was to be returned back to the original owners. The person to whom the property was conveyed was then the trustee of a resulting trust in favor of the other owners.[31]

But the resulting trustee never returned the property. Instead, he and his wife began improving it. They spent money building a new home and installing farm equipment and fixtures. They farmed the land under the government soil conservation program in their own names and kept the proceeds. They contoured and improved the land for crops, paid the mortgage, and paid all the taxes. They leased the land for oil and gas, recorded the leases, and kept the rentals they received.[32]

[8,9] On appeal from a judgment quieting title in the trustee, we considered whether the trustee's actions operated to repudiate the resulting trust. We said:

> Concededly, defendants never did give the interested plaintiffs and codefendants actual formal notice that they claimed title to the land or had repudiated the trust, but defendants were not required to do so because, contrary to plaintiffs' and codefendants' contention, they and their predecessors at all times had notice and knowledge of defendant's repudiation from all the attending open, notorious, and unequivocal facts and circumstances heretofore recited. Concededly, they had severally visited defendants on the land upon numerous occasions . . . . They then and there saw the improvements and knew that defendants were paying no rentals and were taking the income and profits, but they made no demand for an accounting thereof. They knew that defendants were contracting with regard to the land as owners and were making the great expenditures for improvements and otherwise aforesaid

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[30] *Dewey v. Dewey*, 163 Neb. 296, 79 N.W.2d 578 (1956).

[31] See *id.*

[32] See *id.*

> . . . . However, they never reimbursed or offered to reimburse defendants for any of them, and none of plaintiffs or codefendants or their predecessors ever claimed any interest whatever in the land or made any demand whatever for any accounting or reconveyance until . . . some 19 years after [the transfer of the property].[33]

We noted the rule, explained above, that the statute of limitations on a resulting trust will begin to run when the trustee repudiates the trust by the assertion of an adverse claim to or ownership of the trust property. And, we explained, repudiation of a trust "may be proved either by actual knowledge or notice thereof, or by open, notorious, and unequivocal facts and circumstances from which a beneficiary who is not under any recognized disability would be put on notice that the trust has been repudiated and require him to timely assert his equitable rights."[34] Nor was it pertinent that the trustees were also entitled to a share of the property, because, we said:

> "Where one tenant in common enters upon the whole estate, substantially improves it beyond that ordinarily proper for the full enjoyment or use of the estate as a tenant in common, takes all the rents and profits, pays all the taxes, makes it his home and openly claims the whole for more than the period of the statute of limitations, an ouster of his cotenants will be presumed although not otherwise proved."[35]

In sum, based on those facts, we affirmed the trial court's conclusion that the quiet title action was time barred.[36]

Comparable facts are found in this case. The record establishes beyond dispute that Paul and Valeria, and later Paul and Shirley, had been using the property as cropland and pastureland for cattle, paying the expenses for the property, improving the property, accepting rent and other income for the property, and generally operating it in a manner that was irreconcilably

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[33] *Id.* at 303-04, 79 N.W.2d at 583.

[34] *Id.* at 305, 79 N.W.2d at 583.

[35] *Id.* at 307-08, 79 N.W.2d at 585. Cf. *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940).

[36] See *Dewey, supra* note 30.

inconsistent with a resulting trust in favor of Adolph's heirs. For nearly 30 years after Adolph's death, the resulting trustees made no attempt to convey the property to the beneficiaries of the resulting trust, pay them any of the property's income, or require them to share in the expenses. In short, their possession and operation of the property was openly, notoriously, and unequivocally hostile to the implicit terms of the resulting trust.

It is important to distinguish between the purported beneficiaries of the Liebig Trust and the alleged beneficiaries of the resulting trust. Marietta asserts (correctly) that the beneficiaries of the resulting trust are Adolph's heirs at law, whom she alleges are Adolph's intestate beneficiaries. But at that point, the express terms of the Liebig Trust and the implicit terms of the resulting trust were contradictory. And in managing the property according to what they believed to be the terms of the Liebig Trust, the trustees were clearly acting contrary to the resulting trust. No reasonable person aware of the manner in which the property was being managed would believe that it was being managed with the interests of all six of Adolph's children in mind, but that is precisely what the resulting trust alleged by Marietta would have required.

Marietta does not dispute these facts. In fact, she contends that Paul and Valeria did not administer the Liebig Trust property pursuant to its terms or "as true fiduciaries."[37] Marietta asserts, and the record supports, that cattle supposedly belonging to the Liebig Trust were sold to pay for Valeria's funeral, that supposed Liebig Trust assets were used to pay Valeria's personal expenses, and that Valeria was treated as the "real beneficiary" of the Liebig Trust.[38] Marietta's purpose in reciting these facts seems to be to impugn Paul and Valeria's administration of the Liebig Trust, but this evidence is not particularly helpful to her cause. Paul and Valeria's supposed mismanagement of the Liebig Trust assets is *also* inconsistent with the resulting trust created by the failure of the Liebig Trust, and helps establish that the resulting trust was repudiated

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[37] Brief for appellant at 12.

[38] *Id.* at 13.

by the conduct of its trustees no later than (and probably well before) 1997, making Marietta's 2008 complaint untimely pursuant to § 25-202.

Marietta suggested at oral argument that the trustees' management of the property was permissive—in essence, she contended that all of the siblings were comfortable with the property's being managed essentially for Valeria's benefit, so long as Valeria was alive. Marietta seems to be suggesting that her failure to assert any rights under the resulting trust was knowing and deliberate, because neither she nor her siblings wanted to interfere with Valeria's support. Of course, a knowing failure to assert a legal right does not toll a statute of limitations—to the contrary, it is exactly the circumstance against which a statute of limitations is intended to provide a defense. But more significantly, the record in this case affirmatively contradicts Marietta's argument.

While Marietta may have believed that the property was being managed consistent with the terms of the Liebig Trust, it was repudiation of the *resulting trust*, not the Liebig Trust, that started the statute of limitations running on her claims. And as noted above, the requirements of the Liebig Trust and the resulting trust were quite different. Whether or not Valeria was treated as the "real beneficiary" of the Liebig Trust,[39] it is apparent that Marietta was not treated as a beneficiary of *any* trust—either the Liebig Trust or, more importantly, a resulting trust. The record is clear that Marietta did not investigate the validity of the Liebig Trust or her right to any of the property under a resulting trust until the fall of 2007. The conduct of the trustees gave Marietta clear notice that the property was not being managed for her benefit pursuant to any resulting trust—but she did not pursue any claim based on the resulting trust until at least 10 years later. Therefore, her claims are time barred by the statute of limitations.

Marietta's Remaining Arguments

For that reason, we find Marietta's assignments of error to be either without merit or mooted by our conclusion with

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[39] *Id.*

respect to the statute of limitations. Marietta argues, in addition, that one particular deed to the Liebig Trust was defective, even if the Liebig Trust itself was effective, because it conveyed the homestead of a married person and was not properly signed by both Adolph and Valeria.[40] This fact does not change our conclusion; if true, it would simply be another reason that its conveyance to the Liebig Trust was void and does not affect our statute of limitations analysis.

And finally, Marietta argues that the trial court's judgment was "odd," because it did not quiet title in anyone, nor did it dispose of certain state and federal tax liens which were not discussed above because they were not pertinent to our analysis.[41] "An action to quiet title," she argues, "should end with a decree quieting title in somebody."[42] But Marietta filed a complaint seeking to quiet title, and her complaint was time barred. The defendants to her complaint did not expressly ask for title to be quieted in any of them, nor have they appealed from the court's failure to do so. Contrary to Marietta's suggestion, we do not find it odd that the trial court did not grant relief that was not requested, nor is there any basis to reverse a court's failure to grant particular relief when the only parties potentially aggrieved by it have asked that the judgment be affirmed. We find no merit to Marietta's final argument.

CONCLUSION

Our de novo review of the record establishes that the 10-year statute of limitations began to run on Marietta's claim no later than 1997, by which time the resulting trustees' repudiation of the resulting trust was clearly established. Marietta's 2008 complaint was time barred. We affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[40] See *Christensen v. Arant*, 218 Neb. 625, 358 N.W.2d 200 (1984).

[41] Brief for appellant at 27.

[42] *Id.*

RICHARD L. ARMSTRONG AND CYNTHIA A. ARMSTRONG, APPELLANTS, V. COUNTY OF DIXON, APPELLEE.

808 N.W.2d 37

Filed October 28, 2011. No. S-10-235.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
3. **Courts: Eminent Domain: Attorney Fees: Appeal and Error.** Under Neb. Rev. Stat. § 76-726(2) (Reissue 2009), the court encompassed in the expression "the court having jurisdiction of a proceeding instituted by a condemnee under [Neb. Rev. Stat. §] 76-705 [(Reissue 2009)]" includes the district court to which an appeal is taken under Neb. Rev. Stat. § 76-715 (Reissue 2009). The provision in § 76-726(2) allowing an award of attorney fees when "(a) the court renders a judgment in favor of the condemnee or (b) a settlement is effected" authorizes the district court as well as the county court to award attorney fees upon the happening of either (a) or (b).
4. **Eminent Domain: Attorney Fees: Words and Phrases.** While Neb. Rev. Stat. § 76-720 (Reissue 2009), providing for the award of attorney fees upon the happening of certain events, is couched in terms of "may," in the absence of unusual and compelling reasons, the court "shall" enter such an award.
5. **Eminent Domain: Attorney Fees: Appeal and Error.** The results of any work done in connection with a condemnation proceeding which are relevant and material and properly introduced in evidence on appeal in the district court, whenever prepared, may be considered by the latter court in awarding reasonable attorney fees. The district court is not required to allow a fee for such services. On the other hand, the court should not be precluded from taking such factors into account in determining a reasonable fee.
6. **Eminent Domain: Attorney Fees.** In awarding attorney fees under Neb. Rev. Stat. § 76-720 (Reissue 2009), the proper factors to be considered by the court are the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Dixon County, WILLIAM BINKARD, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Jason S. Doele and Tracey L. Buettner, of Stratton, DeLay & Doele, P.C., L.L.O., for appellants.

Matthew V. Rusch and William F. Austin, of Erickson & Sederstrom, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this inverse condemnation proceeding, the district court for Dixon County entered judgment on a jury verdict in favor of Richard L. Armstrong and Cynthia A. Armstrong and against the County of Dixon for $4,049 and awarded the Armstrongs attorney fees in the amount of $5,600. The Armstrongs appealed the judgment to the Nebraska Court of Appeals, which affirmed the judgment. The Armstrongs petitioned for further review limited to the issue of attorney fees. We granted the Armstrongs' petition for further review. Because the Court of Appeals misconstrued the controlling statutes, we reverse that portion of the Court of Appeals' decision which affirmed the award of attorney fees, and we remand the cause to the Court of Appeals with directions to reverse the award of attorney fees in the district court and remand the cause to the district court with directions to award attorney fees in accordance with this opinion.

STATEMENT OF FACTS

In the summer of 2004, the County of Dixon (the County) began a road maintenance project on a county road that ran adjacent to the Armstrongs' property. The Armstrongs' tenant gave the County permission to do work on the property, including grading and removing fences and trees. After much of the work had been completed, Richard Armstrong instructed the tenant to order the County off the property.

The Armstrongs initially filed an action against the County in the district court on September 1, 2006. In the complaint, they alleged claims of negligence, constitutional inverse condemnation, and a violation of the Open Meetings Act. They sought

damages in excess of $65,000. After some discovery had been completed, in October 2007, the County made a settlement offer of $5,000. The Armstrongs declined the offer and did not make a counteroffer. The day before trial was scheduled to commence in July 2008, the Armstrongs dismissed the district court action, and the next week, they filed a new action stating a claim for statutory inverse condemnation in the county court for Dixon County. The proceeding filed in the county court gives rise to the current appeal.

In the county court, the Armstrongs brought an inverse condemnation proceeding under Neb. Rev. Stat. § 76-705 (Reissue 2009). In accordance with procedures set forth in the eminent domain statutes, Neb. Rev. Stat. §§ 76-701 through 76-726 (Reissue 2009), the county court appointed a board of appraisers. The appraisers found that the Armstrongs should be compensated $800 for the taking and damages. The Armstrongs filed a motion for attorney fees in the county court, relying on § 76-726(2). The county court determined that it lacked authority to award the requested attorney fees, thus effectively denying the motion. The county court explained its ruling, stating that under the controlling statutes, the county court could award reasonable attorney fees only "in specific limited circumstances" which "[were] not currently present . . . i.e. there has been no settlement effected; there has been no waiver of appeal by all interested parties, and the award assessed by the appraisers does not rise to the level of a 'court render[ed] judgment'."

Section 76-715 provides that "[e]ither condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court . . . ." The Armstrongs appealed the appraisers' award to the district court under § 76-715. In the district court, they sought damages in the amount of $13,434 plus reasonable attorney fees. Prior to trial in the district court, the parties stipulated that discovery completed in connection with the prior dismissed district court action was relevant to the current district court proceeding and that therefore, the products of such discovery, including interrogatories, requests for admissions, requests for production of documents, and depositions, could be used in the current proceeding. After

trial, a jury awarded the Armstrongs damages of $4,049. The Armstrongs moved for attorney fees.

Before entering judgment on the jury award, the district court considered the Armstrongs' request for attorney fees. The Armstrongs presented evidence of fees incurred, inter alia, in the county court, in the district court appeal, and in the prior district court action. The court stated that it first needed to determine which Nebraska statute or statutes applied to the request. In this regard, the district court stated that "the statutes are not clear" and that "Nebraska appellate courts have not addressed § 76-726(2)."

The district court concluded that attorney fees denied in county court could not be awarded in district court, because the Armstrongs had failed to assign error to the denial, and that in any event, § 76-726(2) prevented an award of attorney fees by the district court sitting as an appellate court. The court noted that under the language of § 76-726(2), a condemnee could seek attorney fees incurred in a "'proceeding instituted by a condemnee under section 76-705.'" The district court reasoned that the "proceeding instituted under § 76-705" occurred in the county court, whereas the proceeding in the district court was an appeal from that proceeding but not a "'proceeding instituted by a condemnee under section 76-705'" for purposes of § 76-726(2). The court concluded that § 76-726(2) did not authorize an award of attorney fees in an appeal in the district court.

The district court determined, however, that fees could be sought by the Armstrongs in district court under § 76-720, which generally permits an award of attorney fees to a condemnee who obtains a judgment 15 percent greater than the appraisers' award. In making its award of attorney fees under § 76-720, the court considered the fees sought by the Armstrongs which had been incurred in connection with the prior district court action, because discovery related to the prior action was used in the present district court proceeding wherein the judgment exceeded the appraisers' award by greater than 15 percent. The court noted that in the prior action, the Armstrongs initially demanded $65,000, and that in October 2007, the County had made a settlement offer of $5,000, which the Armstrongs did

not accept. The court determined that because the damages awarded by the jury were less than the settlement offered by the County in the prior action, the Armstrongs' success "at trial was marginal at best." The district court stated that the "inverse condemnation statutes were not intended to permit a party to proceed through trial without regard for reasonable settlement offers." The district court therefore cut off the award of fees at the point of the declined settlement offer. With respect to the amount of attorney fees awarded, the court noted that the evidence submitted by the Armstrongs "indicate[d] attorney fees of approximately $5,600 at the time the $5,000 settlement offer was tendered by" the County. The court determined that this amount of attorney fees was appropriate and awarded the Armstrongs $5,600 for attorney fees. The court also awarded $7,815.48 for expert witness fees.

The Armstrongs appealed the district court judgment to the Court of Appeals and claimed that the court erred in various respects, including its award of attorney fees. In a memorandum opinion, the Court of Appeals rejected the Armstrongs' assignments of error and affirmed the district court's judgment. See *Armstrong v. County of Dixon*, No. A-10-235, 2011 WL 568688 (Neb. App. Feb. 15, 2011) (selected for posting to court Web site). The Court of Appeals' decision regarding attorney fees is the only issue upon which we granted further review.

With regard to the issue of attorney fees, the Court of Appeals considered the propriety of awarding attorney fees under both §§ 76-720 and 76-726(2). Regarding § 76-726(2) and the denial of fees in county court, it "concluded that § 76-726(2) does not provide a statutory basis for the district court to award attorney fees either not requested in the county court or for which the county court's denial was not properly preserved." *Armstrong v. County of Dixon*, 2011 WL 568688 at *8. The Court of Appeals noted that the Armstrongs did not appeal the county court's ruling denying their request for attorney fees, but instead requested fees directly from the district court. The Court of Appeals concluded that the Armstrongs failed to properly preserve the denial of attorney fees by the county court.

Regarding § 76-726(2), the Court of Appeals noted that the statute authorizes an award of fees incurred in the "court having jurisdiction of a proceeding instituted by a condemnee under § 76-705" and that § 76-705 authorizes an inverse condemnation action to be brought in county court rather than in district court. *Armstrong v. County of Dixon*, 2011 WL 568688 at *7. The Court of Appeals concluded that the "court having jurisdiction of a proceeding instituted by a condemnee under section 76-705" as provided for in § 76-726(2) is the county court in which the proceeding is initiated rather than the district court to which an appeal from an award by appraisers in such a proceeding may be taken. The Court of Appeals approved of the reasoning of the district court to the effect that the district court could not award attorney fees sought in county court and affirmed the denial of attorney fees based on § 76-726(2).

With respect to § 76-720, the Court of Appeals agreed with the district court that attorney fees were available under this statute and the facts of the case. The Court of Appeals considered but rejected the Armstrongs' argument to the effect that additional fees they had incurred for discovery in the prior district court action should have been awarded by the district court under § 76-720. The Court of Appeals cited *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 292 N.W.2d 293 (1980), for the proposition that fees incurred prior to an appeal to the district court but related to the appeal may be *considered* in awarding a reasonable fee, but that the district court is *not required* to allow a fee for such services. *Armstrong v. County of Dixon, supra.* The Court of Appeals noted that the district court "devoted several pages of its judgment to analyzing and explaining its award of attorney fees" and that the district court had concluded that although the Armstrongs' success on appeal wherein they were awarded $4,049 compared to the $800 awarded by the appraisers was sufficient to trigger an award of fees under § 76-720, their success was "marginal at best" in light of their demand for damages of $65,000 in the prior district court action. *Armstrong v. County of Dixon*, 2011 WL 568688 at *8. The Court of Appeals noted that one factor the district court had considered was that in the prior action,

the County had made a settlement offer of $5,000 which exceeded the $4,049 judgment ultimately obtained in the district court. The Court of Appeals concluded that the district court's award of attorney fees of $5,600 was not an abuse of discretion and that the Armstrongs' assignment of error with respect to attorney fees was without merit. *Armstrong v. County of Dixon, supra.*

The Armstrongs petitioned for further review. We granted the petition for further review.

ASSIGNMENTS OF ERROR

The Armstrongs claim that the Court of Appeals erred when it (1) affirmed the district court's denial of an award of attorney fees under § 76-726(2) for fees incurred at the county court stage of the inverse condemnation proceedings and (2) concluded that the district court did not abuse its discretion under § 76-720 when it cut off the award of attorney fees incurred in the prior district court action at the point in time at which the County made a settlement offer.

STANDARDS 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).

[2] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *City of Gordon v. Ruse*, 268 Neb. 686, 687 N.W.2d 182 (2004).

ANALYSIS

Our consideration of this appeal on further review is limited to the issue of attorney fees. We find merit to the Armstrongs' assignments of error. We conclude that the Court of Appeals erred in its interpretation of § 76-726(2) and when it affirmed the district court's award of attorney fees under § 76-720. As explained below, § 76-726(2) authorized the district court to award the attorney fees incurred in county court and, although § 76-720 authorized consideration of the attorney fees in the prior dismissed district court action, the district court abused

its discretion when it failed to consider the full range of factors in awarding attorney fees attributable to the prior action.

Whether and to what extent the Armstrongs are entitled to an award of attorney fees in this inverse condemnation case are controlled by reference to §§ 76-720 and 76-726(2). Section 76-720 provides in relevant part:

> If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment is greater by fifteen percent than the amount of the award, or if appeal is taken by the condemner and the amount of the final judgment is not less than eighty-five percent of the award, . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses.

Section 76-726(2) provides as follows:

> The court having jurisdiction of a proceeding instituted by a condemnee under section 76-705 shall award the condemnee such sum as will, in the opinion of the court, reimburse the condemnee for his or her reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees, actually incurred as a result of the taking of or damage to the condemnee's property if (a) the court renders a judgment in favor of the condemnee or (b) a settlement is effected.

The District Court Was the Court Having Jursidiction of a Proceeding Instituted by a Condemnee in These Inverse Condemnation Proceedings and Therefore Was Authorized to Award Attorney Fees Under § 76-726(2).

The Armstrongs claim that the Court of Appeals erred when it concluded that § 76-726(2) did not authorize the district court to award attorney fees incurred at the county court stage of these inverse condemnation proceedings. We agree with the Armstrongs that this conclusion was in error and that under the circumstances of this case wherein the district court rendered judgment, the district court was authorized to award attorney fees under § 76-726(2).

The Court of Appeals concluded that "[u]nder § 76-726(2), the court having jurisdiction of [a proceeding instituted by a condemnee under § 76-705] is the county court, not the district court." *Armstrong v. County of Dixon*, No. A-10-235, 2011 WL 568688 at *7 (Neb. App. Feb. 15, 2011) (selected for posting to court Web site). The Court of Appeals recognized that § 76-705 authorized a condemnee to institute a proceeding in county court, but reasoned that although the district court had jurisdiction of an appeal from such proceeding, the district court's appellate jurisdiction did not equate to the "court having jurisdiction" for purposes of awarding attorney fees under § 76-726(2). The Court of Appeals' reasoning misconstrues the structure of the eminent domain statutes and the proceedings set forth therein. As explained below, the appeal in district court taken under § 76-715 is part of the proceedings which are initiated by the condemnee in county court by filing under § 76-705. Under § 76-726(2), the authorization to award attorney fees to the "court having jurisdiction of a proceeding instituted by a condemnee under section 76-705" is given to the court where the matter may be resolved, which, in this case, was the district court. The court having jurisdiction for purposes of awarding attorney fees under § 76-726(2) in the instant case is the district court which rendered judgment.

Under § 76-705, a condemnee may file a petition for damages with "the county judge." Upon such filing, the county judge must appoint appraisers and the appraisers must assess damages and file a report thereof with the county court. §§ 76-706 through 76-710. Pursuant to § 76-715, "[e]ither condemner or condemnee may appeal from the assessment of damages by the appraisers to the district court of the county where the petition to initiate proceedings was filed."

Although labeled as an "appeal," the appeal authorized by § 76-715 is not a conventional civil appeal from county court to district court, which is governed by Neb. Rev. Stat. §§ 25-2728 through 25-2738 (Reissue 2008). Section 25-2728(2)(a) specifically provides that such sections shall not apply to, inter alia, "[a]ppeals in eminent domain proceedings as provided in sections 76-715 to 76-723." We have noted that an "appeal from an award of appraisers in an eminent domain proceeding

is sui generis," *Dawson v. Papio Nat. Resources Dist.*, 210 Neb. 100, 103, 313 N.W.2d 242, 245 (1981), and therefore, not necessarily subject to the general rules regarding an appeal. Under § 76-715, the condemnee or condemnor does not appeal an order or ruling of the county court; instead, the condemnee or condemnor appeals "from the assessment of damages by the appraisers." Unlike a conventional appeal, § 76-717 provides that "[t]he appeal shall be tried de novo in the district court" and that when both the condemnee and the condemnor appeal to the district court, "the *proceedings* shall be docketed in the district court as a single cause of action." (Emphasis supplied.) Given the statutes, the conclusions made by the lower courts, relying on conventional appellate jurisprudence to the effect that the district court could not award the Armstrongs attorney fees incurred in county court because they failed to preserve or assign the county court's denial of such fees as error, were erroneous.

Soon after the 1951 enactment of the eminent domain statutes, this court in *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 283, 66 N.W.2d 591, 596 (1954), described the proceedings under the statutes as follows:

> The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceedings in the district court.

This court in *Jensen* also noted, "'On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings.'" 159 Neb. at 277, 66 N.W.2d at 596 (quoting *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953)). Therefore, issues related to matters such as an award of attorney fees are to be "presented by proper pleadings" in the district court, rather than by assignment of error from the county court.

After later amendments to the statutes, this court continued to describe the roles of the county court and the district court in eminent domain proceedings in a similar fashion:

> The proceeding before the appraisers is not a trial. No evidence is received and no record is made. The hearing is before the appraisers, not the county court. The function of the court in such cases is administrative only. Issues are framed for the first time in the District Court. . . . The Legislature did not intend to make the determination of the appraisers final.

Estate of Tetherow v. State, 193 Neb. 150, 156, 226 N.W.2d 116, 120 (1975) (citations omitted). We have also stated: "An appeal to the District Court from the award of the appraisers appointed by the county court contemplates the filing of pleadings and the framing of issues in a judicial proceeding in the District Court." *Zarybnicky v. County of Gage*, 196 Neb. 210, 216, 241 N.W.2d 834, 838 (1976).

[3] Under the scheme set up by the eminent domain statutes, the appeal to the district court is a part of the proceedings that are initiated when a condemnee files under § 76-705. We therefore conclude that under § 76-726(2), the court encompassed in the expression "[t]he court having jurisdiction of a proceeding instituted by a condemnee under section 76-705" includes the district court to which an appeal is taken under § 76-715. It follows, and we further conclude, that the provision in § 76-726(2) allowing an award of attorney fees when "(a) the court renders a judgment in favor of the condemnee or (b) a settlement is effected" authorizes the district court as well as the county court to award attorney fees upon the happening of either (a) or (b).

In the present case, the district court rendered a judgment in favor of the condemnees, the Armstrongs, based on the jury's verdict. The district court therefore was required to award attorney fees under § 76-726(2), which statute provides that the court "shall" award fees when it renders a judgment in favor of the condemnee. Under the language of § 76-726(2), the district court is required to make an award, but because the statute provides that the court must award "such sum as will, in the opinion of the court, reimburse the condemnee for his or

her reasonable costs, disbursements, and expenses," the dollar amount of the award is within the court's discretion. The contrary reading of § 76-726(2) by the lower courts was error.

In this appeal, the Armstrongs assert that attorney fees incurred in the county court stage of these eminent domain proceedings were authorized to be awarded by the district court under § 76-726(2). We agree with the Armstrongs. The Court of Appeals erred when it failed to reverse the district court's determination that it could not award attorney fees under § 76-726(2) for fees incurred in county court. The Court of Appeals should have remanded the cause to the district court to award "reasonable" attorney fees under § 76-726(2) for fees incurred in the county court.

The District Court Should Have Considered Appropriate Factors When Determining Reasonable Fees Under § 76-720 Rather Than Awarding Fees Only Until the Time of the Settlement Offer in the Prior Action.

The Armstrongs claim that the Court of Appeals erred when it affirmed the amount of the district court's award of attorney fees under § 76-720, because the district court awarded only the attorney fees incurred in the prior district court action until the time the County made a settlement offer. We agree that the district court abused its discretion in this respect. As explained below, the district court gave too much weight to the settlement offer in the prior action; instead, the court's focus should have been on how the discovery conducted in the prior action was used in the present action and what amount of fees was reasonable in light of such use, as well as the other factors described below.

[4] There was no dispute in this case that the district court was authorized to award attorney fees under § 76-720, because the damages awarded by the jury were greater by 15 percent than the amount of the appraisers' award. In *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 236, 292 N.W.2d 293, 296 (1980), we said that while § 76-720 "is couched in terms of 'may,' we have held that, in the absence of unusual and compelling reasons, the court 'shall' enter such an award."

Therefore, because the conditions of § 76-720 were met, and given the absence of compelling reasons to the contrary, the district court was required to award attorney fees. The issue in this appeal is whether the district court abused its discretion in the amount of fees it awarded.

As an initial matter, we note that the district court properly did not award fees under § 76-720 related to the county court stage of these proceedings. Compare § 76-726(2). The court cited *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971), for the proposition that § 76-720 does not permit an award for fees incurred prior to the initiation of an appeal to the district court. With regard to the award of fees under § 76-720:

> We have long held that an award pursuant to § 76-720 is conditional and that the services of attorneys and expert witnesses must be related to the accomplishment of the conditions precedent stated in § 76-720, to wit: securing a final judgment on appeal greater by 15 percent than the amount of the award. See *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971). In *Johnson*, we stated that § 76-720 does not permit the award of attorney fees in eminent domain proceedings for services rendered prior to bringing an appeal in the district court.

In re Application of SID No. 384, 259 Neb. 351, 365, 609 N.W.2d 679, 689 (2000).

[5] Although fees at the county court stage were not recoverable under § 76-720, it was appropriate for the district court to consider the fees for work performed in the prior district court action which proved useful in the district court appeal under consideration. With regard to work done prior to the district court appeal but that was relevant to the appeal, we have held:

> [T]he results of any work done in connection with a condemnation proceeding which are relevant and material and properly introduced in evidence on appeal in the District Court, whenever prepared, may be considered by the latter court in awarding a reasonable fee. The District Court is not required to allow a fee for such services. On

> the other hand, the court should not be precluded from taking such factors into account in determining a reasonable fee.

Prucka v. Papio Nat. Resources Dist., 206 Neb. at 239, 292 N.W.2d at 297.

In the present case, the parties stipulated that the products of discovery in the previous district court action could be used in the present district court proceeding. It was therefore appropriate for the district court to consider such discovery, because on appeal, the Armstrongs received a judgment 15 percent greater than the appraisers' award, and the products of the discovery helped achieve that result. The district court was correct to consider such work, and the Court of Appeals was correct when it affirmed the district court's decision that it could consider the attorney fees the Armstrongs had incurred in the prior district court action. However, we conclude that because the district court abused its discretion by limiting the award of fees up to the point when the County made a settlement offer in the prior district court case, the Court of Appeals erred in affirming the amount of attorney fees awarded by the district court under § 76-720.

[6] In *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 237, 292 N.W.2d 293, 296 (1980) (quoting *Jensen v. State*, 184 Neb. 802, 172 N.W.2d 607 (1969)), we stated that in awarding attorney fees under § 76-720, the proper factors to be considered by the court were:

> "the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties."

These are the factors that the district court should have considered in determining a reasonable amount of attorney fees to award. The results of the prior district court action were not controlling, and therefore, it was not appropriate to award fees based simply on whether the attorney fees were incurred before or after the settlement offer by the County in that case. Instead,

the district court should have considered all of the fees incurred for the production of discovery that was effectively used to achieve the result in the present district court proceeding, and the court should have considered such fees in light of the factors set forth above.

Because the district court's award of $5,600 in attorney fees was based on the timing of the settlement offer in the prior action without due regard to other factors, the Court of Appeals should have concluded that the district court abused its discretion. The Court of Appeals erred when it failed to reverse the attorney fees awarded under § 76-720 and failed to remand the cause to the district court to consider the proper factors set forth above and to make a new award of attorney fees under § 76-720.

CONCLUSION

We conclude that the district court and the Court of Appeals erred in their interpretations of § 76-726(2) and that the statute authorized and required the district court to award attorney fees incurred in county court in these inverse condemnation proceedings. We further conclude that the district court abused its discretion when it based its award of attorney fees under § 76-720 on whether the fees were incurred before or after the County made its settlement offer in the prior district court action. The Court of Appeals should have reversed the district court's award of attorney fees and remanded the cause to the district court for consideration of a new award of attorney fees based on the evidence received at the hearing on the Armstrongs' motion for attorney fees and on the standards set forth herein.

This appeal is before us on a petition for further review. With the exception of the issue of attorney fees, the Armstrongs did not assign error to the Court of Appeals' decision, and therefore, those portions are affirmed. Based on our analysis above, we reverse that portion of the Court of Appeals' decision in which it affirmed the district court's award of attorney fees. We remand the cause to the Court of Appeals with directions to reverse the district court's award of attorney fees and to remand the cause to the district court with instructions to award

reasonable attorney fees under both §§ 76-720 and 76-726(2) in accordance with the standards set forth in this opinion.

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

HEAVICAN, C.J., concurring.

I concur with the decision of the court, but write separately to emphasize what this court did and did not do in its opinion.

This court concluded the district court erred by finding that it lacked the ability to issue an award under Neb. Rev. Stat. § 76-726 (Reissue 2009) for various fees incurred before the county court. This court further concluded that the district court erred in finding that it was required to award fees under Neb. Rev. Stat. § 76-720 (Reissue 2009) for a time period that ceased as of the County's settlement offer.

What this court did not do was opine in any way on the amount of fees awarded below by the district court. Upon remand, the district court should consider an award of fees under both §§ 76-720 and 76-726. And in doing so, the district court is reminded that any amount that might be awarded should be considered anew—and as such, could be in an amount equal to, or higher or lower than, the amount awarded in this case.

FEDERATED SERVICE INSURANCE COMPANY, APPELLEE, V. ALLIANCE CONSTRUCTION, LLC, APPELLANT, AND SADLER LINE CONSTRUCTION, INC., AND DANNY O'NEALL, APPELLEES.

805 N.W.2d 468

Filed October 28, 2011. No. S-10-559.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
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 court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained

one of the motions, the reviewing court obtains jurisdiction over both motions. The reviewing court may determine the controversy that is the subject of those motions or make an order specifying the facts that appear without substantial controversy and direct such further proceedings as the court deems just.

4. **Insurance: Contracts.** A court construes insurance contracts like other contracts, according to the meaning of the terms that the parties have used.
5. ____: ____. When the terms of an insurance contract are clear, a court gives them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
6. **Insurance: Contracts: Liability.** Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.
7. **Insurance: Contracts: Liability: Damages.** Under a policy providing liability coverage, the insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a specified occurrence.
8. **Insurance: Liability.** An insurer's duty to defend is broader than the duty to indemnify.
9. **Insurance: Pleadings.** A court must initially measure an insurer's duty to defend an action against the insured by the allegations in the complaint against the insured.
10. **Insurance: Liability.** In determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources.
11. ____: ____. An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.
12. ____: ____. An insurer has a duty to defend its insured whenever it ascertains facts that give rise to the potential of liability under the policy.
13. ____: ____. An insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.
14. **Declaratory Judgments: Insurance: Pleadings: Evidence.** In a declaratory judgment action to determine the insurer's duty to defend, a court must also consider any relevant evidence outside the pleadings.
15. **Insurance: Contracts: Negligence: Intent.** A party to a construction contract (the promisee) may require a subordinate party (which could be a general contractor or subcontractor) to insure losses caused by the promisee's own negligence in two circumstances: if the contract contains (1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties.
16. **Insurance: Contracts.** Subject to restrictions in the additional insured endorsement, an additional insured has the same coverage rights and obligations as the principal insured under the policy.
17. **Insurance: Contracts: Liability: Damages.** A commercial general liability policy is intended to cover an insured's tort liability for physical injuries or property damage.
18. **Insurance: Contracts: Negligence: Intent.** A requirement in the underlying contract that the subordinate party make the promisee an additional insured on the

subordinate party's commercial general liability coverage unequivocally shows that the parties intended the subordinate party to insure against the promisee's negligence.

19. **Insurance: Contracts: Negligence: Liability: Words and Phrases.** The term "arising out of" in an insurance liability policy is very broad and comprehensive; ordinarily understood to mean originating from, growing out of, or flowing from; and requiring only a "but for" causal connection between the occurrence and the conduct or activity specified in the policy.
20. ____: ____: ____: ____: ____. The phrase "arising out of" the principal insured's operations in an additional insured endorsements to a commercial general liability policy requires only a "but for" causal connection to those operations.
21. **Insurance: Contracts: Proof.** An insurer has the burden to prove that an exclusion applies.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for further proceedings.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellant.

Kurt D. Maahs and James C. Morrow, of Morrow, Willnauer & Klosterman, L.L.C., for appellee Federated Service Insurance Company.

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

CONNOLLY, J.

SUMMARY

In this declaratory judgment action, Federated Service Insurance Company (Federated) sought a determination that under its policy with Sadler Line Construction, Inc. (Sadler), it had no duty to defend or indemnify Alliance Construction, Inc. (Alliance). Sadler was a subcontractor of Alliance. The district court granted summary judgment to Federated. We reverse the judgment and remand the cause for further proceedings.

BACKGROUND

SADLER'S SUBCONTRACT WITH ALLIANCE

In June 2005, Sadler signed a subcontract agreement with Alliance to provide services on a construction project to widen an intersection in Omaha, Nebraska. An insurance procurement

clause required Sadler to purchase specific insurance coverages and to make Alliance an additional insured on Sadler's coverages for commercial general liability (CGL) and umbrella/excess liability. The subcontract also provided that Sadler's insurance would be primary to any other applicable insurance maintained by Alliance or the project owner. A separate indemnity clause required Sadler to indemnify and hold Alliance harmless from any liability for personal injuries or property damages, even if Alliance's active or passive negligence caused the loss. The only exception was for liability arising from Alliance's sole negligence.

Sadler's Insurance Coverage With Federated

Sadler's CGL coverage with Federated contained a "Contractual Liability" provision. It provided coverage for liability that Sadler had assumed through a contract if the contract met Federated's definition of an "'insured contract.'" The definition included Sadler's agreement to assume another party's tort liability in a business contract. But it specified that "[t]ort liability" meant liability that would be imposed by law absent the agreement. Also, the CGL coverage included an "Additional Insured by Contract Endorsement." The endorsement is at issue here.

Underlying Personal Injury Action

In 2005, Danny O'Neall was injured while working for Sadler on the jobsite. In 2007, he filed a negligence action against Alliance, Sadler, the project owner, and the Department of Roads. Federated agreed to defend Alliance in the O'Neall suit subject to a reservation of rights. O'Neall's complaint named Sadler in the action, to comply with Neb. Rev. Stat. § 48-118.01 (Reissue 2010). That section of the Nebraska Workers' Compensation Act requires an employee or employer to give notice to other potential parties before bringing an action against a third person so that the other parties have an opportunity to join the action.

Declaratory Judgment Action

In its declaratory judgment action against Alliance, Federated alleged that it had no duty to defend or indemnify Alliance

against O'Neall's personal injury action. Federated alleged that O'Neall had not sued Sadler for independent acts of negligence. It claimed that a limitation and exclusion in the additional insured endorsement precluded coverage. In addition, Federated alleged that under Neb. Rev. Stat. § 25-21,187(1) (Reissue 2008), it had no duty to defend or indemnify Alliance. Section 25-21,187(1) is Nebraska's anti-indemnity statute. It sets out the circumstances under which an agreement to indemnify another party for the promisee's own negligence is void as against public policy. But it contains an exception for insurance contracts.

District Court's Order

Alliance, Sadler, and Federated all moved for summary judgment. The court overruled Alliance's and Sadler's motions and granted Federated's motion.

Alliance argued that Federated was obligated to indemnify it under the contractual liability provision of Sadler's CGL coverage. Although § 25-21,187 rendered the indemnity clause void, Alliance argued that Sadler's agreement in the subcontract to procure insurance to cover Alliance's own liability was an insurance contract under § 25-21,187's exception. The court rejected that argument.

The court also ruled that Alliance was not entitled to additional insured coverage under the endorsement. It concluded that the limitation in the endorsement precluded that coverage. The limitation in paragraph B of the endorsement provided, "Coverage shall not exceed the terms and conditions that are required by the terms of the written agreement to add any insured, or to procure insurance." The court concluded that under the limitation, the additional insured coverage was limited by the requirements of the subcontract's insurance procurement clause.

The court determined that under this court's case law, the subcontract could only validly require Sadler to obtain insurance coverage for losses caused by Alliance's own negligence in two circumstances: (1) The subcontract contained express language to that effect, or (2) the subcontract contained clear and unequivocal language that the parties intended Sadler to obtain such insurance. The court concluded that the

subcontract did not satisfy the express language requirement. It also rejected Alliance's argument that the court should consider the indemnity clause as evidence that the parties intended Sadler to obtain insurance coverage for Alliance's own negligence. Accordingly, the court concluded that it was clear the parties intended that Sadler would indemnify Alliance for Alliance's negligence. But it ruled that the subcontract lacked unequivocal language showing that the parties intended Sadler to insure against Alliance's negligence. It therefore concluded that Federated was obligated to insure Alliance only for its vicarious liability.

ASSIGNMENTS OF ERROR

Alliance assigns that the district court erred as follows:

(1) determining that the subcontract did not require Sadler to insure Alliance for its direct acts of negligence;

(2) determining that the Federated policy did not insure Alliance for its direct acts of negligence;

(3) entering an inconsistent order by concluding that Federated had insured Alliance under the policy for its vicarious liability but that Federated had no duty to defend and indemnify Alliance in the personal injury suit; and

(4) overruling Alliance's motion for summary judgment.

STANDARD OF REVIEW

[1,2] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions. The reviewing court may determine the controversy that is the

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[1] See *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[2] See *id.*

subject of those motions or make an order specifying the facts that appear without substantial controversy and direct such further proceedings as the court deems just.[3]

ANALYSIS

Alliance contends that the court erred in determining that the additional insured endorsement did not cover loss caused by its own negligence. Federated counters that it had no duty to indemnify or defend Alliance because the coverage was either precluded by a limitation in the endorsement or excluded under a "sole negligence" exclusion in the endorsement.

Insurer's Duties Under Policy

[4,5] We begin by stating some familiar principles for claims involving an insurer's duties to indemnify and to defend. We construe insurance contracts like other contracts, according to the meaning of the terms that the parties have used. When the terms of an insurance contract are clear, we give them their plain and ordinary meaning as a reasonable person in the insured's position would understand them.[4]

[6-8] Whether an insurer has a duty to indemnify and defend an insured depends upon whether the insured's claimed occurrence falls within the terms of the insurer's coverage as expressed in the policy.[5] Under a policy providing liability coverage, the insurer has a duty to indemnify an insured who becomes legally liable to pay damages for a covered occurrence.[6] But an insurer's duty to defend is broader than the duty to indemnify.[7]

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[3] See *id.*

[4] See *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[5] See, e.g., *Mortgage Express v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009); *City of Scottsbluff v. Employers Mut. Ins. Co.*, 265 Neb. 707, 658 N.W.2d 704 (2003); *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

[6] See, *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *City of Scottsbluff, supra* note 5.

[7] See *Mortgage Express, supra* note 5.

[9-11] A court must initially measure an insurer's duty to defend an action against the insured by the allegations in the complaint against the insured.[8] But in determining its duty to defend, an insurer must look beyond the complaint and investigate and ascertain the relevant facts from all available sources.[9] An insurer has a duty to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.[10]

[12-14] So an insurer has a duty to defend its insured whenever it ascertains facts that give rise to the potential of liability under the policy.[11] Conversely, an insurer is not bound to defend a suit if the pleadings and facts ascertained by the insurer show the insurer has no potential liability.[12] In a declaratory judgment action to determine the insurer's duty to defend, a court must also consider any relevant evidence outside the pleadings.[13]

Insurance Procurement Clause in Subcontract Required Sadler to Provide Coverage for Alliance's Own Negligence

As noted, paragraph B of the additional insured endorsement provided, "Coverage shall not exceed the terms and conditions that are required by the terms of the written agreement to add any insured, or to procure insurance." The court correctly concluded that this language limited the coverage available to Alliance to the coverage that Sadler had agreed to provide under the subcontract's insurance procurement clause. But it erred in concluding that the subcontract's insurance procurement clause was insufficient to show that the parties intended Sadler to insure against Alliance's negligence.

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[8] See *id.*

[9] See *id.*

[10] See *id.*

[11] See *id.*

[12] See *id.*

[13] See, *Peterson, supra* note 6; *Neff Towing Serv., supra* note 5.

As noted, the insurance procurement clause required Sadler to make Alliance an additional insured. Federated argues that the clause is like the one that we considered in *Anderson v. Nashua Corp.*[14] and insufficient to show the parties' intent that Sadler would insure against Alliance's negligence. We disagree.

[15] Citing previous case law, we held in *Anderson* that a party to a construction contract (the promisee) may require a subordinate party (which could be a general contractor or subcontractor) to insure losses caused by the promisee's own negligence in two circumstances: if the contract contains (1) express language to that effect or (2) clear and unequivocal language shows that that is the intention of the parties. In *Anderson*, a property owner sought damages from its contractor after one of the contractor's employees was injured while performing work for the contractor on the property. The property owner alleged that the contractor had failed to purchase the insurance required under the construction contract. The contract required the contractor to carry specified coverages that would protect the contractor and property owner "'from all risks and from any claims that may arise out of or pertain to the performance of such work or services . . . .'"[15]

In *Anderson*, we concluded that the clause did not contain express language requiring the contractor to provide insurance to cover loss caused by the property owner's negligence. We further concluded that the same clause did not contain clear and unequivocal language that the parties intended the contractor to insure the owner against its own negligence. So we implicitly concluded that coverage for claims that arose out of the contractor's work did not clearly require the contractor to insure against the property owner's own negligence. We did not interpret the "arise out of" language to clearly include the property owner's negligence that would not have occurred but for the contractor's work on the property.

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[14] *Anderson v. Nashua Corp.*, 251 Neb. 833, 560 N.W.2d 446 (1997).

[15] *Id.* at 835, 560 N.W.2d at 448 (emphasis omitted).

We recognize that in interpreting liability insurance policies, we have stated that the phrase "arising out of" is broad and comprehensive and requires only "but for" causation.[16] But we give insurance terms a plain and ordinary meaning as a reasonable person in the insured's position would understand them[17] because the insurer drafts the language used in the policy.

In contrast, in *Anderson*, our analysis of the construction contract was governed by case law requiring clear and unequivocal language showing the parties' intent. As the case illustrates, we apply this higher standard because if a contract clearly requires a subordinate party to insure against the promisee's negligence and the subordinate party fails to do so, the subordinate party will be liable for the promisee's damages for its own negligence. And so we declined to interpret the "arise out of" language as clearly requiring the contractor to insure against the property owner's negligence. But the provision that we considered in *Anderson* is significantly different from a requirement that a subordinate party make a promisee an additional insured on the subordinate party's CGL policy.

[16-18] Subject to restrictions in the additional insured endorsement, an additional insured has the same coverage rights and obligations as the principal insured under the policy.[18] And a CGL policy is intended to cover an insured's tort liability for physical injuries or property damage.[19] We

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[16] See *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). Accord, *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008); *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999); *O'Toole v. Brown*, 228 Neb. 321, 422 N.W.2d 350 (1988).

[17] *D & S Realty, supra* note 4.

[18] See, *Liberty Mut. Ins. Co. v. Travelers Indem. Co.*, 78 F.3d 639 (D.C. Cir. 1996); *Massachusetts Turnpike Authority v. Perini Corp.*, 349 Mass. 448, 208 N.E.2d 807 (1965); 4 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 11:151 (2010); 1 Scott C. Turner, Insurance Coverage of Construction Disputes § 42:1 (2d ed. 2002).

[19] See 9A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 129:4 (2005).

recognize that additional insured endorsements commonly have restrictions for coverage. But those restrictions are irrelevant to interpreting the parties' intent in the underlying contract. We conclude that a requirement in the underlying contract that the subordinate party make the promisee an additional insured on the subordinate party's CGL coverage unequivocally shows that the parties intended the subordinate party to insure against the promisee's negligence. This interpretation of the subcontract is consistent with the typical practice of parties to construction contracts.

It is common practice in construction contracts for owners and general contractors to shift the risk of liability for injuries sustained by a subordinate party's employees to the subordinate party's insurer.[20] They usually accomplish this by contractually requiring the subordinate party to make the owner or general contractor an additional insured on the subordinate party's CGL coverage.[21] The main reason for including this requirement is so that the promisee of the additional insured agreement will not be limited to the coverage that the insurer owes for the subordinate party's contractual liability under an indemnity agreement in the construction contract.[22] If an indemnity agreement is invalid under an anti-indemnity statute, then the insurer will not be liable for the subordinate party's contractual liability under the indemnity agreement. But even if an indemnity agreement is invalid, its invalidity does not affect the coverage extended to another party under an additional insured endorsement.[23]

In sum, Sadler's agreement to make Alliance an additional insured on its CGL policy unequivocally showed that the parties intended for Sadler to procure tort liability coverage for Alliance's negligence. Further, the limitation in the additional insured endorsement provided that the coverage would not exceed "the terms of a written agreement to add any

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[20] See *State Auto. Mut. Ins. v. Habitat Const. Co.*, 377 Ill. App. 3d 281, 875 N.E.2d 1159, 314 Ill. Dec. 872 (2007).

[21] See 4 Bruner & O'Connor, *supra* note 18.

[22] See *id.*, § 11:164.

[23] See, *id.*; 1 Turner, *supra* note 18, § 42:4.

insured, or to procure insurance."[24] Because Sadler specifically agreed in the subcontract to add Alliance to its CGL coverage, Federated's coverage of Alliance's negligence did not exceed the terms of the written agreement. The district court erred in ruling that the endorsement's limitation precluded coverage for Alliance's negligence.

Scope of Coverage Under Endorsement's Indemnity Provision

Alliance was covered under Sadler's blanket endorsement for additional insureds, as distinguished from an endorsement that names a specific entity or person as an additional insured. In the blanket endorsement, paragraph A extended coverage to "[a]ny person or organization . . . for which you [Sadler] have agreed by written contract to procure bodily injury or property damage liability insurance, *arising out of operations* performed by you [Sadler] or on your behalf . . . ."

Alliance contends that the court erred in failing to interpret the "arising out of" language in the indemnity provision to extend coverage to Alliance for its own negligence. Federated argues that the "arising out of operations" language shows that the endorsement does not include coverage for Alliance's negligence. We disagree.

[19,20] Federated relies on a federal district court case in which the court considered an additional insured endorsement that was more restrictive. The endorsement specifically limited an additional insured's coverage to "'LIABILITY FOR THE CONDUCT OF THE NAMED INSURED.'"[25] In contrast, as previously noted, this court has interpreted the term "arising out of" in liability policies as very broad and comprehensive; ordinarily understood to mean originating from, growing out of, or flowing from; and requiring only a

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[24] See, e.g., *BP Chemicals, Inc. v. First State Ins. Co.*, 226 F.3d 420 (6th Cir. 2000); *W.E. O'Neil Const. Co. v. General Cas. Co.*, 321 Ill. App. 3d 550, 748 N.E.2d 667, 254 Ill. Dec. 949 (2001); *Transport Intern. Pool v. Continental Ins.*, 166 S.W.3d 781 (Tex. App. 2005); 3 Steven Plitt et al., Couch on Insurance 3d § 40:29 (2011).

[25] See *Boise Cascade Corp. v. Reliance Nat. Indem. Co.*, 129 F. Supp. 2d 41, 47 (D. Me. 2001).

"but for" causal connection between the occurrence and the conduct or activity specified in the policy.[26] Even if under *Anderson*[27] the "arising out of" phrase could be interpreted as not clearly covering the promisee's own negligence, the argument would only create an ambiguity, which we would construe in favor of coverage.[28] And when considering additional insured endorsements to CGL policies, the majority of courts have broadly interpreted the phrase "arising out of" the principal insured's operations to require only a "but for" causal connection to those operations:

> "The majority view of these cases is that for liability to 'arise out of the operations' of a named insured it is not necessary for the named insured's acts to have 'caused' the accident; rather, it is sufficient that the named insured's employee was injured while present at the scene in connection with performing the named insured's business, even if the cause of the injury was the negligence of the additional insured."[29]

We agree with these courts. O'Neill would not have been injured but for performing work for Sadler's operations. Interpreting the "arising out of" language in the additional insured endorsement to require only a simple causal relationship to the principal insured's operations is consistent with our

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[26] See *Farmers Union Co-op Ins. Co., supra* note 16.

[27] *Anderson, supra* note 14.

[28] See, *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004); *Federal Ins. v. Am. Hardware Mut. Ins.*, 124 Nev. 319, 184 P.3d 390 (2008).

[29] *Mid-Continent Cas. Co. v. Swift Energy Co.*, 206 F.3d 487, 498 (5th Cir. 2000), quoting *Admiral Ins. Co. v. Trident NGL, Inc.*, 988 S.W.2d 451 (Tex. App. 1999), and citing *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251 (10th Cir. 1993); *Merchants Ins. Co. of New Hampshire, Inc. v. USF&G*, 143 F.3d 5 (1st Cir. 1998); and Douglas R. Richmond, *The Additional Problems of Additional Insureds*, 33 Tort & Ins. L.J. 945 (1998). See, also, *American v. General Star Indemn. Co.*, 125 Cal. App. 4th 1510, 24 Cal. Rptr. 3d 34 (2005); *Shell Oil Co. v. AC & S, Inc.*, 271 Ill. App. 3d 898, 649 N.E.2d 946, 208 Ill. Dec. 586 (1995); *Federal Ins., supra* note 28; 2 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 5:219 (2002); 1 Turner, *supra* note 18, § 42:4.

reasoning in interpreting other liability policies. We also note that the insurance industry issued a new additional insured endorsement in 2004 in response to courts' interpreting the "arising out of" language to require only "but for" causation.[30] Finally, a reasonable person would not conclude that the endorsement contains the restrictions for which Federated argues. It neither explicitly requires the principal insured's negligence to have caused the loss nor states that an additional insured is covered only for its vicarious liability. If this is the only coverage that Federated intended to provide, it could have clearly stated its coverage.

We conclude that because Sadler's employee was injured while performing work for Sadler, the accident arose out of Sadler's operations even if Sadler was not negligent. Accordingly, paragraph A of the additional insured endorsement provides direct primary coverage for Alliance's own negligence, not just its vicarious liability. Federated's interpretation of the coverage provision is without merit.

Sole Negligence Exclusion

[21] Federated argues that the "sole negligence" exclusion in the endorsement bars coverage to Alliance for a loss caused by its own negligence. Paragraph D of the endorsement excluded coverage for bodily injury or property damage "arising out of the sole negligence of" the additional insured. This exclusion is relevant both to Federated's duty to indemnify and its duty to defend. But the insurer has the burden to prove that an exclusion applies,[31] and the court did not rule on this claim, which potentially raises questions of fact. So we decline to decide the issue on appeal. Instead, we remand the cause to the district court for further proceedings on this issue.

CONCLUSION

We conclude that the parties, by requiring Sadler to name Alliance as an additional insured on its CGL policy, intended that Sadler would insure against loss caused by Alliance's

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[30] See 4 Bruner & O'Connor, *supra* note 18, § 11:167.

[31] See *Fokken, supra* note 16.

negligence. We also determine that Sadler's additional insured endorsement, which provided coverage for liability arising out of Sadler's operations, was broad enough to include coverage for Alliance's negligence even if Sadler was not negligent. We reverse the judgment and remand the cause for further proceedings on the application of the "sole negligence" exclusion in the endorsement.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DONALD M. LEE, APPELLANT.
807 N.W.2d 96

Filed October 28, 2011. No. S-10-1098.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
2. ____: ____: ____. When a movant for postconviction relief makes an allegation of an infringement of constitutional rights, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **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.
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 this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
5. **Pleas: Waiver.** A voluntary guilty or no contest plea generally waives all defenses to the charge.
6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When lawyers employed by the same office represent a defendant both at trial and on direct

appeal, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

8. **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 meet the test put forward in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); that is, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.
9. **Criminal Law: Effectiveness of Counsel.** A lawyer's performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
10. **Effectiveness of Counsel: Proof.** 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.
11. **Postconviction: Appeal and Error.** A defendant cannot use a postconviction proceeding to secure review of issues that were known to the defendant and that were or could have been litigated on direct appeal.
12. **Pleas: Waiver.** 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. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.
13. **Right to Counsel.** An express advisement of the right to counsel is not necessary when the defendant is represented by counsel.
14. **Postconviction: Effectiveness of Counsel: Speedy Trial.** In a postconviction proceeding, when a defendant alleges that trial counsel failed to properly assert his or her speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
15. **Effectiveness of Counsel.** Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.
16. ____. Defense counsel is not ineffective for failing to raise a meritless argument.
17. **Speedy Trial.** Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute.
18. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008).
19. ____. If the State does not bring the defendant to trial within the permissible time, the court must order an absolute discharge from the offense charged.

20. **Speedy Trial: Indictments and Informations.** For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed.
21. **Postconviction: Proof.** Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.
22. **Postconviction.** The district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing.
23. **Postconviction: Appeal and Error.** An appellate court examines the procedures used by the district court to determine whether to grant an evidentiary hearing for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald M. Lee, pro se.

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

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

CONNOLLY, J.

In 2009, under a plea bargain, Donald M. Lee pleaded nolo contendere to one count of second degree murder. The court sentenced Lee to a term of 70 years to life in prison. Lee now moves for postconviction relief. He claims violations of his right to speedy trial, his right to due process, and his right to effective assistance of counsel. The district court denied relief without granting an evidentiary hearing. We affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

In July 2008, the State originally filed a complaint in county court, charging Lee with first degree murder. On July 21, the court arraigned him. On November 3, after Lee waived a

preliminary hearing, the State filed the information in district court, charging Lee with first degree murder.

On May 19, 2009, under a plea bargain, the State filed an amended information reducing the charge to second degree murder and Lee pleaded nolo contendere. Lee attended the plea hearing with his attorney. After a colloquy in which the court advised Lee of certain rights, the State provided a factual basis for the plea. Briefly stated, an autopsy revealed that a young girl died of manual strangulation and had also suffered injuries such as a fractured skull, a lacerated intestine, and multiple abrasions and contusions. Lee was the only adult with the girl when the incident occurred. Lee's explanation for the injuries was inconsistent with the pathologist's report.

The court sentenced Lee to a term of 70 years to life in prison. Lee appealed in case No. S-09-779, asserting only a claim of an excessive sentence. On December 10, 2009, we summarily affirmed.

Postconviction Claims

Lee's first postconviction claim is that the State violated his right to a speedy trial. He alleged that the State filed the information on July 18, 2008, but that he did not enter his plea until May 19, 2009. Further, while Lee acknowledges the court conducted at least two hearings regarding his case, he alleged that he requested no continuance and never waived his speedy trial rights. And he claims that nobody ever explained his right to a speedy trial to him.

Lee's next claim is that the court failed to advise him of the consequences of his plea. He alleged that the court did not explain the rights that he would waive by entering a plea of no contest. He also claimed that the court failed to question him regarding his age; education; whether he was intoxicated; whether he was acting under any threats, promises, or inducements; and whether he was mentally competent. Finally, he alleged that the court failed to ask him whether he agreed with the State's factual basis for the plea.

Lee's final two claims relate to the effectiveness of his trial and appellate counsel. He claims that both were ineffective for

failing to raise the speedy trial issue and the voluntariness of his plea.

The District Court's Order Denying an Evidentiary Hearing

The court denied Lee relief without an evidentiary hearing. The court's analysis of the speedy trial issue appears limited to the statutory speedy trial provision. Lee's motion does not appear to have raised a constitutional speedy trial claim.[1] The court found that the State filed the information on November 3, 2008, and that Lee entered his plea on May 19, 2009, which meant that if no time was excluded, Lee's right was violated. But the court found that a pair of continuances—one relating to a hearing on a motion to suppress and the other a continuance of the trial itself—tolled the time in which to bring Lee to trial. But the record in this appeal fails to show who filed these continuances, when they were granted, or the length of the continuances. Nevertheless, the court found that the State had not violated Lee's right to a speedy trial, so neither trial nor appellate counsel was ineffective in failing to raise it.

The court also rejected Lee's claim that the court did not advise him of the consequences of his plea. The court found that the bill of exceptions clearly showed that the court had advised Lee of his rights and that Lee had knowingly and voluntarily waived those rights. As with Lee's speedy trial claim, the court concluded that because the underlying error was meritless, it was not ineffective assistance of counsel to not raise it.

ASSIGNMENTS OF ERROR

Lee assigns that the district court erred as follows:

(1) in denying his motion for postconviction relief without an evidentiary hearing; and

(2) in refusing to appoint counsel for the postconviction motion.

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[1] See, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

STANDARD OF REVIEW

[1-3] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[2] When a movant makes such an allegation, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief.[3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[4]

[4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[5] Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that we review independently of the lower court's decision.[6] We review factual findings for clear error.[7]

ANALYSIS

Lee's brief is sketchy at best. He appears to claim that he is entitled to relief for the following reasons: (1) He entered his plea involuntarily and unintelligently; (2) the State violated his statutory right to a speedy trial; and (3) his trial and appellate counsel (who were from the same office) were ineffective for failing to raise the above issues.

[5,6] We begin with a few general principles. First, a voluntary guilty or no contest plea generally waives all defenses to the charge.[8] But in a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court

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[2] See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[3] See *id.*

[4] *Id.*

[5] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[6] *Id.*

[7] *Id.*

[8] See, *id.*; *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

will consider an allegation that the plea was the result of ineffective assistance of counsel.[9]

[7] When lawyers employed by the same office represent a defendant both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[10] So, this is Lee's first opportunity to assert his ineffective assistance of counsel claims.

[8-10] To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to meet the test put forward in *Strickland v. Washington*[11]; that is, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.[12] A lawyer's performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[13] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[14]

The Voluntariness of Lee's Plea

[11] Lee first argues that his plea did not comport with due process because the trial court did not ensure that his plea was voluntary. But Lee either knew or should have known of this error when he prosecuted his direct appeal. Because he did not raise it, he has waived consideration of it now. A defendant cannot use a postconviction proceeding to secure review of issues that were known to the defendant and that were or could have been litigated on direct appeal.[15]

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[9] *Yos-Chiguil, supra* note 5; *Vo, supra* note 8.

[10] See, *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[11] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[12] See *Yos-Chiguil, supra* note 5.

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

[14] *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

[15] See *Vo, supra* note 8.

But Lee may still assert an ineffective assistance of counsel claim based on those facts. Lee claims that his counsel was ineffective for not reminding the court of its obligations to ensure the voluntariness of his plea and for not raising the issue on appeal.

[12] 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."[16]

A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.[17]

At the plea hearing, where Lee was represented by counsel, the following exchange occurred:

> THE COURT: Okay. Mr. Lee, the Amended Information alleges that on or about July 19, 2008 here in Lincoln County you intentionally [but] without premeditation killed [the victim]. It's a Class I(B) felony which is punishable by life imprisonment as a maximum or twenty years in prison as a minimum. Do you understand that?
>
> MR. LEE: Yes.
>
> THE COURT: If you enter a plea of no contest to this charge, you're giving up your right to have a speedy and a public trial by jury, and at that trial you'd have the right

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[16] *State v. Golka*, 281 Neb. 360, 378, 796 N.W.2d 198, 213 (2011), quoting *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). See, also, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[17] *Golka, supra* note 16.

to see and hear all the witnesses that would come and testify and have [counsel] cross-examine those witnesses on your behalf. You'd also have the right to put on your own evidence, which includes the right to ask the Court to issue subpoenas to anyone you'd like to have testify for you and the Court would issue those subpoenas and make them come and testify on your behalf.

You cannot be called as a witness against yourself nor can you be made to testify against yourself. If you chose not to testify it can't be used against you in any way or even be mentioned in front of a jury; however, if you decided you wanted to testify and took the stand, you would waive your Fifth Amendment right and the County Attorney could ask you any questions she wished about your testimony or about the charges and you would have to answer.

You are presumed to be innocent of this charge and that presumption goes with you throughout the trial until the State has proven your guilt beyond a reasonable doubt so that all twelve members of the jury believed you were guilty. If all twelve could not agree, you could not be found guilty at that trial. Do you understand those rights?

MR. LEE: Yes.

THE COURT: You also understand by entering a plea of no contest you're waiving any other motions you may file and plus any appeal of the Court's prior ruling on the motion to suppress that you had filed?

MR. LEE: Yes.

THE COURT: If you enter a plea of no contest, as I said, you're waiving those rights, and if the State supplies a sufficient factual basis for the Court to accept the plea, you'd be found guilty the same as if you'd been tried and convicted by a jury.

MR. LEE: Yes.

THE COURT: Do you understand that?

MR. LEE: Yes.

After this colloquy, the State provided a factual basis for the crime.

Thus, to summarize the proceedings, the court informed Lee that the State had charged him with a Class IB felony and that the State had alleged that he had killed the victim intentionally but without premeditation. The court informed Lee that the possible sentence ranged from 20 years to life in prison. The court also informed Lee that by pleading guilty, Lee was waiving his right to a jury trial, the right to cross-examine witnesses, and his right not to testify. Finally, the State provided a factual basis for the plea. Lee stated several times that he understood the rights he was waiving and the nature of the charge. And the court found that the plea was "knowingly, voluntarily and intelligently entered."

[13] It is true that the court did not explicitly advise Lee that he was entitled to the assistance of counsel, but in considering a similar advisement, we held that an express advisement of the right to counsel is not necessary when the defendant is represented by counsel.[18] Counsel represented Lee at all times—from the arraignment through his plea—so an express warning was unnecessary.

Thus, the court gave Lee all the required advisements. And so, counsel was not ineffective in failing to ask the court to do so.

Was Counsel Ineffective for Failing to Assert Lee's Speedy Trial Rights?

Lee next argues that the State violated his right to a speedy trial. From his motion for postconviction relief and the court's order, it appears that Lee is asserting that the State violated his statutory speedy trial rights. He did not claim and does not argue on appeal that the State violated his constitutional right to a speedy trial,[19] and we will not address it. Further, the Nebraska Postconviction Act provides relief only if there was a "'denial or infringement'" of constitutional rights.[20] The 6-month statutory speedy trial right found at Neb. Rev. Stat.

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[18] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[19] See, U.S. Const. amends. VI and XIV; Neb. Const. art. I, § 11. See, also, *Barker, supra* note 1; *Sims, supra* note 1.

[20] *Yos-Chiguil, supra* note 5, 281 Neb. at 626, 798 N.W.2d at 840.

§ 29-1207 (Reissue 2008) is separate from the *constitutional* speedy trial right.[21] So even if it were not waived by a plea of guilty,[22] a claim of a statutory speedy trial violation, in and of itself, would not be cognizable in a postconviction proceeding because it is not a constitutional right. Nevertheless, it can be considered through the prism of an ineffective assistance of counsel claim.

[14-16] In a postconviction proceeding, when a defendant alleges that trial counsel failed to properly assert his or her speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland*.[23] Again, under *Strickland*, one claiming ineffective assistance of counsel must show a reasonable probability that but for the deficient performance, the result of the proceedings would have been different.[24] Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.[25] Defense counsel is not ineffective for failing to raise a meritless argument.[26]

[17-20] Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute.[27] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).[28] If the State does not bring the defendant to trial within the permissible time, the court must order an

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[21] See, e.g., *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

[22] See Neb. Rev. Stat. § 29-1209 (Reissue 2008).

[23] See, *Sims, supra* note 1; *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[24] *Gibilisco, supra* note 14.

[25] See, *Sims, supra* note 1; *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003).

[26] See *Vo, supra* note 8.

[27] See § 29-1207.

[28] See *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

absolute discharge from the offense charged.[29] For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed.[30]

Section 29-1207(4) sets out the excludable time periods for speedy trial purposes.[31] As relevant here, these include delays resulting from pretrial motions of the defendant, such as a motion to suppress evidence[32] or for continuances requested by or consented to by the defendant or his counsel.[33]

Lee claims that the speedy trial clock began to run July 18, 2008, the day the State filed the complaint. On this point, Lee is mistaken. While the record shows that the State filed the complaint on July 18, this is not the operative date. As we noted in *State v. Williams*,[34] for a felony, the clock begins to run when the State files the information. This occurred on November 3, 2008. To determine the date, excluding any tolling, by which the State had to commence trying Lee, we exclude the date the State filed the information, count forward 6 months, and then back up 1 day. Applying this methodology, the State had to commence trying Lee by, at the latest, May 3. Lee did not enter his plea until May 19. So unless excludable periods extended the deadline, it would appear that counsel should have moved for discharge on speedy trial grounds.

But the postconviction court found that there were two continuances that tolled the speedy trial clock. It found that the trial court continued a motion to suppress hearing and the trial, which together added an additional 60 days to the time in which the State could try Lee. The records, however, do not show when the court granted the continuances or for how long the matters were continued. And Lee alleges in his motion that he never moved for any continuances.

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[29] *Id.* See, also, Neb. Rev. Stat. § 29-1208 (Reissue 2008).

[30] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[31] See *id.*

[32] § 29-1207(4)(a).

[33] § 29-1207(4)(b).

[34] *Williams, supra* note 30.

[21-23] Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.[35] And the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing.[36] We examine these procedures for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[37]

In determining whether to hold an evidentiary hearing, we have previously allowed a court to hold a records hearing to receive into evidence the relevant files and records that the court may need to review in considering whether to grant or deny an evidentiary hearing.[38] If a court does not receive into evidence the relevant files and records at a records hearing, the court should certify and include in the transcript the files and records of the earlier proceedings it considered in denying relief.[39]

Here, the district court denied an evidentiary hearing because it had found that Lee had asked for continuances, which tolled the time in which the State had to commence the trial. Because of this tolling, the court concluded that the State had not violated Lee's right to a speedy trial. But the files and records of the case do not show when the court granted these continuances or for how long the matters were continued. In other words, the files and records of the case do not show that Lee actually moved for continuances and thus do not show that the State did not violate his speedy trial right. Simply put, the records do not affirmatively show that Lee is not entitled to

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[35] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

[36] See *McLeod, supra* note 2.

[37] *Id.*

[38] See, also, *Glover, supra* note 35.

[39] See, *id.*; *State v. Fugate*, 180 Neb. 701, 144 N.W.2d 412 (1966).

relief. Under the rule articulated in *State v. Glover*,[40] the court should have certified and included in the transcript any files or records, which would have included any documents related to the supposed continuances, that it considered in denying Lee an evidentiary hearing.

The reason for this rule should be obvious. When the court denies an evidentiary hearing based upon documents it does not certify and include in the transcript, it effectively denies the movant a meaningful appeal. We are left with only the option of taking the district court's word for the matter. This we refuse to do.

The State's contention—that Lee had the burden of producing a record including all materials relevant to the issue—is contrary to the petitioner's burden in postconviction cases, and we reject it. We have repeatedly stated that the petitioner must only allege facts that, if proved, show that the petitioner's constitutional rights were violated. The petitioner is obviously not required to disprove his or her own allegations or to make the State's case for it. If the records and files are sufficient to refute the petitioner's claim, the statutes allow the postconviction court to notice those facts, or the State can offer them as evidence in a records hearing. But because the statutes permit judicial notice of records and files, we require a court to include those files and records that illustrate why it denied an evidentiary hearing.

Because the court failed to certify and include in the record the documents that it considered in denying an evidentiary hearing, the record does not affirmatively show that Lee is not entitled to relief. We remand for further proceedings.

CONCLUSION

We conclude that Lee's claim regarding the voluntariness of his plea and the related ineffective assistance of counsel claim are meritless. The records before us, however, do not affirmatively show that Lee's ineffective assistance of counsel claim regarding his speedy trial rights is without merit. Accordingly,

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[40] *Glover, supra* note 35.

we affirm in part, and in part reverse and remand for further proceedings.

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

DARLENE HOWSDEN, APPELLANT, V. ROPER'S REAL ESTATE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

805 N.W.2d 640

Filed October 28, 2011. No. S-11-174.

1. **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.
2. **Workers' Compensation.** If an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.
3. **Corporations: Fraud.** A court will disregard a corporation's identity, or pierce the corporate veil, only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
4. **Corporations: Courts: Equity.** A court exercises its equitable power when it disregards the corporate form.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Jefferson Downing and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

James A. Snowden and Joseph M. Aldridge, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

GERRARD, J.

The plaintiff in this case was injured on premises that were leased to her employer by a legally distinct entity that is owned

and operated by the same shareholders as her employer. The question presented in this appeal is whether the plaintiff can go to district court and sue the entity that owns the premises for negligence, or whether her exclusive remedy is under the Nebraska Workers' Compensation Act (the Act).[1] We conclude that the plaintiff is not barred by the Act from bringing her third-party claim against the entity that owns the premises.

BACKGROUND

Roper & Sons, Inc., is a funeral home that was incorporated in Lincoln, Nebraska, in 1914. It operates from real property owned by Roper's Real Estate Company, Inc. (Roper's Real Estate). Roper's Real Estate was incorporated in Lincoln in 2003. Roper's Real Estate was created to separate Roper & Sons' real property from its funeral home business, for tax and other business purposes. The stock ownership of Roper & Sons and Roper's Real Estate is identical, both in the shareholders and the distribution of their stock, and most of the directors and officers are the same, although their roles and titles differ between the two entities. Tom Roper, director and president of Roper & Sons, testified that the two businesses were not run separately and that without the funeral home business engaged in by Roper & Sons, Roper's Real Estate would not exist.

In 2003, Roper & Sons purchased the Metcalf/Nelson Funeral Home, LLC (Metcalf). In 2005, Roper's Real Estate completed the purchase of what had been Metcalf's real property. Although Metcalf still exists as a business entity, the only member of its limited liability company is Roper & Sons. The Metcalf funeral home business operates from property owned by Roper's Real Estate, which is leased by Roper & Sons pursuant to an oral lease. The taxes on the property were paid by Metcalf. But neither Roper's Real Estate nor Metcalf have any employees of their own, and Tom Roper averred that Roper's Real Estate does not maintain, repair, or manage the property it owns—Roper & Sons is solely responsible for it.

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[1] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2008).

The plaintiff in this case, Darlene Howsden, was an employee of Roper & Sons who worked at a former Metcalf property. There is an old elevator in the building that connects to two hallways: one running to the south, and the other running to the east. The elevator is rarely used to travel between floors, but employees apparently use it as a makeshift passageway between the hallways abutting it. Nonetheless, on some occasions, it was used to travel between floors. One day, when Howsden was leaving work, she went down one of the hallways and opened the elevator door to pass through. Unknown to her, the elevator was upstairs, so she fell down the elevator shaft into the basement and was seriously injured. She received workers' compensation disability and medical benefits under an insurance policy issued to Roper & Sons and expressly providing coverage for Roper & Sons, Roper's Real Estate, and Metcalf.

Howsden filed a complaint in district court against Roper's Real Estate, alleging that Roper's Real Estate's negligence caused her injuries. In response, Roper's Real Estate alleged among other things that Howsden's exclusive remedy was under the Act. Howsden and Roper's Real Estate filed cross-motions for summary judgment on the exclusive remedy issue, and the district court, citing our decision in *Millard v. Hyplains Dressed Beef*,[2] granted Roper's Real Estate's motion. Howsden appeals.

ASSIGNMENTS OF ERROR

Howsden assigns that the court erred in (1) concluding that the exclusive remedy rule extended to Roper's Real Estate, an entity legally distinct from Howsden's employer, Roper & Sons, and (2) concluding it was bound by *Millard*.[3]

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence

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[2] *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991), *disapproved on other grounds, Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[3] *Id.*

offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

ANALYSIS

[2] We have held that if an injury arises out of and in the course of employment, the Act is the injured employee's exclusive remedy against his or her employer.[5] In this case, however, Howsden's employer was Roper & Sons, and she is trying to sue Roper's Real Estate. Roper's Real Estate, on the other hand, contends that for these purposes, it and Roper & Sons should be considered the same entity. We disagree.

The issue presented to the district court was a disagreement about whether the "dual persona" or "dual capacity" doctrines should apply. We have discussed these doctrines in the past, although we have had no occasion to adopt or reject them. We have explained that under the "dual capacity" doctrine, an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer.[6] But, we noted, the dual capacity doctrine has been discredited.[7] Under the narrower "dual persona" doctrine, "'[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—it possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person.'"[8]

But those doctrines are not precisely applicable here, because the question in this case is not whether Roper & Sons had

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[4] *Britton v. City of Crawford, ante* p. 374, 803 N.W.2d 508 (2011).

[5] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008). See, also, *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007); *Millard, supra* note 2.

[6] *Bennett, supra* note 5.

[7] See *id.* See, also, 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 113.01[4] (2000).

[8] *Bennett, supra* note 5, 273 Neb. at 308, 729 N.W.2d at 86. See, also, 6 Larson & Larson, *supra* note 7, § 113.01[1].

another capacity, separate from its capacity as Howsden's employer, or even whether Roper & Sons had a second "persona" that was completely independent. The dual capacity and dual persona doctrines, to the extent they have any vitality, are implicated when there is one business entity that an employee nonetheless tries to sue as a "third party" because of an injury caused by a function of the employer that is separate from the employment relationship. For instance, the paradigmatic example is that of a truckdriver employed by a tire manufacturer, who was injured when one of the tires on his truck blew out.[9] The tire had been manufactured by the employer, but the truckdriver was still permitted to recover for product liability.[10]

In other words, the dual capacity and dual persona doctrines were intended to address situations in which the plaintiff alleges that his or her employer should nonetheless be considered a "third party" for purposes of workers' compensation exclusivity. There is no need to resort to such doctrines, however, when the defendant is *actually* a legally separate entity. In such a case, resorting to a legal fiction is unnecessary, because the separate existence of the defendant is a legal fact.[11] And under such circumstances, courts have refused to disregard the corporate form to apply the exclusive remedy rule.[12]

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[9] *Mercer v. Uniroyal*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976), *disapproved, Schump v. Firestone Co.*, 44 Ohio St. 3d 148, 541 N.E.2d 1040 (1989).

[10] See *id.*

[11] See Larson & Larson, *supra* note 7, § 113.01[3].

[12] See, e.g., *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979); *Matter of Johns-Manville/Asbestosis Cases*, 511 F. Supp. 1229 (N.D. Ill. 1981); *Great Atlantic Tea v. Imbraguglio*, 346 Md. 573, 697 A.2d 885 (1997); *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995) (superseded by statute as stated in *Hayes Lemmerz Intern., Inc. v. Ace American Ins.*, 619 F.3d 777 (7th Cir. 2010)); *LaBelle v. Crepeau*, 593 A.2d 653 (Me. 1991); *Smith v. Cotton's Fleet Service, Inc.*, 500 So. 2d 759 (La. 1987); *Wodogaza v H & R Terminals*, 161 Mich. App. 746, 411 N.W.2d 848 (1987); *Searcy v. Paul*, 20 Mass. App. 134, 478 N.E.2d 1275 (1985); *Gaber v. Franchise Services, Inc.*, 680 P.2d 1345 (Colo. App. 1984); *Mingin v. Continental Can Company*, 171 N.J. Super. 148, 408 A.2d 146 (1979).

Those courts have based their reasoning upon the principle that a business enterprise has a range of choices when determining how to organize itself into a corporate structure.[13] But, as the Sixth Circuit explained, "reciprocal obligations arise as a result of the choice it makes."[14] While the "owners [of the business] may take advantage of the benefits of dividing the business into separate corporate parts," the court said, "principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee."[15]

Many considerations may move a business entity to diversify its structure through the creation of other entities, but those considerations should include the obligations which arise as a consequence of such diversification.[16] One cannot claim the benefits of incorporation without the burdens.[17] So, when two companies are corporations which benefit from legally recognized identities separate and apart from one another, they must also bear the responsibility and liability of such separation.[18]

[3,4] Those courts have also reasoned that the separate identity of different corporate entities should be pierced only in cases of fraud.[19] We have explained that a corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears and that "[a] court will disregard a corporation's identity," or pierce the corporate veil, "*only* where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest

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[13] See *Boggs, supra* note 12.

[14] *Id*. at 662.

[15] *Id*. Accord, *McQuade, supra* note 12; *Wodogaza, supra* note 12.

[16] See *Wodogaza, supra* note 12.

[17] See *LaBelle, supra* note 12.

[18] See *Gaber, supra* note 12.

[19] See, *Matter of Johns-Manville/Asbestosis Cases, supra* note 12; *McQuade, supra* note 12; *LaBelle, supra* note 12; *Smith, supra* note 12; *Searcy, supra* note 12; *Mingin, supra* note 12.

or unjust act in contravention of the rights of another."[20] And there is no allegation of fraud here. A court exercises its equitable power when it disregards the corporate form,[21] but there is "little likelihood that equity will ever require [a court] to pierce the corporate veil to protect the same party that erected it. It was, after all, [the] defendant that chose to structure itself in its present multi-corporate form."[22] In short, defendants have uniformly been denied the opportunity to pierce their own corporate veil in order to avoid liability.[23]

LaBelle v. Crepeau[24] presents a good example of that reasoning being applied to facts comparable to those of the instant appeal. In *LaBelle*, the plaintiff was injured at his place of employment, allegedly due to inhaling paint fumes in an improperly vented paint and body shop. The plaintiff's corporate employer leased the building from the defendant, who owned the building in his individual capacity, but also owned 98 percent of the stock in the corporation, and managed and controlled it. The Supreme Judicial Court of Maine held that it was improper to ignore the corporate entity in order to allow a shareholder to avoid the burden of incorporation.[25] The court held that the plaintiff could not sue the corporation, nor could he sue the defendant in any capacity related to the defendant's employment or association with the corporation as an employee or officer. But, the court reasoned, the defendant had been sued "as the owner of premises he leased to a separate corporate entity, solely for failure to conform to an alleged legal duty on the part of a landlord to [en]sure the safety of the premises."[26] So, the court concluded, the

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[20] *Christian v. Smith*, 276 Neb. 867, 883, 759 N.W.2d 447, 462 (2008) (emphasis supplied). See, also, *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[21] See *Medlock, supra* note 20.

[22] *McQuade, supra* note 12, 659 N.E.2d at 1020.

[23] See *Matter of Johns-Manville/Asbestosis Cases, supra* note 12.

[24] See *LaBelle, supra* note 12.

[25] See *id.*

[26] *Id.* at 655.

plaintiff's claim was not barred by his acceptance of workers' compensation.[27]

We agree with that reasoning. In this case, Roper & Sons chose to diversify its corporate form, presumably because of the business advantages of such diversity. But that choice has legal consequences. We are not at liberty to disregard the corporate form in the absence of circumstances that would justify invoking equitable power. But there are no such allegations here. Therefore, there is no basis in this record to set aside the corporate structure that Roper & Sons and Roper's Real Estate decided to form. We find merit to Howsden's first assignment of error.

We also find merit to Howsden's second assignment of error. Howsden argues that the court erred in finding that our decision in *Millard* was controlling here. We agree with Howsden that *Millard* is distinguishable.

As context, we note that several courts have held that an employee's third-party claim may be barred by the exclusive remedy rule based upon factors such as the third party's control of the employee's duties, payment of wages, and right to hire and fire.[28] But the reasoning of those cases is based on the recognition that sometimes, an employee can work for two employers at the same time.[29] For instance, in *Saf-T-Cab Service v. Terry*,[30] a taxicab driver was employed by the owner of the cab he was driving when he was injured, but a separate entity was responsible for directing the cab's operation and the driver's duties. The driver's third-party action against the operating entity was barred because the court found the evidence sufficient to show that both entities were functionally employing the driver at the time of the injury.[31]

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[27] See *id.*

[28] See, e.g., *Clark v United Technologies*, 459 Mich. 681, 594 N.W.2d 447 (1999); *Imbraguglio, supra* note 12, citing *Saf-T-Cab Service v. Terry*, 167 Md. 46, 172 A. 608 (1934); *Ramnarine v. Memorial Center for Cancer*, 281 A.D.2d 218, 722 N.Y.S.2d 493 (2001).

[29] See, *Clark, supra* note 28; *Ramnarine, supra* note 28.

[30] *Terry, supra* note 28.

[31] See *id.*

Millard was such a case.[32] In *Millard*, the pilot of a small airplane was also the owner of three related companies, and when the airplane crashed, two employees of one of those companies were killed. Their estates sued the pilot and the other two companies that he owned and controlled. But we found that their exclusive remedy was under the Act, because their deaths arose out of and in the course of their employment with the pilot and his corporations. We found that the evidence would have been insufficient to show that the pilot had a second "persona" unrelated to his status as employer. And we explained that the decedents "were employees whose professional expertise led them to be asked to provide their opinions, and [that] those opinions were offered in the course and scope of their employment."[33] So, we concluded that "[w]hether the purpose [of the trip] was to benefit the decedents' employer . . . or to benefit one of the other entities does not alter [the pilot's] liability."[34]

In this case, however, as explained above, the separate legal existence of Roper's Real Estate is established as a matter of law. And there is no basis in the record to conclude that Howsden was employed by *both* Roper & Sons and Roper's Real Estate. The evidence establishes beyond reasonable dispute that Howsden was hired and controlled exclusively by Roper & Sons. Neither *Millard* nor any other dual-employer case is pertinent here.

Roper's Real Estate also argues that even if it is a third party against which a tort claim can be maintained, there are other grounds upon which the district court's judgment can be affirmed. Roper's Real Estate argues that as a landlord, it has no direct liability for an allegedly dangerous condition on the premises[35] and that it cannot be held vicariously liable for any

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[32] See *Millard, supra* note 2.

[33] *Id.* at 912, 237 N.W.2d at 128.

[34] *Id.*

[35] See, generally, *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

torts of Roper & Sons.[36] But these arguments would depend on evidence of the terms of the lease agreement and any specific acts of negligence that occurred. And, we note, it is far from clear from the record that these arguments were raised below. They were not specifically presented by the pleadings, and the cross-motions for summary judgment were specifically directed only at Roper's Real Estate's exclusive remedy defense. In other words, there is nothing in this record to suggest that Howsden had notice that she was expected to present evidence at the summary judgment hearing on the other issues raised by Roper's Real Estate on appeal. Therefore, we decline to reach those issues at this point in the proceedings.

CONCLUSION

Roper's Real Estate is a legally separate entity from Roper & Sons, despite their corporate kinship, and there is no equitable basis in this record to justify piercing the corporate veil between the two entities. Roper's Real Estate is a third party to the employment relationship between Howsden and Roper & Sons, so Howsden's third-party claim against Roper's Real Estate is not barred by the exclusive remedy provisions of the Act. And Roper's Real Estate's other asserted defenses are not ripe for adjudication in this appeal. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[36] See, generally, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997), and *disapproved on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).

SCOTTSBLUFF POLICE OFFICERS ASSOCIATION, INC., F.O.P. LODGE 38, APPELLEE, V. CITY OF SCOTTSBLUFF, NEBRASKA, A CITY OF THE FIRST CLASS, APPELLANT.

805 N.W.2d 320

Filed November 4, 2011. No. S-10-960.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from an order by the Commission of Industrial Relations regarding prohibited practices, an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Labor and Labor Relations: Federal Acts: Statutes.** Decisions under the National Labor Relations Act are helpful in interpreting Nebraska's Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 2010), but are not binding.
4. **Labor and Labor Relations: Contracts.** Good faith bargaining includes the execution of a written contract incorporating the terms of an agreement reached pursuant to Neb. Rev. Stat. § 48-816(1) (Reissue 2010).
5. **Labor and Labor Relations.** Nebraska's Industrial Relations Act requires parties to negotiate only mandatory subjects of bargaining.
6. ____. Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining under Nebraska's Industrial Relations Act.
7. ____. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.
8. **Labor and Labor Relations: Insurance.** Health insurance coverage and related benefits, including health insurance exclusions, are akin to fundamental, basic, or essential concerns to an employee's financial and personal concern and, therefore, may be considered as involving working conditions and are thus mandatory subjects of bargaining under Nebraska's Industrial Relations Act.
9. **Commission of Industrial Relations: Labor and Labor Relations.** An employer subject to Nebraska's Industrial Relations Act may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission

of Industrial Relations. If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.

10. **Appeal and Error.** Error that does not prejudice a party does not provide grounds for relief on appeal.

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

Jerry L. Pigsley, of Harding & Shultz, P.C., L.L.O., for appellant.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

GERRARD, J.

The City of Scottsbluff, Nebraska (the City), appeals from a decision of the Nebraska Commission of Industrial Relations (CIR), which determined that the City violated Nebraska's Industrial Relations Act (IRA),[1] when the City implemented changes to health insurance coverage and related benefits without bargaining with the Scottsbluff Police Officers Association, Inc. (the Union). The City appeals. For the following reasons, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

The Union represents Scottsbluff law enforcement officers below the rank of captain. The City and the Union negotiate these officers' contracts on a year-to-year basis. Past contracts typically ran on a fiscal year basis, from October through September of the following year. However, health insurance premiums were determined on a calendar year basis, so past contracts between the City and the Union contained a reopen clause, which stated that during the term of the contract,

[1] See Neb. Rev. Stat. § 48-801 et seq. (Reissue 2010).

negotiations could be reopened for individual, specifically defined issues, such as cost-of-living increases, salary comparisons and increases, and health and dental premiums.

The present dispute arose out of contract negotiations for the October 2009 through September 2010 term. During negotiations, the City presented several proposed changes, including changes to the article of the contract which allowed for the reopening of negotiations for health and dental premiums each year prior to open enrollment. After several negotiation sessions, on June 24, 2009, the parties arrived at a tentative agreement, subject to ratification of the agreement by the parties.

On July 30, 2009, the City adopted an amendment to its health insurance plan which pertained to hazardous hobbies or activities, effective August 1. The previous hazardous hobbies or activities provision had generally excluded health insurance plan coverage for injuries which resulted from hazardous activities, and the provision had identified some of those activities. The City's amendment clarified the provision by further defining hazardous pursuits, hobbies, and activities, and enumerating several examples of such hazardous activities. The examples included "ultimate fighting," reckless operation of machinery, all-terrain vehicle use, and travel to countries with advisory warnings. The City did not negotiate these changes with the Union and later stated that it did not view the health insurance exclusion as a negotiable item. The City informed the Union of the changes to the health insurance plan on August 4.

On August 19, 2009, the Union ratified the agreement for the 2009-10 term and, thereafter, informed the City of the Union's decision. However, according to the Union, after it ratified the agreement, individual union members approached the Union's president and voiced concerns about the unilateral changes to the hazardous hobbies or activities exclusion in the health insurance plan. Though the Union had voted to ratify the agreement for the 2009-10 term, the Union's president sent an e-mail to the City asking the City to refrain from presenting the agreement to the city council for approval until the health insurance exclusions could be discussed between the parties.

The City refused to remove the agreement from the city council's consideration, and the city council ratified the agreement on September 8 and then notified the Union that the approved contract had been signed by the mayor and was available for the Union president's signature. The Union's president refused to execute the agreement until the parties could "get the insurance issues taken care of."

The parties then met three times to discuss the health insurance hazardous activities exclusion. However, the City maintained that the terms of the health insurance plan were solely within its control as long as reasonable coverage was provided. On November 10, 2009, the City informed the Union that the City intended to review the group insurance rates and benefits for 2010. The Union declined to discuss those issues without the presence of the Union's attorney. The City then implemented changes to the City's health insurance plan, including changes to the deductibles, copays, and maximum out-of-pocket amounts. The City later admitted to implementing changes in the health care benefits and hazardous activities exclusion section because the City believed those changes to be within its management control.

The Union then filed a petition with the CIR, alleging that the City had violated § 48-824(1) by unilaterally implementing changes in the health insurance hazardous activities exclusion and by unilaterally changing the group health care benefits. The City counterclaimed that the Union had violated §§ 48-816(1) and 48-824(3)(c) when the Union failed to execute a written contract incorporating the agreement reached by the parties for the 2009-10 term. The City also claimed that the Union had refused to negotiate and meet with the City in good faith to discuss calendar year increases in health and dental premiums for 2010, in violation of §§ 48-816(1) and 48-824(1) and (3)(c).

The CIR noted that § 48-816(1) requires parties to negotiate only mandatory subjects of bargaining. Ultimately, the CIR determined that both the health insurance exclusion and the health care benefits were mandatory subjects of bargaining and that the City had violated § 48-824(1) in refusing to bargain with the Union regarding those issues. The CIR determined

that the Union had not violated the IRA in refusing to execute the written contract incorporating the parties' prior agreement for the 2009-10 term, nor had the Union refused to negotiate the calendar year increases in health and dental premiums for 2010. The CIR ordered the City to return the parties to the status quo ante and ordered the parties to commence good faith negotiations within 30 days. Finally, the CIR denied the Union attorney fees, determining that the City's violation was not repetitive, egregious, or willful.

ASSIGNMENTS OF ERROR

The City assigns, summarized and restated, that the CIR erred when it (1) determined that the Union had not violated the IRA when it refused to execute a written contract incorporating an agreement ratified by the Union, (2) determined that the City had violated the IRA by unilaterally implementing changes to the health insurance exclusions and to health care benefits, (3) determined that the Union had not failed to bargain in good faith with the City over insurance premiums, and (4) considered the Union's request for attorney fees although the Union had not pled for the award of such fees.

STANDARD OF REVIEW

[1] Under § 48-825(4), any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[2]

[2] In an appeal from an order by the CIR regarding prohibited practices, an appellate court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.[3]

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[2] *IBEW Local 763 v. Omaha Pub. Power Dist.*, 280 Neb. 889, 791 N.W.2d 310 (2010).

[3] *Id.*

ANALYSIS

Union's Failure to Execute Agreement

The City argues that the CIR erred when it determined that the Union had not violated the IRA when the Union refused to execute a written contract which it had previously ratified. Section 48-824(3)(c) provides that it is a prohibited practice under the IRA to refuse to bargain collectively with an employer, and § 48-816(1) states that collective bargaining includes the "execution of a written contract incorporating any agreement reached if requested by either party." The City argues that the parties reached an agreement on June 24, 2009, subject to ratification by the Union and city council and that both parties later ratified the agreement; so the Union committed a prohibited practice under § 48-824(3)(c) when the Union's president later refused to execute the written contract which embodied the earlier agreement.

[3,4] We have previously noted that decisions under the National Labor Relations Act (NLRA)[4] are helpful in interpreting the IRA, but are not binding.[5] Section 48-824(3)(c) is substantially similar to the NLRA's § 8(b)(3), codified at 29 U.S.C. § 158(b)(3), and decisions interpreting § 8(b)(3) are instructive. Under the NLRA, it is well established that a union refuses to bargain collectively with an employer, in violation of § 8(b)(3), when the union refuses to execute a written collective bargaining agreement reached with the employer which incorporates all the terms of its agreement.[6] We agree. Because collective bargaining includes the "execution of a written contract incorporating any agreement reached" pursuant to § 48-816(1), the Union's failure to execute the agreement after both parties

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[4] See 29 U.S.C. § 151 et seq. (2006).

[5] See *IBEW Local 763, supra* note 2.

[6] See *Teamsters Local 589 (Jennings Distribution)*, 349 N.L.R.B. 124 (2007). See, also, *H. J. Heinz Co. v. Labor Board*, 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 (1941); *Ivaldi v. N.L.R.B.*, 48 F.3d 444 (9th Cir. 1995); *N.L.R.B. v. Quinn Restaurant Corp.*, 14 F.3d 811 (2d Cir. 1994); *N. L. R. B. v. Ralph Printing & Lithographing Company*, 433 F.2d 1058 (8th Cir. 1970).

ratified that agreement constitutes a prohibited practice within the meaning of § 48-824(3)(c).

The Union argues that the parties agreed to "ground rules" which stated, in part: "It is agreed by the parties that all agreements shall be considered as tentative, and not final, until the execution of the final agreement or contract, unless otherwise specified." However, the fact that the parties agreed to ground rules which stated that the parties' agreements were to be considered tentative until the execution of a final agreement does not change the scope of the parties' statutory duty to execute a ratified agreement pursuant to § 48-816(1). And though the Union argues that it attempted to remove the agreement from going before the city council for ratification, the Union had already ratified the agreement and notified the City of the Union's ratification, so the City was under no duty to honor the Union's request to withdraw the agreement from going before the city council for consideration.

The Union also argues that it was under no duty to execute the ratified agreement because of the City's unilateral change to the insurance hazardous activities exclusion section. As will be discussed in detail below, the City's unilateral implementation of changes to the insurance exclusions indeed constituted a prohibited practice under the IRA. The Union's argument appears to be that the City's unilateral change to the insurance exclusion excused the Union's statutory duty to execute the ratified agreement. However, the record reflects that the City's unilateral change to the insurance exclusion occurred before the Union ratified the agreement, that the Union was given notice of the unilateral change before it voted to ratify the agreement, and that the terms of the agreement did not contain any provisions pertaining to insurance exclusion provisions. So, though the City committed a prohibited practice under the IRA when the City unilaterally changed the scope of the insurance exclusions, the Union remained under a duty to execute any agreement that the parties ratified pursuant to § 48-816(1).

The undisputed evidence in the record indicates that the Union refused to execute the parties' ratified agreement. The Union therefore committed a prohibited practice within the meaning of § 48-824(3)(c), regardless of the City's unilateral

changes to the insurance exclusions. The CIR's determination that the Union did not violate § 48-824(3)(c) when it refused to execute the ratified agreement is therefore contrary to law. Accordingly, we reverse the decision of the CIR with regard to the Union's violation of § 48-824(3)(c). Because the CIR did not determine that the Union committed a prohibited practice when it failed to execute the ratified agreement, the CIR did not determine what remedies might be available to the City. We remand to the CIR to determine what, if any, remedies are available to the City for the Union's § 48-824(3)(c) violation.

City's Changes to Health Plan

The City argues that the CIR erred in determining that the City had violated the IRA when the City unilaterally implemented changes both to the design of the health insurance plan regarding the health insurance exclusion and to the group health care benefits regarding premiums, copays, deductibles, and maximum out-of-pocket expenses.

[5-7] The IRA requires parties to negotiate only mandatory subjects of bargaining.[7] However, management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining.[8] A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on management prerogative.[9]

[8] The CIR has previously determined that health insurance benefits are mandatory subjects of bargaining.[10] And notably, it is well established under the NLRA that health insurance coverage and related benefits are mandatory subjects of bargaining,

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[7] See § 48-816(1)(b).

[8] *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007).

[9] *Id.*

[10] See, *Communications Workers of America v. County of Hall*, 15 C.I.R. 95 (2005); *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59 (1994).

if the coverage or benefits are not provided for by statute but are left to the discretion of the employer.[11] We agree. Health insurance coverage and related benefits, including health insurance exclusions, are akin to fundamental, basic, or essential concerns to an employee's financial and personal concern and, therefore, may be considered as involving working conditions. Accordingly, we determine that health insurance coverage and related benefits are mandatory subjects of bargaining under the IRA.

In that regard, we do not disagree with the dissent's suggestion that the Legislature could and perhaps should decide whether "health plan design," such as an exclusion like the one at issue in this case, is mandatorily bargainable or a management prerogative. This question implicates public policy, the declaration of which is the Legislature's function.[12] But the fact remains that the Legislature has not spoken to the issue. And the question must be answered, regardless of whether we have legislative guidance.

The dissenting opinion suggests that there is a difference between "health insurance benefits" and "health plan design" and criticizes the authority cited above as neglecting that distinction. But the dissenting opinion counters with no authority of its own—particularly, no authority making the distinction the dissent suggests. Nor is that distinction particularly easy to make. What the dissenting opinion characterizes as "health plan design" is, in fact, the essence of health insurance benefits: what, exactly, the insurance *covers*. A prudent consumer shopping for insurance considers not only the bare fact of coverage, or the cost of coverage, but the *scope* of coverage offered by an insurer. The distinction between "benefits" and "design" disappears if the design narrows the scope of coverage to the point

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[11] See *Larry Geweke Ford*, 344 N.L.R.B. 628 (2005). See, also, *Mid-Continent Concrete*, 336 N.L.R.B. 258 (2001), *enforced sub nom. N.L.R.B. v. Hardesty Co., Inc.*, 308 F.3d 859 (8th Cir. 2002); *F.D.I.C. v. Federal Labor Relations Authority*, 977 F.2d 1493 (D.C. Cir. 1992); *Bastian-Blessing, Div. of Golconda Corp. v. N. L. R. B.*, 474 F.2d 49 (6th Cir. 1973).

[12] See, e.g., *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

that benefits to the insured are lost. Yet the dissenting opinion suggests that the scope of coverage—an essential part of the bargain in evaluating the value of an insurance policy—is outside the bounds of what is mandatorily bargainable.

The dissenting opinion suggests that the scope of coverage is too complex for such negotiation, such that it would be "unmanageable and unrealistic" to require an employer to enter into negotiations over all the details of coverage. Again, we do not disagree—but we also anticipate that most of those details would prove noncontroversial and would not require exhaustive negotiation. And we are not in a particularly good position to evaluate which details will be important to either employees or employers.

We obviously agree, as the dissenting opinion suggests, that it is prudent public policy for the City to control insurance costs. Employees certainly have an interest in that as well. But employees also have an interest in enjoying the full range of hobbies and recreational activities that any citizen is entitled to pursue, including many that might involve "risk-taking," such as skiing, water sports, or martial arts. As with many aspects of collective bargaining, there is a balance to be struck. And, in the absence of a clear legislative mandate, that balance should be struck by the parties through negotiation, not by this court.

In short, while we agree with several of the practical concerns raised by the dissenting opinion, we cannot agree with the dissent's conclusion that there is a meaningful difference between the mere fact of health insurance benefits and the "plan design" that actually describes what those benefits are. Health insurance coverage—and the *scope* of that coverage—is a meaningful and important part of an employee's compensation and, as such, should be mandatorily bargainable. Until the Legislature says otherwise, it is not this court's place to decide what aspects of that coverage are nonnegotiable.

And in this case, those negotiations did not occur. The record clearly indicates that the City unilaterally implemented changes to the health insurance plan exclusions and to the group health benefits regarding premiums, copays, deductibles, and maximum out-of-pocket expenses. On appeal, the

City argues that the Union refused to negotiate with the City and waived the Union's right to bargain over health insurance benefits.

The record reflects that the parties never previously bargained over health insurance benefits other than premium amounts. But, there is no evidence contained in the record that the Union clearly waived its right to bargain over those terms. The record indicates that both parties were long under the misapprehension that health care benefits were not mandatory subjects of bargaining. That misapprehension is not sufficient to establish that the Union waived its right to collectively negotiate regarding a mandatory subject of bargaining. And though the Union committed a prohibited practice when it refused to execute the ratified agreement, the Union's refusal did not excuse the City from negotiating mandatory subjects of bargaining.

[9] The first of the City's unilateral changes—the change to the health insurance exclusions—took place before the Union's refusal to execute the ratified agreement. Though the City's other unilateral changes occurred after the Union's refusal, it remains that an employer subject to the IRA may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the CIR.[13] If any of these three conditions are not met, then the employer's unilateral implementation of changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith.[14] Here, there is no evidence in the record that the City's unilateral changes to the health insurance premiums, copays, deductibles, and maximum out-of-pocket expenses were bargained to impasse, and no evidence that they were contained in a final offer.

The CIR determined the evidence established that the City created the design of the plan, the plan benefits, and the

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[13] See *IBEW Local 763, supra* note 2.

[14] *Id.*

contribution amounts independently from the negotiation process. The CIR also determined that the City had presented no evidence that the Union clearly and unmistakably waived its right to bargain. There is competent evidence in the record to support these determinations, and we cannot say the determinations were unreasonable.

The City's unilateral implementation to the health insurance exclusions, premiums, copays, deductibles, and maximum out-of-pocket expenses constituted a per se violation of the duty to bargain in good faith, which is not excused by the Union's refusal to execute the ratified agreement. We therefore affirm the CIR's determination that the City committed a prohibited practice by unilaterally implementing the previously mentioned health insurance changes.

Did Union Refuse to Bargain in Good Faith?

The City argues that the CIR erred when it denied the City's counterclaim that the Union had violated the IRA by failing to bargain in good faith on proposed increases in health insurance premiums. The City argues that when it refused to change the health insurance exclusions, the Union refused to meet with it to negotiate health and dental insurance premiums.

The City's argument that the Union violated the IRA by failing to bargain in good faith on the proposed increases in health insurance premiums is without merit. Given our standard of review, the question is whether the CIR's findings were unreasonable or unsupported by competent evidence. As the CIR determined, the record reflects that the Union did not refuse to meet with the City to negotiate health and dental premiums, but, rather, attempted to resolve the health insurance issues through the use of its attorney. The City repeatedly and continuously said that it was under no duty to bargain with the Union in regard to health insurance plan exclusions or health care benefits, other than negotiating premiums. In spite of the City's assertion that it was under no duty to negotiate the previously mentioned issues, the record reflects that the Union suggested dates and times for negotiations in an attempt to bargain with the City. And though the record shows that the Union refused

to negotiate without the assistance of counsel, that refusal did not amount to a refusal to negotiate in good faith. There is competent evidence in the record supporting the CIR's determination that the Union did not refuse to bargain in good faith for failing to meet to negotiate health and dental premiums, and the CIR's conclusion was not unreasonable.

Attorney Fees

[10] The City argues that the CIR erred in considering the Union's request for attorney fees, because the Union failed to plead for such fees. The City argues that this was a violation of CIR rule 42,[15] which requires, in relevant part, that a complaint filed for prohibited practices must include a demand for the relief to which the party supposes itself entitled. The Union's petition and amended petition in fact do not contain a demand for attorney fees. However, the issue of whether the Union was required to plead for the award of attorney fees in order for the CIR to award the fees is one we need not decide. The CIR refused to award attorney fees in this case, so the City was not prejudiced by the CIR's consideration of the attorney fees issue. Error that does not prejudice a party does not provide grounds for relief on appeal.[16] Because the City was not prejudiced by the CIR's consideration of attorney fees, there are no grounds for relief available on appeal, so we do not consider the City's last assignment of error.

CONCLUSION

Because we determine that the Union's refusal to execute the previously ratified agreement constitutes a prohibited practice under the IRA, we reverse the order of the CIR in relevant part. We note that the contract year at issue is past, but the record is not clear as to what liabilities may have been incurred during the pendency of these proceedings. It is not entirely clear to us, from the record, how the parties would propose

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[15] See Rules of the Nebraska Commission of Industrial Relations 42 (rev. 2011).

[16] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

to remedy the Union's refusal to execute the agreement. So, rather than simply directing the agreement to be enforced, we remand the cause to the CIR to determine what, if any, remedies are available to the City for the Union's violation. The portion of the CIR's order requiring the parties to commence good faith negotiations on the health insurance issues within 30 days is affirmed.

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

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

I join that portion of the majority's opinion which concludes the CIR erred in failing to find that the Union's refusal to execute the previously ratified agreement was a prohibited practice under the IRA. I also concur with the majority that the City is required to bargain with the Union with respect to costs of insurance coverage, including premiums, copayments, and maximum out-of-pocket amounts. But because I would hold that health plan design, at least as presented in this case, is a management prerogative, I disagree with the portion of the majority opinion which orders the parties to enter into good faith negotiations regarding that topic of bargaining. As such, I concur in part, and in part dissent from the decision of the court.

My first concern is that the majority opinion acknowledges the two distinct questions presented to the court—health insurance benefits and health plan design—but then reaches a conclusion without engaging in any analysis addressing these distinct issues. The majority simply concludes that "[h]ealth insurance coverage and related benefits, including health insurance exclusions . . . involve[] working conditions." In reaching this decision, the majority cites only the general proposition that health insurance benefits are mandatory subjects of bargaining, but does not discuss any cases that address the distinction at issue here.

Nor do I find the reasoning of the CIR persuasive. In its order, the CIR noted that the issue of health plan design had not been previously addressed by the CIR. In support of its ultimate conclusion that the City erred in not negotiating with regard to design, the CIR cited *F.D.I.C. v. Federal Labor*

Relations Authority.[1] In this case, decided under the Federal Service Labor-Management Relations Act,[2] the Circuit Court of Appeals for the District of Columbia was presented with two health insurance related issues—the requirement that employees with family coverage pay more for coverage, as well as a change in "open season" for enrolling for coverage. But I find this case of limited utility. First, *F.D.I.C. v. Federal Labor Relations Authority* deals with two distinct areas, one involving plan cost and the other involving plan design. Yet the court does not separately address the two issues; instead, it concludes without much analysis that the employer should have engaged in bargaining.

And we are not bound by federal decisions in this area. We have held that decisions under the National Labor Relations Act (NLRA)[3] (and technically *F.D.I.C. v. Federal Labor Relations Authority* was not a decision under the NLRA) are helpful in interpreting the NLRA, but are not binding.[4]

More substantively, I disagree with the conclusion that health plan design, in this case, the hazardous activities exclusion, is mandatorily bargainable. I would instead conclude that this exclusion is an example of a management prerogative and is not subject to mandatory bargaining.

I agree with the majority's view that "[a] matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions . . . ."[5] But management prerogative excludes from mandatory bargaining certain issues, like the right to hire, to maintain order and efficiency, and to control transfers and assignments.[6]

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[1] *F.D.I.C. v. Federal Labor Relations Authority*, 977 F.2d 1493 (D.C. Cir. 1992).

[2] See 5 U.S.C. § 7101 et seq. (2006 & Supp. IV 2010).

[3] See 29 U.S.C. § 151 et seq. (2006).

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

[5] *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 77-78, 736 N.W.2d 375, 382 (2007).

[6] *Id.*

In my view, the exclusion at issue in this case deals primarily with the employer's right to maintain order and efficiency. Here, the City has a police force in order to provide for public safety. The City also has numerous other employees in a variety of roles that also provide services to the public. Like most public employers, the City has been assigned the obligation to provide health insurance coverage for all those employees. It is prudent public policy for the City to both discourage employee risk-taking and control insurance costs for both it and the individuals it employs.

The conclusion reached by the majority thwarts both management objectives. And unlike copayments and maximum out-of-pocket payments, the cost of exclusions such as the hazardous activities exclusion would appear to be much more complex to calculate and will depend greatly on variables under the control of yet another party, the health insurance provider. Making such details subject to mandatory bargaining seems unworkable. An examination of the City's health insurance plan includes at least 47 separate exclusions from coverage, including controversial exclusions such as abortion. It would be unmanageable and unrealistic to require the City to enter into negotiations as to all of these exclusions, particularly when one considers that the City has relationships with multiple unions and other employees. Yet the majority's conclusion could lead to such a result.

Simply put, this is a close case. The CIR is not a court, and it has limited jurisdiction. Notably, it has no power or authority other than that specifically conferred on it by statute.[7] Under these circumstances, I feel the Legislature should be the last word in whether health plan design, particularly an exclusion such as the one at issue in this case, is mandatorily bargainable or is a management prerogative.

For these reasons, I respectfully concur in part, and in part dissent.

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[7] *Central City Ed. Assn. v. Merrick Cty. Sch. Dist.*, 280 Neb. 27, 783 N.W.2d 600 (2010).

TYMAR, LLC, DOING BUSINESS AS SECOND TO NONE MOVING, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT AND CROSS-APPELLEE, V. TWO MEN AND A TRUCK ET AL., APPELLEES, AND NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE AND CROSS-APPELLANT.

805 N.W.2d 648

Filed November 10, 2011. No. S-10-861.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.
4. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
5. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** Neb. Ct. R. Disc. § 6-336 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence.
6. **Rules of the Supreme Court: Pretrial Procedure.** If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Neb. Ct. R. Disc. § 6-336 which require that the matter be deemed admitted.
7. **Pretrial Procedure: Courts: Appeal and Error.** Appellate courts look to other courts for guidance in applying Nebraska's rules of civil procedure which are based on the federal rules.
8. **Rules of the Supreme Court: Pretrial Procedure.** The language of Neb. Ct. R. Disc. § 6-336 contemplates that, if a request for admission seeks information that is permissible under Neb. Ct. R. Disc. § 6-326, the request can ask a party to admit facts in dispute, the ultimate facts in a case, or facts as they relate to the law applicable to the case.
9. **Pretrial Procedure: Rebuttal Evidence: Evidence.** An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established

by default, even if the matters admitted relate to material facts that defeat a party's claim.

10. **Motor Carriers.** The issue of public convenience and necessity is ordinarily one of fact.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Tymar, LLC, doing business as Second to None Moving (Tymar), filed an application with the Nebraska Public Service Commission (Commission) seeking authority to operate as a common carrier of household goods in intrastate commerce in service points in Cass, Sarpy, Douglas, and Washington Counties. Other common carriers in the area, including Two Men and a Truck; Jim's Moving & Delivery Co., Inc.; Vaughn Moving; I-Go Van & Storage; Earl D. vonRentzell; vonRentzell Van & Storage, Inc.; and Chieftain Van Lines, Inc. (Chieftain), filed protests to Tymar's application. The Commission conducted a hearing and determined that Tymar had failed to establish its prima facie case that it met the standards for approval of its application under the regulatory scheme imposed by Neb. Rev. Stat. § 75-301 et seq. (Reissue 2009). The Commission denied the application.

Tymar appealed to the district court for Lancaster County under Neb. Rev. Stat. § 75-136 (Reissue 2009) and the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), and the district court affirmed the decision of the Commission. Tymar appeals, and the Commission cross-appeals. Because certain rulings surrounding the evidentiary significance of the unanswered

requests for admissions tendered by Tymar amounted to errors of law, we reverse the order of the district court and remand the cause with directions to the district court to reverse the Commission's denial of the application and remand the action to the Commission with directions to reconsider Tymar's application consistent with this opinion.

STATEMENT OF FACTS

Tymar is owned and operated by Myron Tyrone Franklin. In 2008, Tymar filed an application with the Commission seeking authority to operate as a common carrier of household goods in intrastate commerce in service points in Cass, Sarpy, Douglas, and Washington Counties.

An application is subject to the rules and regulations of the Commission, as well as to statutory requirements. Under the Commission rules: "An application which is not protested may on applicant's motion, or on the Commission's own motion, be processed by use of affidavits and will be processed administratively. The affidavit will be signed by the applicant or counsel and sworn to before a notary." 291 Neb. Admin. Code, ch. 1, § 018.03 (2001). The Commission rules contain an affidavit form requesting information in addition to that provided in the application. The affidavit seeks information such as the vehicles the applicant proposes to use, the maintenance schedule of the vehicles, and the applicant's agreement to abide by safety standards, tariffs, Nebraska statutes governing motor carriers, and the Commission's rules and regulations. We understand such affidavit is necessary to the grant of an unopposed application and may be requested under other circumstances. The record does not contain an affidavit filed by Tymar.

In response to the application, various protests were filed by existing carriers, including Two Men and a Truck, Jim's Moving & Delivery Co., Vaughn Moving, I-Go Van & Storage, Earl D. vonRentzell, vonRentzell Van & Storage, and Chieftain. As a general matter, where protests are filed, a hearing is necessary. On March 19, 2009, the Commission sent a letter to Tymar inquiring whether it wished to pursue its application. Notwithstanding the protests, Tymar responded that it did wish

to pursue its application. There ensued correspondence regarding setting a hearing date.

In addition to the rules and regulations of the Commission, applications for common carrier authority are subject to § 75-311(1), which provides:

> A certificate shall be issued to any qualified applicant authorizing the whole or any part of the operations covered by the application if it is found after notice and hearing that (a) the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of sections 75-301 to 75-322 and the requirements, rules, and regulations of the commission under such sections and (b) the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or household goods, is or will be required by the present or future public convenience and necessity. Otherwise the application shall be denied.

We have stated that the issue of public convenience and necessity is ordinarily one of fact. *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 315 N.W.2d 245 (1982). We have further explained that

> [i]n determining public convenience and necessity, the deciding factors are (1) whether the operation will serve a useful purpose responsive to a public demand or need, (2) whether this purpose can or will be served as well by existing carriers, and (3) whether it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.

In re Application of Nebraskaland Leasing & Assocs., 254 Neb. 583, 591, 578 N.W.2d 28, 34 (1998).

On June 15, 2009, Tymar served requests for admissions pursuant to Neb. Ct. R. Disc. § 6-336 (Rule 36) on the protestants. The requests for admissions requested, inter alia, that the protestants admit the following:

Request No. 4: Applicant is minority owned.

Request No. 5: Applicant is minority operated.

Request No. 6: The public interest will be benefited by authorizing a minority-owned entity to provide services in the geographical area set forth in the application.

Request No. 7: The public interest will be benefited by authorizing a minority-operated entity to provide services in the geographical area set forth in the application.

Request No. 8: Applicant is fit, willing, and able to provide services in the geographical area set forth in the application.

Request No. 9: The present public convenience and necessity require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 10: The future public convenience and necessity will require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 11: The present public convenience and necessity require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 12: The future public convenience and necessity will require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 13: Granting the application will benefit the public interest and benefit present public convenience and necessity.

With the exception of Chieftain, the protestants did not respond to Tymar's requests. Chieftain's response to the requests is not in the record. However, the record elsewhere shows that Chieftain's position was not to deny or object to the substance of the admissions, but, rather, implied that it was Tymar's burden to establish its entitlement to a certificate. As explained below, such response effectively admits the substance of the requests. Chieftain did not appear at the hearing on Tymar's application.

A hearing was scheduled before the Commission. The day before the hearing, counsel for Tymar submitted a letter to the Commission stating that the procedural requirements regarding proper service of the requests for admissions had been met. Tymar advised the Commission that the lack of response to the requests for admissions resulted in the facts therein being deemed admitted pursuant to Rule 36 and that, in Tymar's

view, such facts resolved the matter in favor of granting Tymar's application.

At the hearing, Tymar submitted the affidavit of its counsel showing proper service and the requests for admissions were offered into evidence. The Commission stated that it would admit the exhibit but reserved ruling on how it would treat the admissions "until a further time."

Tymar's position has consistently been that the unanswered requests for admissions which are deemed admitted resolved the matter in its favor. As counsel for Tymar explained before the district court, because the Commission would not state that it would treat the facts as conclusively established, Tymar was forced to go forward with the presentation of evidence. Accordingly, counsel for Tymar called Franklin and others to testify. Franklin testified regarding his experience and skill, and other witnesses testified about the unavailability of movers on certain occasions. Several representatives of the protestants testified in opposition to Tymar, generally stating that business had declined due to the national economic downturn.

On October 14, 2009, the Commission issued its order. In its order, the Commission declined Tymar's request to disregard the testimony of the testifying protestants due to their failure to respond to Tymar's requests for admissions and other discovery. Instead, the Commission's order stated: "The Commission hereby overrules the motion of the applicant and will allow the protestants['] testimony contained in the record and will give it the due weight that it deserves."

In its order, the Commission determined that Tymar was fit, willing, and able to provide the proposed service, and this determination has not been challenged in subsequent proceedings. Thus, we treat Tymar as fit, willing, and able under § 75-311(1)(a). However, upon review of the evidence, the Commission determined that Tymar had not presented sufficient evidence of the need for its proposed services to support a grant of its application. The Commission denied Tymar's application essentially as not having satisfied the convenience and necessity requirements in § 75-311(1)(b).

Tymar appealed to the district court for Lancaster County under § 75-136 and the Administrative Procedure Act. In an

order filed August 5, 2010, the district court affirmed the decision of the Commission to deny Tymar's application. The district court addressed the protestants' failure to respond to Tymar's requests for admissions. The district court determined that based on the protestants' failure to respond, certain facts must be deemed established, including request No. 13 to the effect that "granting Tymar's application will benefit the public interest and will benefit present public convenience and necessity." Despite the foregoing determination, the district court stated that the substance of this admission was merely an "additional" factor to be considered with other evidence and that the admissions did not in and of themselves determine whether Tymar's application should be granted. The district court also stated that several of the requests inserted an irrelevant factor, i.e., that Tymar is a minority-owned business, and that the existence of this irrelevant matter affected the weight the district court would give the admissions.

The district court's order describes the evidence presented at the Commission hearing and addresses whether Tymar's evidence met the statutory requirements for issuance of a certificate. The district court order assumed that Tymar was fit, willing, and able. Therefore, the district court indicated that the primary question it would consider was whether the evidence established that the service proposed by Tymar is or will be required by the present or future public convenience and necessity. The district court reviewed the evidence adduced before the Commission and determined that Tymar had failed to prove that public convenience and necessity would be served by its proposed service.

The standard of review before the district court is de novo on the record. § 84-917(5)(a). Although at one point in its order, the district court quoted a superseded standard of review, the district court applied the correct standard of review and affirmed the order of the Commission.

Tymar appeals the decision of the district court and the Commission cross-appeals.

ASSIGNMENTS OF ERROR

Tymar claims the district court erred when it did not recognize that the facts contained in Tymar's unanswered requests

for admissions were conclusively established and that such facts entitled Tymar to the certificate it sought. Tymar claims that the district court erred when it failed to correct the Commission's ruling regarding the treatment of the unanswered admissions and further erred when it did not reverse the order denying the application.

On cross-appeal, the Commission claims that, because the substance of the requests sought impermissible material including legal conclusions, the district court erred to the extent it determined that certain facts were deemed admitted as a result of the protestants' failure to respond to the requests.

Although the parties assign other errors, our resolution of these assignments of error results in a reversal and remand to the district court with directions to reverse and remand to the Commission with directions to reconsider Tymar's application consistent with this opinion. Accordingly, we do not directly discuss the remaining assignments of error.

STANDARDS OF REVIEW

[1] In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record. *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

[2] An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

Cross-Appeal: It Was Not Error for the District Court to Conclude That Certain Facts in the Unanswered Requests for Admissions Had Been Admitted by the Protestants.

We begin by addressing the Commission's assignment of error on cross-appeal in which it claims that the district court erred when it determined that the protestants' failure to respond to the requests for admissions tendered by Tymar established certain facts contained in the admissions. The Commission asserts that the substance of the requests was improper, because the requests sought admission of facts clearly in dispute and legal conclusions and these matters exceed the scope

of inquiries permitted under Rule 36. Thus, the Commission maintains, it was error to accord any weight to unanswered requests. We do not agree with the Commission's assertions regarding the proper scope of Rule 36 requests and reject this assignment of error.

As an initial matter, the district court indicated that along with the Commission, it would consider Tymar fit, willing, and able. Thus, it focused on whether Tymar's evidence showed that the proposed service would serve the public convenience and necessity.

In considering the issue of the protestants' failure to respond to the requests for admissions served by Tymar, the district court noted that the Commission's rules provide that the discovery proceedings in matters before the Commission are governed by the rules and regulations of the Nebraska Supreme Court. Regarding depositions and discovery, the Nebraska Administrative Code provides: "The use of depositions and discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court." 291 Neb. Admin. Code, ch. 1, § 016.11 (2001). The district court correctly noted that the Nebraska Supreme Court rules relating to discovery provide that a party may serve on another party written requests for admissions and that unless answered, objected to within 30 days after service, or requested to be withdrawn, the requests are deemed admitted. See Rule 36. We have treated protestants as "parties" in our prior cases. E.g., *In re Application of Northland Transp.*, 239 Neb. 918, 479 N.W.2d 764 (1992); *In re Application of George Farm Co.*, 233 Neb. 23, 443 N.W.2d 285 (1989); *In re Application of BIJK Enterprises*, 228 Neb. 804, 424 N.W.2d 356 (1988); *In re Application of Regency Limo*, 222 Neb. 684, 386 N.W.2d 444 (1986). Accordingly, service of requests on the protestants was permissible and the protestants were subject to Rule 36.

Admissions are governed by Rule 36, which states in relevant part:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of [Neb. Ct. R. Disc. § 6-326

> (Rule 26)] set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. . . .
>
> . . . The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him or her.

Rule 26, to which reference is made in Rule 36, provides in part:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Based on Rule 36(a) and the case law of this court, the district court determined that Tymar had met the various procedural requirements surrounding the requests and had met the proper foundational requirements for the receipt into evidence of all of the requests for admissions. Because no motion was made to the Commission to have the admissions withdrawn, the district court determined that the Commission was obligated to deem the substance of the requests admitted by the protestants.

As stated in its order, based on this reasoning, and upon its de novo review, the district court considered,

> without limitation, the following to have been conclusively established by the failure of the protestors to have answered the requests for admissions:
>
> (1) Tymar is a minority-owned and operated business;
>
> (2) the public interest will be benefitted by authorizing a minority-owned and operated business to provide service in the geographical area set forth in Tymar's application;
>
> (3) the present and future public convenience and necessity requires and will require provision of services by a minority-owned and operated business in the geographical area set forth in Tymar's application; and
>
> (4) granting Tymar's application will benefit the public interest and will benefit present public convenience and necessity.

Despite having determined that the foregoing matters had been established, the district court nevertheless stated that these admitted facts did not in and of themselves establish the convenience and necessity necessary to grant the application. Instead, the district court stated that these facts were merely factors to be considered along with the evidence Tymar was forced to offer. The district court further stated that the requests inserted an irrelevant factor, i.e., that Tymar is a minority-owned business, and stated that this irrelevant material affected the weight the district court would give to the admissions.

[3-6] We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission by that party of the subject matter of the request, unless, on motion, the court permits withdrawal of the admission. See *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006). See, also, *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). We have recognized that Rule 36 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *City of Ashland v. Ashland Salvage, supra*; *Mason State Bank v. Sekutera*, 236 Neb. 361, 461 N.W.2d 517 (1990). We have noted, however,

that Rule 36 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *City of Ashland v. Ashland Salvage, supra*. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Rule 36 which require that the matter be deemed admitted. *City of Ashland v. Ashland Salvage, supra*; *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000).

In this case, it is not disputed that Tymar followed the necessary foundational requirements for serving the requests for admissions and that the unanswered requests were received in evidence. With the exception of Chieftain, the protestants did not respond to the requests, and Chieftain's response was neither an objection nor a denial. The Commission asserts that this failure to respond is of no consequence. It argues in its cross-appeal that, because the requests sought impermissible admissions of facts in dispute and legal conclusions, the protestants were not obligated to answer the requests for admissions.

[7] This court has not previously addressed whether requests for admissions under Rule 36 surrounding the ultimate facts in the case or mixed questions of law and fact are proper. However, many federal and state courts and scholars have addressed this issue. We have indicated that we look to other courts for guidance in applying our rules of civil procedure which are based on the federal rules. See, *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007); *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

Our research shows that the issue of the proper scope of requests under Fed. R. Civ. P. 36 (federal Rule 36) created a conflict among the courts that was addressed in amendments made to the Federal Rules of Civil Procedure in 1970. See 8B Charles Alan Wright et al., Federal Practice and Procedure § 2255 (3d ed. 2010). It has been observed that prior to 1970,

the rules allowed for admissions of only "'relevant matters of fact.'" *Jones v. Boyd Truck Lines*, 11 F.R.D. 67, 70 (W.D. Mo. 1951). Therefore, before 1970, a majority of decisions stated that only matters "of fact" were properly the subject of requests for admissions. 8B Wright et al., *supra*. The decisions sustained objections to requests that were regarded as involving opinions or conclusions or a mixture of law and fact. *Id*. However, this view was not unanimous. *Id*.

In the 1970 amendments to federal Rule 36(a), the reference to "relevant matters of fact" was deleted and the rule was rewritten and authorized requests to admit that sought the truth of "any matters within the scope of [federal] Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either." See, also, 8B Wright et al., *supra*. Notwithstanding the expanded scope of proper federal Rule 36 requests, the advisory committee's note to this amendment indicated that it was still improper to request the admission of an issue that is purely a matter of law. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487 (1970). Nebraska Rule 36 contains the language of the 1970 amendment.

Contrary to the suggestion urged by the Commission in its cross-appeal to the effect that the permissible scope of Rule 36 is narrow, the Wisconsin Supreme Court observed that the more recent federal decisions interpreting federal Rule 36 do not support the conclusion that a party cannot request another party to admit "ultimate facts" or facts that would be dispositive of the entire case. *Schmid v. Olsen*, 111 Wis. 2d 228, 330 N.W.2d 547 (1983) (citing *City of Rome v. United States*, 450 F. Supp. 378 (D.D.C. 1978), *affirmed* 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), and *Campbell v. Spectrum Automation Co.*, 601 F.2d 246 (6th Cir. 1979)). In *Schmid,* the Wisconsin Supreme Court reversed the trial court's ruling to the effect that it was improper to request a party to admit that such party was 70 percent negligent. The Wisconsin Supreme Court stated: "We believe that there is no compelling reason why a request to admit seventy percent negligence should be considered a nullity. '[Federal Rule 36] is designed to expedite litigation, and it permits the party securing admissions to rely

on their binding effect.'" *Schmid v. Olsen*, 111 Wis. 2d at 236-37 n.4, 330 N.W.2d at 551 n.4 (quoting *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981)). See, also, advisory committee's note, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, *supra*.

In discussing the amendments, one treatise noted that one of the 1970 amendments to federal Rule 36(a) resolved the conflict in the cases as to whether a party can request another party to admit facts in dispute. 8B Wright et al., *supra*, § 2256. The advisory committee's note to the 1970 amendment of federal Rule 36(a) states in part:

> The proper response in [cases where disputed facts are sought to be admitted] is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) [regarding discovery sanctions] provides a sanction of costs only when there are no good reasons for a failure to admit.

48 F.R.D. at 532.

As we have noted, Nebraska Rule 36(a) states that

> [t]he matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his or her attorney . . . .

Thus, Rule 36 provides an opportunity for the party on whom a request has been served to give an answer showing facts are in dispute or object to the propriety of the request. However, failure to answer will serve as an admission of the substance of a proper request.

[8] Based on the foregoing, we conclude that the language of Rule 36 contemplates that, if the request for admission seeks information that is permissible under Rule 26, the request can ask a party to admit facts in dispute, the ultimate facts in a case,

or facts as they relate to the law applicable to the case. Having made this determination, we now review Tymar's requests to determine the propriety of the requested admissions.

With respect to the statutory components of a case, the applicant must show that (1) it was fit, willing, and able to perform the proposed service and (2) the service is or will be required by the present or future public convenience and necessity. § 75-311(1). As noted, there seems to be no dispute that Tymar was fit, willing, and able.

The requests made by Tymar included:

Request No. 4: Applicant is minority owned.

Request No. 5: Applicant is minority operated.

Request No. 6: The public interest will be benefited by authorizing a minority-owned entity to provide services in the geographical area set forth in the application.

Request No. 7: The public interest will be benefited by authorizing a minority-operated entity to provide services in the geographical area set forth in the application.

Request No. 8: Applicant is fit, willing, and able to provide services in the geographical area set forth in the application.

Request No. 9: The present public convenience and necessity require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 10: The future public convenience and necessity will require provision of services by a minority-owned entity in the geographical area set forth in the application.

Request No. 11: The present public convenience and necessity require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 12: The future public convenience and necessity will require provision of services by a minority-operated entity in the geographical area set forth in the application.

Request No. 13: Granting the application will benefit the public interest and benefit present public convenience and necessity.

In the instant case, the references in the requests to Tymar's being a minority owned and operated entity and the need for a minority-owned entity in the moving industry are not directly tied to the explicit statutory language under consideration. We

need not consider the propriety of these requests, because the unanswered requests Nos. 8 and 13, which are proper under Rule 26, are directly related to the statutory requirements under § 75-311(1)(a) and (b), and thus the "minority-owned" requests are unnecessary to Tymar's success. Request No. 8 to the effect that applicant Tymar is fit, willing, and able to provide services in the geographical area set forth in the application and request No. 13 to the effect that granting the application will benefit the public interest and benefit present public convenience and necessity go directly to the statutory elements Tymar needed to establish under § 75-311(1)(a) and (b). Further, contrary to the argument of the Commission in its cross-appeal, based on the current language of Rule 36, this requested material was not improper because these requests ask the protestants to apply the facts of this case to the legal issues presented under the statute.

By not responding to requests Nos. 8 and 13, the protestants have effectively admitted that (1) the applicant is fit, willing, and able to provide services in the geographical area set forth in the application and (2) granting the application will benefit the public interest and benefit present public convenience and necessity. If the protestants had objections to the requests because they contained facts which the protestants believe were in dispute, then the proper course of action would have been to deny the requests, object to the requests, or request that they be withdrawn at the hearing before the Commission, not to simply ignore the requests. By not responding and not requesting that requests for admissions Nos. 8 and 13 be withdrawn, the matters in requests Nos. 8 and 13 are deemed admitted by the protestants. Thus, to the extent the district court deemed the substance of requests Nos. 8 and 13 admitted by the protestants, it did not err.

Appeal: The District Court Erred by Not Giving Proper Effect to Requests for Admissions Nos. 8 and 13 and Not Correcting the Commission's Ruling Relative to These Requests.

Having determined that the foundational requirements for the requests were established, that requests for admissions

Nos. 8 and 13 were proper and relevant to the matter, that the substance of the requests was effectively admitted by the protestants due to their failure to deny, object to, or answer the requests or to request they be withdrawn, and noting that the unanswered requests were received in evidence, we now address the effect of requests Nos. 8 and 13 in this case. This discussion resolves Tymar's assignment of error to the effect that the district court erred when it failed to treat requests Nos. 8 and 13 as the protestants' admission of the elements of § 75-311(1). We agree with Tymar that the district court erred in its legal analysis; however, such error does not necessarily entitle Tymar to a certificate. A certificate may be granted where an applicant meets not only the statutory requirements under discussion but also the dictates of the Commission's rules and regulations. A protestant's admission of the elements of § 75-311 does not necessarily mean that the applicant has established the elements of § 75-311.

[9] As noted above, if the necessary foundational requirements are met for the requests for admissions and no motion is made and sustained to withdraw an admission, under Rule 36, the trial court is obligated to deem the facts admitted by the party on whom the requests were served. See *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). Such admitted facts serve to limit the proof at trial. It has been observed that "[t]he salutary function of [federal] Rule 36 in limiting the proof would be defeated if the party were free to deny at the trial what he or she has admitted before trial." 8B Charles Alan Wright et al., Federal Practice and Procedure § 2264 at 382 (3d ed. 2010). In this regard, the Court of Appeals for the Fifth Circuit noted:

> An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim. Mere trial testimony did

> not constitute a motion by the Legal Clinic [defendant] to withdraw or amend its admissions.

American Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991). Similarly, "'[a]ffidavits and depositions entered in opposition to summary judgment that attempt to establish issues of fact cannot refute default admissions.'" *Praetorian Ins. Co. v. Site Inspection, LLC*, 604 F.3d 509, 514 (8th Cir. 2010) (quoting *U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987)). Thus, the evidence offered by the protestants after the requests were admitted, designed to refute the statutory matters in the defaulted admissions, was not properly received or considered by the lower tribunals.

This matter is before us on appeal from the district court sitting as an appellate court. We review questions of law independently of the lower court's rulings. See *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010). In addressing whether the district court erred in its consideration of the admissions, we must review the rulings made by the Commission which were challenged in district court.

Prior to the hearing before the Commission, Tymar submitted a letter to the Commission, along with the requests for admissions, indicating it was Tymar's position that, because of the lack of response to the admissions, their substance was deemed admitted and such admitted facts resolved the matter before the Commission in favor of granting Tymar's application. At the hearing, Tymar offered the admissions into evidence and argued that their substance amounted to admitted facts. Although the Commission allowed the admissions into evidence, Tymar was informed by the Commission that, rather than treat the unanswered requests as admitted by the protestants, it would withhold its ruling on how to treat the unanswered admissions; permitting the protestants to testify further compounded this error. See, *American Auto. Ass'n v. AAA Legal Clinic, supra*; 8B Wright et al., *supra*.

It was error for the Commission at the outset of the hearing to not give the unanswered admissions the full legal weight they were due. Given the protestants' failure to respond to

the admissions or to request that they be withdrawn, the Commission was required to deem the facts contained in requests Nos. 8 and 13 admitted by the protestants pursuant to Rule 36. The Commission failed to give the admissions their full legal effect as they pertained to § 75-311(1), and such failure was an error of law which the district court on appeal should have corrected.

[10] In its order on appeal, the district court acknowledged request for admission No. 13 as conclusive as a matter of law but considered it as only one factor to be weighed in its determination which ultimately affirmed the order of the Commission denying the application. Request No. 13 provided that "[g]ranting the Application will benefit the public interest and benefit present public convenience and necessity." We have stated that "[t]he issue of public convenience and necessity is ordinarily one of fact." *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 415, 315 N.W.2d 245, 248 (1982). Given the unanswered request for admission No. 13, Tymar's proposal that it will serve the public convenience and necessity stands as admitted by the protestants.

The lower tribunals were not free to ignore the controlling record or bolster the protests. When Tymar put on evidence of the unanswered requests for admissions Nos. 8 and 13, the facts under § 75-311(1) were deemed admitted by the protestants, although not necessarily established by Tymar. Further, the statutory component does not necessarily meet additional regulatory requirements which may exist under the rules and regulations of the Commission, and we make no comment regarding additional evidence such as that sought in the affidavit form referred to above which may be necessary on remand to the issuance of a certificate. The district court erred as a matter of law when it failed to correct the Commission's rulings which did not treat the unanswered requests Nos. 8 and 13 as deemed admitted by the protestants with respect to the statutory requirements. See § 75-311(1). We agree with Tymar that the district court erred when it did not reverse the Commission's rulings regarding the treatment of these requests for admissions and did not reverse the denial of Tymar's application and remand for further consideration.

CONCLUSION

Tymar served and offered unanswered requests for admissions, which were received in evidence. Under applicable law, the substance of the unanswered requests should be deemed admitted by the protestants. The Commission erred under Rule 36 when it did not give legal effect to the substance of unanswered requests Nos. 8 and 13 regarding, respectively, fitness and necessity under § 75-311(1). The district court erred as a matter of law when it failed to correct the Commission's rulings regarding these requests for admissions and affirmed the Commission's denial of Tymar's application. We reverse the decision of the district court and remand this cause to the district court with directions to remand the action to the Commission with directions to reconsider Tymar's application consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KEVIN J. PETERSON AND PATTI J. PETERSON, APPELLEES, V. STACIA E. SANDERS, ALSO KNOWN AS STACIA E. WOODS, ET AL., APPELLANTS.

806 N.W.2d 566

Filed November 10, 2011. No. S-10-1170.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.

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

Rick L. Ediger, Katie S. Baltensperger, and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

STEPHAN, J.

Record owners of surface property brought this equitable action pursuant to Nebraska's dormant mineral statutes.[1] The surface owners claimed the property's severed mineral interests had been abandoned and sought an order vesting title in the severed mineral interests in them. We affirm the judgment of the district court for Scotts Bluff County which vested title to the mineral interests in the surface owners after determining the mineral interests had been abandoned.

FACTS

Kevin J. Peterson and Patti J. Peterson, husband and wife, reside in Scotts Bluff County, Nebraska. The Petersons are the record owners of real property described as: "East Half (E 1/2) of the Southeast Quarter (SE 1/4) of Section Twenty-Eight (28) and the West Half (W 1/2) of the Southwest Quarter (SW 1/4) of Section Twenty-Seven (27), Township Twenty-Two (22) North, Range (58) West of the 6th P.M., Scotts Bluff County, Nebraska."

In 1953, Stacia E. Sanders and Floyd M. Sanders sold this property and a warranty deed was filed in Scotts Bluff County. At the time of the 1953 sale, Stacia and Floyd severed and reserved unto themselves an undivided one-half interest in all oil, gas, and mineral rights in and under the property. Floyd died in 1960, and the mineral rights passed to Stacia. On or about November 8, 1985, Stacia transferred the severed mineral rights to her children, Kenneth E. Sanders, Alice F. Martin, Loree Mann, Myra Gaines, Alva Richard Sanders, and Theodore C. Sanders, appellants herein. Stacia died in 2000.

On July 23, 2010, the Petersons filed a complaint in equity naming Stacia's children as defendants. The complaint alleged that all claims to the mineral rights had been abandoned pursuant to § 57-229 and sought a court order vesting title to all severed mineral rights in the Petersons. The parties agree that in the 23 years preceding the filing of the complaint, none of the named defendants nor anyone acting on their behalf publicly exercised a right of ownership in the mineral interests in any

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[1] Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2010).

of the ways specified by § 57-229. The parties also agree that in the 23 years preceding the filing of the complaint, no person has recorded a verified claim of interest to the mineral rights in Scotts Bluff County.

After an answer was filed, the district court held a bench trial. The Petersons offered the complaint, the answer, and a joint stipulation of facts into evidence; all were received without objection. Stacia's children offered the 1953 warranty deed that created the severed mineral interests and the 1985 quitclaim deed from Stacia to her children. Both were received without objection. Theodore testified that he and his siblings were unaware of any restriction on the mineral interests that Stacia deeded to them.

After considering the evidence, the district court entered an order finding appellants had abandoned the mineral interests pursuant to § 57-229. The court declared the Petersons the owners of the mineral interests. The court reasoned that the provisions of Nebraska's dormant mineral statutes applied, because for more than 23 years preceding the filing of the complaint, appellants had not publicly exercised rights of ownership. It specifically found that the case did not involve retroactive application of the dormant mineral statutes, because the transfer whereby appellants acquired their ownership interest occurred in 1985, years after the statutes were enacted. Appellants filed this timely appeal.

ASSIGNMENT OF ERROR

Appellants assign that the district court erred in failing to find that application of Nebraska's dormant mineral statutes against their severed mineral interests was an unconstitutional retroactive application of the statutes.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

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[2] See *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

ANALYSIS

Appellants argue that the district court erred in applying Nebraska's dormant mineral statutes to them, because the application was retroactive and therefore unconstitutional. They contend that applying the statutes to them interferes with their contractual rights and deprives them of both substantive and procedural due process.

Several Nebraska statutes affect dormant mineral rights. The primary statute at issue in this case is § 57-229, which provides:

> A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided*, that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner.

The procedure by which a severed mineral interest may be extinguished and canceled is set out in § 57-228:

> Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record, naming as parties defendant therein all persons having or appearing to have any interest in such severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Chapter 25, article 3.

And according to § 57-230:

> If the court shall find that the severed mineral interest has been abandoned, it shall enter judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the interest in the surface from which it was originally severed in the proportions in which they own such interest in the surface.

These statutes were intended to address title problems that developed after mineral estates were fractured.[3]

The mineral interests at issue in this case were created in 1953, when they were severed from the surface property. The essence of appellants' argument is that because Nebraska's dormant mineral interest statutes were not enacted until 1967, after the creation of the mineral interests at issue here, the statutes can never be applied to those interests.

Appellants' argument is based on *Wheelock & Manning OO Ranches, Inc. v. Heath* (*Wheelock*),[4] a 1978 case which was one of the first to address Nebraska's dormant mineral statutes. *Wheelock* involved an application of the statutes to mineral

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[3] *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010).

[4] *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

interests which were severed from the surface property in 1950. The action to declare the severed interests abandoned was filed more than 23 years after the defendants acquired their mineral interests, but less than 23 years after enactment of the dormant mineral statutes. Those statutes provided that in an action filed within 2 years after enactment, "the owner of a severed mineral interest may enter his appearance and assert his interest therein, and he shall be deemed thereby to have timely and publicly exercised his right of ownership."[5] In *Wheelock*, this court concluded:

> In other words, the record title owners [of the mineral interests] were required within 2 years from October 23, 1967, to take some affirmative action or lose their property. In all actions filed after October 23, 1969, if no affirmative action had been taken within 23 years, the severed interest is to be considered abandoned. The owner does not have any remedy. The statute, insofar as it attempts to operate retroactively, is unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions.[6]

Several years after we decided *Wheelock*, the U.S. Supreme Court reached a different conclusion with respect to dormant mineral statutes which operate in a manner similar to Nebraska's. In *Texaco, Inc. v. Short*,[7] the Court affirmed a decision of the Indiana Supreme Court rejecting a constitutional challenge to Indiana's Dormant Mineral Interests Act, which became effective in 1971. That act provided that mineral interests which were unused for a period of 20 years would be extinguished and revert to the owner of the surface estate, unless the owner of the mineral interest filed a statement of claim in accordance with the statute. The act further provided a 2-year grace period from the date of enactment in which owners of mineral interests that were unused and subject to lapse could preserve those interests by filing a claim.

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[5] § 57-231.

[6] *Wheelock, supra* note 4, 201 Neb. at 845, 272 N.W.2d at 773-74.

[7] *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982).

The Indiana act was challenged by parties who acquired mineral interests at the time of severance in 1942, 1944, and 1954, but had neither "used" the interests within the meaning of the act nor filed a statement of claim within the 2-year grace period. They challenged the constitutionality of the act on grounds that the lack of prior notice of the extinguishment of their mineral interests deprived them of property without due process of law, affected a taking of private property for public use without just compensation, and constituted an unconstitutional impairment of contract. The Indiana Supreme Court rejected those claims. Prior to *Texaco, Inc.*, several other state supreme courts, including this court in *Wheelock*, had considered similar statutes and found them unconstitutional, at least in part.[8]

The *Texaco, Inc.* Court held that while severed mineral estates were considered to be vested property interests under Indiana law and were entitled to the same protection as fee simple titles, the state clearly had the power "to condition the permanent retention of [a] property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[9] The Court determined that retroactive application of the statutes did not amount to a taking without just compensation, because "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . ."[10] And the Court rejected the contention that the application of the statutes affected a contractual right, finding that the right at issue was a property right, not a contractual one.

With respect to whether the dormant mineral statutes gave sufficient notice to comport with due process, the Court stated: "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable

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[8] See, *Wilson v. Bishop*, 82 Ill. 2d 364, 412 N.E.2d 522, 45 Ill. Dec. 171 (1980); *Contos v. Herbst*, 278 N.W.2d 732 (Minn. 1979); *Wheelock, supra* note 4; *Chicago & N. W. Transp. Co. v. Pedersen*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

[9] *Texaco, Inc. v. Short, supra* note 7, 454 U.S. at 526.

[10] *Id.*, 454 U.S. at 530.

opportunity to familiarize itself with its terms and to comply."[11] Further, it reasoned that it was "well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."[12] The Court held that "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights."[13] It also noted that according to the Indiana act, before any judgment could be entered quieting title in the surface owner, the full procedural protections of the Due Process Clause, including notice and an opportunity to be heard, would be afforded.

The dissent in *Texaco, Inc.* concluded that retrospective application of the Indiana act to persons who owned severed mineral interests prior to its enactment deprived them of due process. But in reaching this conclusion, the dissent drew the following distinction, which is important to our resolution of this case:

> As to one class of mineral interest owners, there is no question that the statute is a constitutionally proper exercise of the State's power. Every mineral interest in land carved from the fee after the effective date of the statute was carved subject to the statute's limitations. In *prospective* application the statute simply provides that any instrument purporting to transfer a mineral interest carries with it the implicit condition that unless the transferee uses the land within the meaning of the statute, his interest will revert to the transferor. It is only where the State seeks to change the fundamental nature of a property interest already in the hands of its owner that the operative restrictions of both the Takings Clause and the Due Process Clause come into play.[14]

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[11] *Id.*, 454 U.S. at 532.

[12] *Id.*

[13] *Id.*, 454 U.S. at 536.

[14] *Id.*, 454 U.S. at 542 (Brennan, J., dissenting; White, Marshall, and Powell, JJ., join).

We need not decide whether *Wheelock* remains good law after *Texaco, Inc.* with respect to retroactive application of Nebraska's dormant mineral statutes, because we agree with the district court that the statutes have not been applied retroactively to appellants. The critical date in this case is not 1953, when the mineral interests were severed, but, rather, 1985, when they were transferred by Stacia to appellants. Prior to 1985, appellants had no right of ownership in the severed mineral interests that could have been affected by the dormant mineral statutes. The transfer by Stacia and acquisition by appellants in 1985 occurred years after the enactment of the dormant mineral statutes and prevented the abandonment of the severed mineral interests for at least 23 years into the future.[15] At the time of the transfer, appellants were presumed to have knowledge of the law then in effect which affected their *prospective* enjoyment and retention of the mineral interests.[16] Unlike the plaintiffs in *Wheelock*, appellants had the full 23-year period specified in § 57-229 to publicly exercise their right of ownership so as to prevent abandonment of the mineral interests. They failed to do so, and the district court did not err in determining that those interests had been abandoned under the provisions of § 57-229.

CONCLUSION

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

AFFIRMED.

WRIGHT, J., not participating.

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[15] See § 57-229(1).

[16] See, *Texaco, Inc. v. Short, supra* note 7; *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009); *State v. Veiman*, 249 Neb. 875, 546 N.W.2d 785 (1996).

STATE OF NEBRASKA, APPELLEE, V. RONALD G. SMITH, APPELLANT.

806 N.W.2d 383

Filed November 18, 2011. No. S-09-1107.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
4. ____: ____. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
5. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
6. ____: ____. In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. The test is an objective one. Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.
7. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes be strictly construed.
8. **Statutes: Legislature: Intent.** The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.
9. ____: ____: ____. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. **Homicide: Intent: Case Overruled.** An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter. To the extent that *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), holds otherwise, it is overruled.
11. **Jury Instructions: Proof: New Trial: Appeal and Error.** In order to find that a trial court's error in giving an incorrect jury instruction warrants a new trial, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

On February 13, 2009, Ronald G. Smith was charged by information with one count of murder in the second degree; one count of first degree forgery, which was later amended to second degree forgery; and one count of theft by taking. All three charges related to the death of Terri Harris. After a jury trial, Smith was convicted and sentenced on all three counts. He then filed this timely appeal, assigning error only with respect to his conviction for second degree murder, for which he was sentenced to 40 to 70 years' imprisonment.

FACTS

Smith and Harris lived together in a single family residence in Syracuse, Nebraska. In November 2008, both were laid off from their jobs at a Syracuse manufacturing company. Both received severance checks in December as a result of the layoffs; Harris' check was for $3,067.51, and Smith's check was for $3,218.97.

Smith cashed his check at a Syracuse bank on December 19, 2008. Smith cashed Harris' check at the drive-through window of the same bank at approximately 10 a.m. on December 23. He was driving Harris' vehicle at the time and told the teller that he needed the money because Harris had broken her leg and was in the hospital. Smith left Syracuse after cashing the check.

From December 23 to 25, 2008, both Harris' adult son and Harris' sister tried unsuccessfully to contact her on her cellular telephone. Finally, on December 25, Harris' sister called Smith on his cellular telephone to ask if he knew where Harris was. Smith told the sister that Harris was having trouble with her cellular telephone, but that he had seen her that morning

and that she was fine. Smith also told the sister that he was in St. Louis, Missouri, and that he would be back home the next day.

Harris' sister remained concerned after speaking with Smith, so she called Harris' son and asked him to go to the house and check on Harris. The son went to the house at approximately 5:30 p.m. on December 25, 2008. He discovered Harris' body on the floor of the bedroom. The body was face up, lodged between the bed and the wall, and partially covered with a blanket.

A pillow covered in a dark-blue pillowcase was found on the floor near Harris' head, and strands of her hair and blood were found on the pillowcase and pillow. Investigators did not observe any defensive wounds on Harris' hands or arms and saw no signs that a struggle had occurred in the room. Investigators noticed that the mattress on the bed was shifted about 6 inches to one side, so that the mattress and boxspring did not meet on the side of the bed where Harris' body was found.

After finding his mother's body, Harris' son made several calls to Smith's cellular telephone and left angry messages, informing Smith that the police were looking for him. Smith did not return the calls. On December 27, 2008, a tearful Smith called the 911 emergency dispatch service in Illinois and stated that he had been on a drug and alcohol binge for 2 weeks and thought he had killed someone in Nebraska. When Smith was subsequently arrested by Illinois law enforcement authorities, he was extremely intoxicated; hospital records show he had a blood alcohol content of .435 on the evening of December 27.

Smith was interviewed by Nebraska law enforcement authorities on December 28, 2008, at 2:35 p.m. He was informed of and waived his *Miranda* rights prior to this interview. The interview was recorded and was played to the jury at trial.

During the interview, Smith stated that after losing his job, he began drinking and using methamphetamine on a regular basis. Smith said that he arrived at the home which he and Harris shared at approximately 1 a.m. on December 22, 2008, after a night of drinking and drug use. Harris was asleep in the bedroom when he arrived, and Smith slept on the couch. When

Smith awoke at approximately 5:30 or 6 a.m., he and Harris began arguing in the bedroom. They argued about Smith's drinking and drug use, their recent layoffs, and money. At some point during the argument, Smith pushed Harris from her bed. She hit the floor hard and lay there motionless with her face up. Smith took a pillow from the bed and held it over Harris' face for 1 to 2 minutes. She did not resist. Smith covered Harris with a blanket, kissed her, and left the house in Harris' vehicle. He admitted that he took Harris' severance check, cashed it, and then left the state. Harris' cellular telephone and $15.65 in cash was found in Smith's motel room at the time of his arrest in Illinois. During his interrogation, Smith wrote a note to Harris' family in which he stated: "There is nothing I can say to justify my actions. . . . I just hope your family can move on. Sorry is not enough I know that but its [sic] all I can do right now."

Two medical experts testified as to the cause of Harris' death. The pathologist who testified for the State had performed the autopsy on Harris and had authored a report stating that Harris' cause of death was "undetermined," but that nothing in the autopsy was inconsistent with a death caused by smothering. A forensic pathologist testified for Smith. He reviewed photographs of the autopsy, the autopsy report, photographs of the crime scene, and Harris' medical records. He testified that Harris died from natural causes, specifically, heart disease and sleep apnea. He opined that smothering could not have been the cause of Harris' death, because there was no forensic evidence of a struggle prior to her death.

During the jury instruction conference, Smith objected to the trial court's proposed instruction on the elements of second degree murder, and submitted his own. The district court refused to give Smith's requested instruction and instead gave a pattern second degree murder instruction to the jury. The jury was instructed that to convict Smith of murder in the second degree, the State had to prove beyond a reasonable doubt that Smith killed Harris intentionally but without premeditation. The jury was then instructed that if it found the State had proved each element beyond a reasonable doubt, it was its "duty to find [Smith] guilty of the crime of murder in

the second degree." The jury was instructed that it could proceed to consider whether Smith committed manslaughter if it found that the State had failed to prove any one or more of the material elements of second degree murder beyond a reasonable doubt.

Smith was convicted of second degree murder, second degree forgery, and theft by taking. After he was sentenced for each offense, he filed this timely appeal, challenging only his conviction for second degree murder. We granted his petition to bypass.

ASSIGNMENTS OF ERROR

Smith assigns that the district court (1) erred in failing to give his requested jury instruction on second degree murder and (2) violated his constitutional right to due process by failing to instruct the jury that the distinction between second degree murder and manslaughter is based on whether the specific intent to kill was or was not the result of a "'sudden quarrel.'"

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[1]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[2]

ANALYSIS

Smith contends that the jury was not properly instructed on the distinction between second degree murder and manslaughter. Because all crimes are statutory in Nebraska, and no act is criminal unless the Legislature has in express terms declared it

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[1] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[2] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

to be so,[3] we begin with the statutory elements of the offenses. "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."[4] Second degree murder is a Class 1B felony, punishable by imprisonment for a minimum term of 20 years and a maximum term of life.[5] The statutory definition of manslaughter is expressed in an "inclusive disjunction,"[6] namely: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[7] Manslaughter is a Class III felony punishable by a maximum term of imprisonment of 20 years, a $25,000 fine, or both.[8] The statutes defining the elements of these offenses have remained unchanged since 1977.[9]

In this case, we are concerned with the first type of manslaughter defined by § 28-305(1), which we shall refer to as "sudden quarrel manslaughter" or "voluntary manslaughter."

Nature of Sudden Quarrel

[3-6] A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.[10] It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the

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[3] See, *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008); *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[4] Neb. Rev. Stat. § 28-304(1) (Reissue 2008).

[5] Neb. Rev. Stat. § 28-105(1) (Reissue 2008) and § 28-304(2).

[6] *State v. Pettit*, 233 Neb. 436, 445, 445 N.W.2d 890, 896 (1989), *overruled on other grounds, State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

[7] Neb. Rev. Stat. § 28-305(1) (Reissue 2008).

[8] §§ 28-105(1) and 28-305(2).

[9] See 1977 Neb. Laws, L.B. 38, §§ 19 and 20.

[10] *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

victim.[11] It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.[12] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[13] The test is an objective one.[14] Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.[15]

In *State v. Vosler*,[16] we reversed a conviction for second degree murder because the jury had not been instructed on sudden quarrel manslaughter. In that case, the defendant's wife was hospitalized after a suicide attempt stemming from her despondency over an extramarital affair she was having with her husband's close friend. The defendant came to the hospital with a weapon, intending to kill himself in his wife's presence. When he arrived in the hospital room and observed his friend hugging and kissing his wife, he shot and killed his friend. On these facts, we held the jury should have been instructed on sudden quarrel, because the jury would have been justified in finding that the defendant "was provoked into killing the victim by the display of affection between his wife and the victim."[17]

But in *State v. Lyle*,[18] we held that a trial judge did not err in convicting the defendant of first degree murder, and not

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[11] *Lyle, supra* note 10; *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

[12] See *Lyle, supra* note 10.

[13] See, *id.*; *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

[14] See *id.*

[15] See *Cave, supra* note 13.

[16] *Vosler, supra* note 11.

[17] *Id.* at 465, 345 N.W.2d at 809.

[18] *Lyle, supra* note 10.

sudden quarrel manslaughter. After fighting with his brother, the defendant left and then returned about 20 minutes later and fatally shot his brother. We noted that while the defendant's anger may have been the motivating factor behind the killing,

> the fact that [the defendant] was angry is not the standard for reducing a murder to manslaughter. Rather, it is whether [the defendant's] anger was prompted by a provocation which would so provoke a reasonable person to obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection.[19]

We further noted: "The concept of manslaughter '"is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility . . . ."'"[20]

Jury Instructions

Smith contends that the step instruction given by the district court deprived him of due process because it did not allow the jury to consider whether his specific intent to kill was the result of a sudden quarrel. Smith acknowledges that this argument runs contrary to current Nebraska law as set forth in *State v. Jones*,[21] in which this court reversed *State v. Pettit*[22] and held that "there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill."[23] Smith effectively argues that *Jones* should be overruled, because it is based upon the same reasoning as prior cases holding that malice was an element of second degree murder, which we overruled in *State v. Burlison.*[24]

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[19] *Id.* at 364, 513 N.W.2d at 302.

[20] *Id.*, quoting *Com. v. Pirela*, 510 Pa. 43, 507 A.2d 23 (1986).

[21] *Jones, supra* note 6.

[22] *Pettit, supra* note 6.

[23] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

[24] *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

The question of whether an intentional killing may constitute sudden quarrel manslaughter has vexed this court for many years. At its root is the statutory language defining manslaughter as a killing which is committed "without malice."[25] In *State v. Batiste*,[26] this court considered an argument that the evidence was insufficient to support a first degree murder conviction and established, at most, only sudden quarrel manslaughter. Focusing on the phrase "without malice," this court reasoned:

> "Malice," in a legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. . . . Thus, to constitute manslaughter, the slayer must have no intention of doing the wrongful act of killing another without just cause or excuse.[27]

From this, the court reasoned that if a killing "is done intentionally without legal cause or excuse, then there is malice, and the degree of killing is greater than manslaughter because malice is involved."[28]

Several months after the *Batiste* decision, this court revisited the meaning of the phrase "without malice" in *Pettit*.[29] There, the defendant was convicted of manslaughter in the death of his wife, which occurred after an argument. The defendant contended that he intended to kill himself, but accidentally shot his wife. The State countered that because the fatal shooting occurred during a "sudden quarrel," it constituted manslaughter, regardless of the defendant's intent. This court framed the issue as "whether manslaughter 'upon a sudden quarrel' requires the element of intent to kill or whether strict accountability for another's death 'upon a sudden quarrel' eliminates intent to kill as an element of the felony designated as 'manslaughter.'"[30] Examining the common-law roots of the crime of

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[25] § 28-305(1).

[26] *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989).

[27] *Id.* at 488, 437 N.W.2d at 130 (citations omitted).

[28] *Id.*

[29] *Pettit, supra* note 6.

[30] *Id.* at 445, 445 N.W.2d at 896.

manslaughter, this court noted that "adequate legal provocation eliminated malice from murder," and "[f]or that reason, the phrase 'without malice,' in reference to voluntary manslaughter, does not mean 'without intention,' but means a 'willful act, characterized by the presence of an intent to kill . . . .'"[31] After further analysis of decisions by other state courts holding that an accidental killing is not voluntary manslaughter, the *Pettit* court concluded:

> Consequently, we hold that, to sustain a conviction for voluntary manslaughter under § 28-305(1), that is, a conviction for killing another, without malice, "upon a sudden quarrel," the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. Thus, intentional criminal homicide as the result of legally recognized provocation distinguishes voluntary manslaughter "upon a sudden quarrel" from another intentional criminal homicide, murder in the second degree, namely, "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."[32]

Pettit disapproved of the language in *Batiste* to the effect that an intentional killing is not an element of voluntary manslaughter as defined by § 28-305(1). But the opinion in *Pettit* was not unanimous. A dissent reasoned that "common-law voluntary manslaughter was subsumed by the crime of second degree murder" and that "'malice' is a judicially supplied essential element in second degree murder to distinguish second degree murder from an intentional killing that is permitted by law under certain circumstances."[33] The dissent concluded:

> If a person is killed intentionally, whether done "upon a sudden quarrel" or not, the act is obviously done with malice, because killing another is an unlawful act unless the killing is exempt under §§ 28-1406 to 28-1416. It

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[31] *Id.* at 450-51, 445 N.W.2d at 899, quoting *People v. Brubaker*, 53 Cal. 2d 37, 346 P.2d 8 (1959).

[32] *Id.* at 460, 445 N.W.2d at 905.

[33] *Id.* at 470, 474-75, 445 N.W.2d at 910, 913-14 (Fahrnbruch, J., dissenting; White, J., joins).

> is logically impossible to distinguish between a killing done intentionally and one done without malice. A killing committed without malice is one committed unintentionally.[34]

In *State v. Myers*,[35] we held that malice was an element of second degree murder, notwithstanding the fact that it is not included in the statutory definition of that crime. In holding that a jury instruction which did not include malice as an element constituted plain error, the *Myers* court reasoned: "By omitting the element of malice from the second degree murder instruction, the instruction in effect became one for the crime of intentional manslaughter as defined by this court in [*Pettit*]. Malice is not an essential element of manslaughter."[36]

Jones, decided approximately 5 months after *Myers*, extended this reasoning to the issue before us in this case: whether an intentional killing can constitute sudden quarrel manslaughter. The court concluded:

> Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. [*Pettit*] was incorrect in its reasoning and holding, and to that extent, it is overruled.[37]

In *Burlison*,[38] this court reversed the holdings of *Myers* and its progeny, including *Jones*, that malice was an element of second degree murder. We held that the elements of second degree murder included only those stated in the statutory definition of the crime and that the definition was not constitutionally overbroad. *Burlison* did not address the distinct but analytically related holding of *Jones* that because the statutory definition of

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[34] *Id.* at 476, 445 N.W.2d at 913-14 (Fahrnbruch, J., dissenting; White, J., joins).

[35] *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

[36] *Id.* at 909, 510 N.W.2d at 63.

[37] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

[38] *Burlison, supra* note 24.

manslaughter includes the phrase "without malice," an intentional killing can never constitute sudden quarrel manslaughter. We turn to that issue now.

[7-9] We begin our analysis, as we did in *Burlison*, with the language which the Legislature used to define the crime: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[39] It is a fundamental principle of statutory construction that penal statutes be strictly construed.[40] The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.[41] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[42]

The first clause of the statute defines manslaughter as a killing "without malice," and the remainder of the sentence describes two ways in which the offense of manslaughter can be committed. Logically and semantically, the phrase "without malice" applies to both categories of manslaughter. In the second clause of the sentence, which describes those categories, the Legislature used the term "unintentionally." But given its syntactic placement in § 28-305(1), the word "unintentionally" modifies the language of the statute describing the second category of manslaughter, i.e., a killing committed "in the commission of an unlawful act," but not the first, i.e., "upon a sudden quarrel." There is no corresponding reference to intent, or the absence thereof, in the preceding phrase defining sudden quarrel manslaughter. Had the Legislature intended the word "unintentionally" to apply to both categories, it could have

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[39] § 28-305(1).

[40] See, *State v. Huff, ante* p. 78, 802 N.W.2d 77 (2011); *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

[41] *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

[42] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

placed the word in the first clause of the sentence along with the phrase "without malice."

In *Jones*, this court essentially rewrote § 28-305(1) to accomplish exactly that. It did so based upon a perceived necessity of distinguishing sudden quarrel manslaughter from second degree murder, which was a part of the rationale for judicially grafting the element of malice into the statutory definition of second degree murder in *Myers* and subsequent second degree murder cases prior to *Burlison*. The holding in *Jones* was based on the premise that malice is the equivalent of intent to kill. For the reasons which underlie our decision in *Burlison,* we now conclude that this was error.

It is the province of the legislative branch, not the judiciary, to define criminal offenses within constitutional boundaries.[43] "[J]udicial construction is constitutionally permissible, but judicial legislation is not."[44] The plain and unambiguous language used by the Legislature to define the crime of manslaughter clearly specifies the different factors which distinguish the two categories of manslaughter from second degree murder. With respect to manslaughter involving a killing in the commission of an unlawful act, the distinguishing factor is the absence of an intent to kill. But with respect to sudden quarrel manslaughter, the distinguishing factor is that the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence.[45]

The holding of *Jones* that an intentional killing cannot constitute sudden quarrel manslaughter is inconsistent not only with the language of § 28-305(1), but also with its common-law roots. At common law, "homicide, even if intentional, was said to be without malice and hence manslaughter if committed

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[43] See *Burlison, supra* note 24.

[44] *Id.* at 201-02, 583 N.W.2d at 39 (Wright, J., concurring; Connolly and Gerrard, JJ., join).

[45] See *State v. Woods*, 249 Neb. 138, 542 N.W.2d 410 (1996) (Gerrard, J., concurring).

in the heat of passion upon adequate provocation."[46] More than a century ago, this court stated in *Boche v. State*[47] that statutory language which defined manslaughter as a killing "'without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act'" made no change in the common-law definition of manslaughter. The court further stated:

> In the first class of cases referred to in the statute the homicide must have been intentional, but in sudden passion or heat of blood caused by a reasonable provocation, and without malice; in the latter clause the killing must have been unintentional, but caused while the slayer was committing some act prohibited by law . . . .[48]

In *Pettit*, this court undertook a thorough review of decisions by other state courts which construed similar or identical statutory provisions in a manner consistent with *Boche*.[49] The same holds true today. As one commentator notes:

> Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. The principal extenuating circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (i.e., a provocation which would cause a reasonable man to lose his normal self-control).[50]

Common examples of this type of manslaughter include a killing provoked by the sudden discovery of a spouse in the act of committing adultery and a killing provoked during a physical altercation in which the participants voluntarily engaged.[51]

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[46] A.L.I., Model Penal Code and Commentaries § 210.3, comment 1 at 44 (1980).

[47] *Boche v. State*, 84 Neb. 845, 853, 122 N.W. 72, 75 (1909).

[48] *Id.* at 854, 122 N.W. at 75.

[49] See *Pettit, supra* note 6.

[50] 2 Wayne R. LaFave, Substantive Criminal Law § 15.2 at 491 (2d ed. 2003).

[51] *Id.*, § 15.2(b)(2) and (5).

It is nonsensical to regard "sudden quarrel" as a provocation, as this court and many others have, but then conclude that lethal response to the provocation must be unintentional in order to constitute voluntary manslaughter. Provocation is that which incites another to do something.[52] As one commentator has observed, in the context of sudden quarrel manslaughter, "[p]rovocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negat[e] intent. It magnifies it."[53]

[10] In *Burlison*, we recognized that our duty "to ensure that statutes are interpreted correctly is in no way diminished when the error we perceive is our own."[54] For the foregoing reasons, we conclude that the analysis and holding of *Pettit* was correct and that the holding of *Jones* that "[t]he distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill" was error.[55] We therefore overrule this holding in *Jones* and reaffirm the holdings of *Pettit* and *Boche* that an intentional killing committed without malice upon a "sudden quarrel," as that term is defined by our jurisprudence, constitutes the offense of manslaughter.

Because of our holding today, the step instruction given in this case was not a correct statement of the law. Specifically, the step instruction required the jury to convict on second degree murder if it found that Smith killed Harris intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.

PREJUDICE

[11] Having identified trial error, we must now consider whether it was prejudicial or harmless. Before an error in the giving of jury instructions can be considered as a ground for

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[52] Black's Law Dictionary 1346 (9th ed. 2009).

[53] Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminology 421, 462 (1982).

[54] *Burlison, supra* note 24, 255 Neb. at 196, 583 N.W.2d at 36.

[55] *Jones, supra* note 6, 245 Neb. at 830, 515 N.W.2d at 659.

reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[56] The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[57]

A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.[58] But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.[59] In the context of this case, Smith was prejudiced by the erroneous jury instruction only if the jury could reasonably have concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.

The only evidence of the events which transpired immediately prior to Harris' death is the video recording of Smith's interrogation following his arrest, as summarized above. From this, the jury could reasonably infer that Smith and Harris had been arguing and that Smith was angry. But there is no evidence explaining how or by whom the argument was started, its duration, or any specific words which were spoken or actions which were taken before Smith pushed Harris to the floor. And most importantly, there is no evidence that Harris said or did anything which would have provoked a reasonable person in Smith's position to push her from the bed and smother her with a pillow. In the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion.[60] Nor does evidence of a string of prior arguments and a continuing dispute without any indication of some sort of instant incitement constitute a sufficient showing to warrant a voluntary manslaughter instruction.[61]

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[56] *State v. Almasaudi, ante* p. 162, 802 N.W.2d 110 (2011); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[57] See *State v. Almasaudi, supra* note 56.

[58] See Neb. Rev. Stat. § 29-2027 (Reissue 2008).

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

[60] *Lyle, supra* note 10.

[61] *Id.*

We conclude that there is no evidence in this record upon which the jury could have concluded that Smith committed sudden quarrel manslaughter instead of second degree murder. We therefore conclude that the improper jury instruction did not prejudice Smith or affect his substantial rights, and does not require the reversal of his second degree murder conviction.

CONCLUSION

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

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD A. HALVERSTADT, APPELLANT.
809 N.W.2d 480

Filed November 18, 2011. No. S-11-145.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. ____: ____. 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.

Appeal from the District Court for Lancaster County, JODI NELSON, Judge, on appeal thereto from the County Court for Lancaster County, JEAN A. LOVELL, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

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

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

STEPHAN, J.

Richard A. Halverstadt was convicted of violating Neb. Rev. Stat. §§ 60-6,294 and 60-6,300 (Reissue 2010) after being cited for hauling an overweight load on a Nebraska roadway. He appeals, contending the statutes do not apply to his actions, because he possessed a special permit. We affirm his convictions for violating § 60-6,294, but reverse his conviction for violating § 60-6,300.

I. FACTS

On May 14, 2010, Nebraska State Patrol Trooper John Lewis stopped a vehicle carrying an oversized load. Halverstadt, the driver of the vehicle, gave Lewis three special permits related to the oversized load: one issued by the city of Lincoln, one issued by Lancaster County, and one issued by the State of Nebraska. Because Halverstadt was on a county road at the time Lewis stopped him, Lewis was concerned only with the county permit.

After viewing the permit, Lewis weighed Halverstadt's load with portable scales. Lewis determined that the weight on the triple axles was 51,300 pounds, which exceeded the 50,100 pounds authorized by Halverstadt's county permit and the 42,500 pounds authorized by state statute.[1] He determined that the weight on the quad axles was 72,200 pounds, which exceeded the 64,000 pounds authorized by the county permit and the 51,500 pounds authorized by state statute.[2] Lewis also determined that the gross weight of Halverstadt's vehicle was 136,500 pounds, which exceeded the 126,000 pounds authorized by the county permit and the 95,000 pounds authorized by state statute.[3] Lewis wrote "Revoked" on the county permit and cited Halverstadt for two violations of § 60-6,294 based on the axle weight excesses. He also cited Halverstadt for violating § 60-6,300 based on the excess gross weight. Halverstadt was convicted in county court of the statutory violations and

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[1] See § 60-6,294.

[2] *Id.*

[3] See § 60-6,300.

fined $500 and $1,550 for the axle violations and $1,050 for the gross weight violation.

Halverstadt appealed to the district court, which affirmed his convictions. He then filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Halverstadt assigns, restated, that the district court erred in (1) concluding the county permit was retroactively revoked when his violation consisted solely of exceeding the weight limitations specified by the county permit, (2) convicting him under an inapplicable statute and imposing a fine contrary to law, and (3) concluding he violated § 60-6,300 when he was operating with three valid special permits issued pursuant to Neb. Rev. Stat. § 60-6,298 (Cum. Supp. 2008) and was not the owner of the vehicle.

III. STANDARD OF REVIEW

[1] Statutory interpretation is a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[4]

IV. ANALYSIS

It is undisputed that Halverstadt's load exceeded both the weight limits of his special county permit and the statutory weight limits on two axles and in gross weight. The issue is whether he was cited under the correct statute and, if so, what the penalty for his violations should be.

1. Axle Weight Violations

Section 60-6,294 limits how much weight a vehicle can carry per axle on Nebraska roadways. Generally, no axle can carry a load in excess of 20,000 pounds.[5] Groups of two or more consecutive axles also have weight restrictions based on the distance in feet between the axles, and these restrictions are set out in a statutory chart.[6] "Every vehicle" traveling on a Nebraska

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[4] *State v. Huff, ante* p. 78, 802 N.W.2d 77 (2011).

[5] § 60-6,294(2).

[6] § 60-6,294(3).

roadway must comply with these weight restrictions.[7] The only statutory exceptions are for agricultural floater-spreader implements, disabled vehicles, vehicles moving buildings, self-propelled mobile equipment, and emergency vehicles.[8] "The limitations imposed by [§ 60-6,294 are] supplemental to all other provisions imposing limitations upon the size and weight of vehicles."[9]

The penalties for "operating any motor vehicle . . . when the weight of the vehicle and load is in violation of the provisions of section 60-6,294" are set forth in Neb. Rev. Stat. § 60-6,296 (Reissue 2010). The penalties are always fines, and they are assessed based on the percentage of weight that is over the statutory maximum identified in § 60-6,294.[10] The penalties do not apply in limited situations, including when the cargo can be shifted to meet the statutory weight limits, certain haulings of livestock or grain, and the hauling of refuse.[11]

The Department of Roads, the State Patrol, and "local authorities" may issue special permits allowing operators over "highways under their jurisdiction" to carry loads exceeding the statutory maximum weight restrictions.[12] Each permit issued by such authority must "state the maximum weight permissible on a single axle or combination of axles and the total gross weight allowed."[13] The issuing authority may also "limit the number of days during which the permit is valid," limit the number of trips the permit holder may make, or establish seasonal or time limitations within which the permit is valid.[14]

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[7] § 60-6,294(1).

[8] See § 60-6,294(1) and (10). See, also, Neb. Rev. Stat. §§ 60-6,288(2)(i), 60-6,294.01, 60-6,297, and 60-6,299 (Reissue 2010) and § 60-6,298(1)(a)(v).

[9] § 60-6,294(1).

[10] § 60-6,296.

[11] See Neb. Rev. Stat. § 60-6,301 (Reissue 2010).

[12] § 60-6,298.

[13] § 60-6,298(4).

[14] § 60-6,298(3).

In this case, Halverstadt obtained a special permit from the county. Section 60-6,298(4) provides in part:

> No person shall violate any of the terms or conditions of [a] special permit. In case of any violation, the permit shall be deemed automatically revoked and the penalty of the original limitations shall be applied unless:
>
> (a) The violation consists solely of exceeding the size or weight specified by the permit, in which case only the penalty of the original size or weight limitation exceeded shall be applied; or
>
> (b) The total gross load is within the maximum authorized by the permit, no axle is more than ten percent in excess of the maximum load for such axle or group of axles authorized by the permit, and such load can be shifted to meet the weight limitations of wheel and axle loads authorized by such permit. Such shift may be made without penalty if it is made at the state or commercial scale designated in the permit. The vehicle may travel from its point of origin to such designated scale without penalty, and a scale ticket from such scale, showing the vehicle to be properly loaded and within the gross and axle weights authorized by the permit, shall be reasonable evidence of compliance with the terms of the permit.

(a) Special Permit Was Improperly Revoked

The district court conceded that § 60-6,298(4)(a) provides that revoking a special permit is not proper if the "violation consists solely of exceeding the size or weight specified by the permit" and stated that Halverstadt's axle violations were "technically" related only to weight. But it reasoned that when read in context, § 60-6,298(4)(a) refers only to a situation where a vehicle exceeds the maximum *gross* weight specified by the permit, but at the same time does not exceed any of the maximum axle weights. It concluded this had to be true, even though § 60-6,298(4)(a) does not refer to gross weight, because § 60-6,298(4)(b) applied when a vehicle was within the maximum gross weight but had axles that exceeded the maximum by no more than 10 percent. It reasoned that if § 60-6,298(4)(a) applied to axle weight in addition to gross weight, then § 60-6,298(4)(b) would be meaningless.

[2] We disagree with the district court's interpretation. 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.[15] Reading "gross" into § 60-6,298(4)(a) is improper and is not required for § 60-6,298(4)(a) and (b) to make sense. The plain and direct language of § 60-6,298(4) sets out three possible penalties for a violation of a special permit. Section 60-6,298(4) provides the general rule that *any* violation of the special permit results in both revocation of the permit and the "penalty of the original limitations." Section 60-6,298(4)(a) is one exception to the general rule of § 60-6,298(4), and provides that if the *only* violation is exceeding the size or weight specified by the permit, then revocation of the permit is not a penalty and "only the penalty of the original size or weight limitation exceeded" is applied. Section 60-6,298(4)(b) is a further exception to the general rule of § 60-6,298(4), and if all the conditions of that subsection are met, no penalty is imposed for the permit violations.

So construed, it is clear that the statute makes sense without imposing the term "gross" into the specific statutory language of § 60-6,298(4)(a). The phrase "exceeding the size or weight specified by the permit" used in § 60-6,298(4)(a) clearly refers to either exceeding axle weights or exceeding gross weights. In fact, the Legislature used the term "gross" in § 60-6,298(4)(b), indicating that it was aware of the difference between the terms "weight" and "gross" weight and their use in the statutory scheme at issue.

We conclude that under the circumstances of this case, § 60-6,298(4)(a) applies to Halverstadt. Consequently, his special permit was improperly revoked, and only the "penalty of the original size or weight limitation exceeded" applies to his axle weight violations of the special permit.

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[15] *In re Ervin W. Blauhorn Revocable Trust*, 275 Neb. 256, 746 N.W.2d 136 (2008); *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

(b) "Original Limitations" Means Statutory Limitations

The district court, based in part on its erroneous interpretation of § 60-6,298(4)(a) and (b), assumed without specific analysis that the phrase "penalty of the original limitations" used in § 60-6,298(4) meant the original statutory weight limitations imposed by § 60-6,294. Presumably, it did so based on the language in § 60-6,298(4) providing that if the violation falls within that section, the special permit is revoked. And if the permit is revoked, it is not illogical to conclude that the term "original" in § 60-6,298(4) means the original statutory weight limitations of § 60-6,294.

But both § 60-6,298(4) and (4)(a) use the term "original" when referring to the size and weight limitations. And because a violation falling under § 60-6,298(4) results in a revocation of the special permit, but one falling under § 60-6,298(4)(a) does not, it cannot be, as implied by the district court, that "original" in § 60-6,298(4) means the statutory weight limitations simply because under that section the permit is revoked. Instead, for the statute to be internally consistent, the term "original" in § 60-6,298(4) must mean the same thing as the term "original" in § 60-6,298(4)(a).

The question, then, is whether "original" in both subsections refers to the statutory weight restrictions or whether it refers to the weight restrictions of the special permit. We conclude that § 60-6,298(4) can reasonably be interpreted either way and is therefore ambiguous. In such a situation, a court may examine the pertinent legislative history of the act in question to ascertain the intent of the Legislature.[16]

Originally, the Nebraska statutes regulating the width and weight of loads on Nebraska roadways contained no authorization for the issuance of special permits.[17] But a statutory amendment was adopted in 1957 that authorized state and local authorities to issue special permits.[18] The amendment

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[16] *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

[17] See, generally, 1933 Neb. Laws, ch. 105, § 4, p. 426.

[18] 1957 Neb. Laws, ch. 156, § 4, p. 565.

provided that no hauler could violate any term or condition of a special permit so issued and that "in case of any violation the permit shall be deemed automatically revoked and the penalty of the original limitations shall be applied."[19] This identical language is currently codified at § 60-6,298(4). The 1957 amendment did not define "original limitations," and the legislative history on the bill is silent as to how this phrase was to be interpreted.

In 1963, the special permit statute was amended to allow haulers to avoid penalties altogether in certain situations where the load had shifted during travel but could be reconfigured to comply with the restrictions of the special permit.[20] The language adopted in 1963 is identical to the language that is now codified at § 60-6,298(4)(b). The introducer's statement of purpose for the bill that resulted in this amendment explained that as the special permit statute existed prior to the amendment,

> [c]ontractors and contract haulers who move heavy equipment do so under special permits issued by the Department of Roads. These permits set axle weights, gross weights, height restrictions and width restrictions. They are subject to revocation if any of their terms are violated, and *a hauler whose permit has been invalidated is penalized according to the statutory weight limits, rather than the weights allowable by the permits.*[21]

In 1965, the Legislature further amended the special permit statutes to add language identical to that which is now codified at § 60-6,298(4)(a).[22] According to the chairperson of the public works committee, the amendment was necessary because

> [u]nder the present law, a person desiring to haul a load exceeding certain widths and weights must get a special permit from the state to haul such loads. Present statutes provide that if the hauler violates either the weigt [sic]

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[19] *Id.* at 566.

[20] 1963 Neb. Laws, ch. 226, § 1, pp. 709-10.

[21] Introducer's Statement of Purpose, L.B. 542, Committee on Public Works, 73d Leg. 1 (Apr. 3, 1963) (emphasis supplied).

[22] 1965 Neb. Laws, ch. 214, § 1, p. 628.

> or width granted by the permit, *the permit is cancelled and he is fined in an amount just as though he had never received a permit.*[23]

During floor debate on the 1965 amendment, it was explained that without the amendment, if a hauler had a special permit authorizing transport of a load that was both overweight and overwidth and exceeded one of the authorizations, he lost the privileges of the special permit for both, and was penalized under the statutory limitations for both, even though he violated only one.[24] The floor debate explained that the purpose of the amendment was to ensure the hauler was penalized only for the provision of the special permit that was violated.[25] The debate was clear, however, that the penalty to be imposed was based on the statutory restrictions, not the restrictions of the special permit.[26]

Based on this legislative history, it is clear that the Legislature intended to base the penalties for violating a special permit on the statutory weight restrictions, not those of the special permit. We therefore conclude that the term "original" limitations as used in both § 60-6,298(4) and (4)(a) means the original statutory restrictions of § 60-6,294.

Because Halverstadt's violation of his special permit consisted solely of exceeding the weight specified by the permit, his conduct fell within § 60-6,298(4)(a) and his permit was not revoked. He was, however, subject to the "penalty of the original size or weight limitation" he exceeded.[27] Because "original size or weight limitation" refers to the statutory limitations of § 60-6,294, Halverstadt was properly cited and convicted under that statute. We therefore affirm the convictions under § 60-6,294 for the axle weight violations.

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[23] Committee Statement, L.B. 648, 75th Leg. (Apr. 29, 1965) (emphasis supplied).

[24] Floor Debate, L.B. 648, Committee on Public Works, 75th Leg. (Apr. 14, 1965).

[25] *Id.*

[26] *Id.*

[27] § 60-6,298(4)(a).

2. Gross Weight Violation

Halverstadt was also convicted of violating § 60-6,300, which provides:

> It shall be unlawful to operate upon the public highways of this state any truck, truck-tractor, or trailer that weighs in excess of the gross weight for which the registration fee on such vehicle has been paid plus one thousand pounds, but this section shall not apply to any truck, truck-tractor, or trailer being operated under a special permit issued pursuant to section 60-6,298.
>
> Any owner of such a vehicle who permits operation of the vehicle in violation of this section shall be guilty of a traffic infraction and shall, upon conviction, be fined twenty-five dollars for each one thousand pounds or fraction thereof in excess of the weight allowed to be carried under this section with tolerance.

The district court concluded that Halverstadt violated this statute because he was over the statutory gross weight and, even though he had obtained a special permit, it was revoked pursuant to § 60-6,298(4). Halverstadt's violation of the county permit properly falls within § 60-6,298(4)(a), and thus his county permit was not properly revoked. Therefore, § 60-6,300 does not apply to him, because he was operating under a special permit issued pursuant to § 60-6,298. We further note that there is no evidence in the record which could support a finding that Halverstadt was the owner of the vehicle so as to subject him to liability under § 60-6,300. We reverse Halverstadt's conviction for violating § 60-6,300 and remand the cause to the district court with directions to reverse that conviction and remand the case to the county court with directions to dismiss.

V. CONCLUSION

For the foregoing reasons, we affirm Halverstadt's convictions under § 60-6,294 and reverse his conviction under § 60-6,300.

Affirmed in part, and in part reversed and remanded with directions.

Wright and Gerrard, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TERRY JAY GRAFF, APPELLANT.
810 N.W.2d 140

Filed November 18, 2011. No. S-11-158.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach a conclusion independent of the one reached by the lower court.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
5. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict. However, the defendant may still challenge the sufficiency of the evidence.

Appeal from the District Court for Brown County, MARK D. KOZISEK, Judge, on appeal thereto from the County Court for Brown County, JAMES J. ORR, Judge. Judgment of District Court reversed, and cause remanded with directions.

Bradley D. Holtorf, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Terry Jay Graff was convicted of violating a protection order and was sentenced to 12 months' probation. The issue presented by this appeal is whether a defendant can be convicted of knowingly violating a protection order of which he has actual notice if the defendant was not personally served with

that order. We conclude that personal service is required by the statute and accordingly reverse, and remand with directions.

FACTUAL BACKGROUND

Graff and his wife were divorced in 2008. Due to problems between the couple concerning visitation with their children, Graff's ex-wife sought a protection order in the Brown County District Court, and an ex parte order was entered on July 1, 2009. A hearing was held on July 16. Graff, represented by counsel, and his ex-wife, pro se, were in attendance at the hearing. During the hearing, the parties stipulated to the entry of a mutual harassment protection order and stipulated that only contact relating to the parties' minor children should be allowed. A permanent order was entered by the county court judge on August 31. The order indicates that a copy was mailed to Graff and his counsel, as well as to his ex-wife, and that a copy was given to the Brown County sheriff.

On November 1, 2009, Graff's ex-wife arrived at Graff's residence to pick up one of the parties' children. During the course of the pickup, an altercation arose between Graff and his ex-wife. Graff refused to allow the parties' child to leave. Graff then retrieved a baseball bat and swung the bat in the vicinity of his ex-wife's car and pushed his ex-wife's head with the bat through the vehicle's open window. Graff also verbally attacked his ex-wife.

Law enforcement was contacted, and Graff was arrested. At trial, Graff's ex-wife testified to the above facts. At the conclusion of the State's case in chief, Graff moved to dismiss, contending that he had not been personally served with the protection order as required by statute. That motion was denied. Graff was subsequently found guilty and sentenced to 12 months' probation. He appealed to the district court, which affirmed. He now appeals to this court.

ASSIGNMENT OF ERROR

Graff assigns that the county court and district court both erred in finding that he knowingly violated a protection order.

STANDARD OF REVIEW

[1,2] The district court and this court review appeals from the county court for error appearing on the record.[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach a conclusion independent of the one reached by the lower court.[2]

ANALYSIS

Graff's only argument on appeal is that both the county and district courts erred in finding that he knowingly violated a protection order. The basis of this argument is Graff's assertion that the State's failure to have the protection order personally served upon him is fatal to his conviction for violating the order. The precise issue presented by this appeal is whether personal service is an element of the crime of knowingly violating a protection order. We conclude that it is.

Neb. Rev. Stat. § 28-311.09 (Reissue 2008) governs harassment protection orders. That section provides:

> (1) Any victim who has been harassed as defined by section 28-311.02 may file a petition and affidavit for a harassment protection order as provided in subsection (3) of this section. Upon the filing of such a petition and affidavit in support thereof, the judge or court may issue a harassment protection order without bond enjoining the respondent from (a) imposing any restraint upon the person or liberty of the petitioner, (b) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner, or (c) telephoning, contacting, or otherwise communicating with the petitioner.
>
> . . . .
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> (4) A petition for a harassment protection order filed pursuant to subsection (1) of this section may not be withdrawn except upon order of the court. An order issued pursuant to subsection (1) of this section shall specify that it is effective for a period of one year unless otherwise

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[1] *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008).

[2] See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

> modified by the court. *Any person who knowingly violates an order issued pursuant to subsection (1) of this section after service shall be guilty of a Class II misdemeanor.*
>
> . . . .
>
> (8) Upon the issuance of any harassment protection order under this section, the clerk of the court shall forthwith provide the petitioner, without charge, with two certified copies of such order. The clerk of the court shall also forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of such order and one copy each of the sheriff's return thereon. *The clerk of the court shall also forthwith provide a copy of the harassment protection order to the sheriff's office in the county where the respondent may be personally served together with instructions for service. Upon receipt of the order and instructions for service, such sheriff's office shall forthwith serve the harassment protection order upon the respondent and file its return thereon with the clerk of the court which issued the harassment protection order within fourteen days of the issuance of the harassment protection order.* If any harassment protection order is dismissed or modified by the court, the clerk of the court shall forthwith provide the local police department or local law enforcement agency and the local sheriff's office, without charge, with one copy each of the order of dismissal or modification.[3]

[3,4] We begin with a few familiar principles of statutory construction. Statutory language is to be given its plain and ordinary meaning.[4] A fundamental principle of statutory construction requires that penal statutes be strictly construed.[5] In applying these principles to this case, we read the language in question as requiring both intent—in that the crime of violating a protection order must be done knowingly—and service. We

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[3] § 28-311.09 (emphasis supplied).

[4] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[5] *State v. Huff, ante* p. 78, 802 N.W.2d 77 (2011).

must conclude that in this instance, service, which is defined by § 28-311.09(8) solely as personal service, is specifically required by the statute and hence is an element of the crime. This decision is consistent with the decision of the Court of Appeals in *State v. Patterson*,[6] which presented a similar issue under the Protection from Domestic Abuse Act. We acknowledge the logic of the State's argument that Graff's actual knowledge of the entry of the order should be sufficient. But we are constrained by the words of the statute as chosen by the Legislature.

[5] We further reject the State's argument that Graff waived his argument on this point because he failed to renew his motion to dismiss at the close of the case. It is true that a defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict.[7] However, the defendant may still challenge the sufficiency of the evidence.[8] And in this case, we read Graff's assignment of error and argument as a challenge to the sufficiency of the evidence against him.

Because personal service was required, but did not occur, we must conclude that there was insufficient evidence to convict Graff. His conviction should therefore be reversed.

CONCLUSION

The district court's judgment is reversed. The cause is remanded to the district court with instructions to reverse the county court's judgment and remand the case to the county court with instructions to dismiss the charge.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating in the decision.

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[6] *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

[7] *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[8] See *id.*

IN RE ADOPTION OF AMEA R., A MINOR CHILD. ETHEL S. AND EDWARD S., SR., APPELLEES, V. EDWARD S., SR., AN INCAPACITATED PERSON, BY AND THROUGH EDWARD S., JR., HIS SON AND NEXT FRIEND, APPELLANT.

807 N.W.2d 736

Filed December 2, 2011. No. S-10-1163.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Final Orders: Appeal and Error.** 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 and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
4. **Final Orders: Adoption.** Adoption proceedings are special proceedings.
5. **Interventions.** Under Neb. Rev. Stat. § 25-328 (Reissue 2008), an intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
6. **Guardians and Conservators: Words and Phrases.** A next friend is one who, in the absence of a guardian, acts for the benefit of an infant or incapacitated person.
7. **Guardians and Conservators.** A next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right.
8. **Courts: Guardians and Conservators: Guardians Ad Litem: Estates.** It is a court's duty as the general conservator of the estates of all persons under disabilities to see that an incapacitated party's rights and estate are protected, either by a general guardian or by a next friend or guardian ad litem appointed by the court for the purposes of the action.
9. **Guardians and Conservators: Mental Competency.** Even when a person is not completely incompetent, but is incapable, through age or weakness of mind, of conducting his or her affairs, it is within the discretion of the trial court to permit a suit to proceed in his or her behalf through a next friend.
10. **Courts: Guardians Ad Litem: Mental Competency.** A court has discretion to appoint a guardian ad litem for a litigant when the litigant is not mentally competent to comprehend the significance of legal proceedings, or is unable to intelligently and understandingly participate in the protection of his or her best interests, and such a guardian is needed to protect those interests.
11. **Courts: Guardians and Conservators.** A next friend is under control of the court and can be removed if, in the court's discretion, the next friend is unsuitable.

12. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
13. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is not affected when that right can be effectively vindicated in an appeal from the final judgment.

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

Susan J. Spahn, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

William M. Lamson, Jr., Anne Marie O'Brien, and Gage R. Cobb, of Lamson, Dugan & Murray, L.L.P., for appellees.

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

GERRARD, J.

This is an adoption case involving the petition of a married couple to adopt the wife's biological granddaughter. The husband has Alzheimer's-type dementia, so his adult son sought to participate in the adoption proceedings on his behalf and object to his mental capacity to pursue the adoption. The question presented in this appeal is whether the son can stand as his father's "next friend" and participate in such a proceeding. But we do not reach that issue, because we conclude that the son's appeal was not taken from a final, appealable order.

BACKGROUND

Ethel S. and Edward S., Sr. (Edward Sr.), a married couple, filed a petition for adoption in the county court on December 19, 2007, seeking to adopt then-6-year-old Amea R. Amea's biological father is Ethel's son and Edward Sr.'s stepson. On the same day, in a separate proceeding, Edward S., Jr. (Edward Jr.), was appointed temporary conservator of Edward Sr.'s estate. Edward Jr. is Edward Sr.'s son and Ethel's stepson. The conservatorship was based upon Edward Jr.'s allegation that Edward Sr. suffered from dementia and lacked capacity to make financial decisions for himself, and specific allegations that Ethel was misusing a power of attorney to divert Edward Sr.'s assets for personal use.

Edward Jr. filed a "Petition in Intervention and Objection to Petition for Adoption" in the county court adoption case, alleging that he had standing to participate pursuant to his appointment as temporary conservator and as Edward Sr.'s son and next friend. Edward Jr. alleged that Edward Sr. suffered from Alzheimer's-type dementia and possessed neither the mental capacity to care for Amea nor the capacity to consent to the adoption. The county court entered an order on February 7, 2008, based in part on "the agreement of the parties," permitting Edward Jr. to participate.

But on February 19, 2008, Edward Sr. and Ethel answered Edward Jr.'s petition and alleged that he lacked standing to object to the adoption. (We recognize that the parties also dispute whether Edward Sr. has the capacity to retain counsel and whether those who purport to represent his interests are actually doing so. Our description of the pleadings as having been filed by Edward Sr. is based on the representations they make on their face, and should not be construed as a conclusion on the merits of the parties' arguments about Edward Sr.'s representation.)

After several delays, Edward Jr. moved for a summary judgment dismissing the petition for adoption. Edward Sr. and Ethel in turn filed a motion for partial summary judgment seeking to have Edward Jr. removed from the proceedings for lack of standing.

But by this time, Edward Jr. was no longer Edward Sr.'s temporary conservator. The separate guardianship and conservatorship case had proceeded to trial, and an independent lawyer had been appointed as Edward Sr.'s conservator. The court found from the evidence that Ethel "may have not acted reasonably in making certain financial decisions that clearly affected" Edward Sr. The court found that a third-party conservator was necessary because of animosity between Ethel and Edward Jr. But the court declined to appoint a guardian, "because it appears that [Edward Sr.] can still somewhat function on his own and also does have his wife to take care of him on a day-to-day basis." And Ethel and Edward Jr. each had power to act as Edward Sr.'s attorney in fact for health care decisions, pursuant to a durable power of attorney that was

"now effective because [Edward Sr.] has been diagnosed with dementia and is therefore incapacitated."

Then, before the parties' motions for summary judgment were heard, the county court judge entered an order recusing himself from the adoption case. The court acknowledged "the ever present debilitating effect of [Edward Sr.'s] Alzheimer's disease as opposed to [his] condition when the adoption proceedings first began." And the court explained that "any and all proceedings need to be absolutely free from any bias and to safeguard such from arising, particularly due to facts and acts by parties that were revealed and noted by the court in related proceedings under [the guardianship/conservatorship case]." So, the court concluded, "the parties would best be served by a neutral magistrate with a fresh perspective of the facts as related solely in the adoption."

A replacement judge was appointed in the case. Edward Jr. filed a motion to disqualify the law firm purporting to represent Ethel and Edward Sr., contending that Edward Sr. lacked capacity to retain counsel. Edward Jr. also filed a "Motion to Compel [Edward Sr.] to Appear and to Dismiss," which sought an order compelling Edward Sr. to appear before the court "and answer nonleading questions and to dismiss this proceeding." The motion to compel was styled, however, as having been filed by Edward Sr. "by and through" Edward Jr. as his next friend.

After a hearing, the court took the standing issue under advisement and entered an order finding that Edward Jr. did not have standing in the adoption case. The court therefore denied all the motions filed by Edward Jr. and held over the adoption petition for further hearing. And a few days later, the court appointed an attorney to act as guardian ad litem to represent Edward Sr.'s interests in the adoption proceeding. Edward Jr. appeals.

ASSIGNMENTS OF ERROR

Edward Jr. assigns that the court erred in (1) determining that Edward Jr. was required to have standing, personally, and in removing him from these proceedings and granting the motion objecting to standing; (2) failing to find that Edward

Jr. was involved in these proceedings based upon Edward Sr.'s standing; and (3) dismissing the pleadings filed by Edward Sr. by and through Edward Jr., including, but not limited to, the "Motion to Compel [Edward Sr.] to Appear and to Dismiss."

Edward Sr. and Ethel do not cross-appeal, but they do contend in their brief that the order effectively dismissing Edward Jr. from the case was not a final, appealable order.

STANDARD OF REVIEW

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

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] As noted, Edward Sr. and Ethel argue that we lack appellate jurisdiction, because Edward Jr.'s appeal was not taken from a final, appealable order.[3]

[3,4] 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 and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[4] The first and third categories are not at issue here, so the question is whether the county court's order affected a substantial right and was made in a special proceeding. Specifically, because adoption proceedings are special proceedings,[5] the question is whether the order affected a substantial right. We find that it did not. But explaining that conclusion will require an examination of some of the principles underlying the merits of Edward Jr.'s

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[1] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[2] *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

[3] See *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[4] *Id.*

[5] See *id.*

arguments, because those principles clarify the nature of the order from which Edward Jr.'s appeal was taken.

[5] To begin with, it is important to note that Edward Jr. does not claim that he should have been permitted to intervene in the adoption proceeding and participate as a party. Although his initial motion was styled as a "motion to intervene," it did not seek intervention in the usual sense, because Edward Jr. did not seek to join the proceedings in defense of his own rights or interests. Nor could he have—he was not a real party in interest. The Nebraska adoption statutes[6] have no specific provision that would permit his intervention, and under the general intervention statute,[7] an intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.[8] So, while an order denying intervention as a real party in interest might be a final order for purposes of appeal,[9] the court's November 1, 2010, order in this case was not such an order.

[6,7] Instead, Edward Jr. claims that he should have been permitted to participate in the proceedings in a representative capacity as "next friend" of Edward Sr. A next friend is one who, in the absence of a guardian, acts for the benefit of an infant or incapacitated person.[10] It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate

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[6] See Neb. Rev. Stat. § 43-101 et seq. (Reissue 2008).

[7] See Neb. Rev. Stat. § 25-328 (Reissue 2008).

[8] See, *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005); *In re Change of Name of Davenport*, 263 Neb. 614, 641 N.W.2d 379 (2002).

[9] See *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

[10] See, *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *State on behalf of B.A.T. v. S.K.D.*, 246 Neb. 616, 522 N.W.2d 393 (1994). See, also, *T.W. by Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997); *Miller v. Miller*, 677 A.2d 64 (Me. 1996); *Dye v. Fremont County School Dist. 24*, 820 P.2d 982 (Wyo. 1991).

alter ego for the party who is not able to litigate in his or her own right.[11]

[8] We have recognized the general rule that where a person is under disability, but has not been judicially so declared, a suit may be maintained on his or her behalf by a next friend.[12] Under Nebraska law, an action does not abate by the death or other disability of a party, if the cause of action survives; instead, "[i]n the case of the death or other disability of a party, the court may allow the action to continue by or against his or her representative or successor in interest."[13] In such a situation, it is the court's duty as the general conservator of the estates of all persons under disabilities to see that the incapacitated party's rights and estate are protected, either by a general guardian or by a next friend or guardian ad litem appointed by the court for the purposes of the action.[14]

[9-11] And even when a person is not completely incompetent, but is incapable, through age or weakness of mind, of conducting his or her affairs, it is within the discretion of the trial court to permit a suit to proceed in his or her behalf through a next friend.[15] But that is clearly discretionary, and the court also has discretion to appoint a guardian ad litem for a litigant when the litigant is not mentally competent to comprehend the significance of legal proceedings, or is unable to intelligently and understandingly participate in the protection of his or her best interests, and such a guardian is needed to protect those interests.[16] A next friend is under control of the court and can be removed if, in the court's discretion, the next friend is unsuitable.[17] And there is no substantial difference between

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[11] See *Brophy, supra* note 10.

[12] *Stephan v. Prairie Life Ins. Co.*, 113 Neb. 469, 203 N.W. 626 (1925).

[13] Neb. Rev. Stat. § 25-322 (Reissue 2008).

[14] See *Simmons v. Kelsey*, 72 Neb. 534, 101 N.W. 1 (1904).

[15] See, *Westerdale v. Johnson*, 191 Neb. 391, 215 N.W.2d 102 (1974); *Fiala v. Tomek*, 164 Neb. 20, 81 N.W.2d 691 (1957); *Stephan, supra* note 12.

[16] *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511 (1991).

[17] See, *Miller, supra* note 10; *In re Estate of Beghtel*, 236 Iowa 953, 20 N.W.2d 421 (1945); *Wager v. Wagoner*, 53 Neb. 511, 73 N.W. 937 (1898).

a guardian ad litem and a next friend except that historically, a guardian ad litem represented a defendant and a next friend represented a plaintiff.[18]

We have explained that when an alleged incompetent controverts the right of the next friend to act in his or her behalf, the next friend must plead and prove that the incompetent on whose behalf the suit is brought does not reasonably understand the nature and purpose of the suit, does not reasonably understand the effect of his or her acts with reference to the suit, and does not have the will to independently decide whether or not the suit should be brought and prosecuted.[19] And we assume, without deciding, that there does exist some degree of mental incapacity that would prevent a person from being able to join in a petition for adoption. While the Nebraska adoption statutes do not expressly address mental capacity, there are well-established general principles of law regarding the effect of mental incapacity on the power to enter into legal transactions, such as contracts and marriages.[20] Although we expressly do not decide the extent of disability that would be necessary to preclude adoption,[21] it is apparent from those assumptions that the adoption court's discretion would permit the court to inquire into a prospective adoptive parent's competency[22] and to appoint someone to represent that person's interests while inquiring into competency.

But the jurisdictional issue in this appeal does not depend on evidence of Edward Sr.'s alleged incompetency, because the order from which Edward Jr.'s appeal was taken did not determine whether or not Edward Sr. was incompetent. The court's order simply determined that Edward Jr. was not an appropriate person to protect Edward Sr.'s interests. And a subsequent

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[18] *Dye, supra* note 10.

[19] See *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955).

[20] See, *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980); *Taylor v. Koenigstein*, 128 Neb. 809, 260 N.W. 544 (1935).

[21] Compare *Edmunds, supra* note 20.

[22] See *Fiala, supra* note 15.

order determined that a neutral guardian ad litem was. So, the question is: Whose substantial right, if any, was affected?

[12] Edward Jr. had no substantial right that could be affected. A substantial right is an essential legal right, not a mere technical right.[23] Edward Jr. does not claim to have any direct interest in the adoption proceedings, so any right he has to participate or appeal is vicarious. And he does not argue otherwise. Instead, his jurisdictional argument rests on the contention that because the court's order affected *Edward Sr.'s* substantial right, it was appealable.

But the only purported right of Edward Sr. that was affected by the court's orders was the right to have a next friend, rather than a guardian ad litem, independently protecting his interests. In the procedural context of this case, because the adoption itself remained pending, the court's order was not appealable. Our decision in *In re Adoption of Krystal P. & Kile P.*[24] has some bearing here. In that case, the Nebraska Department of Social Services sought to intervene in an adoption proceeding and challenge the validity of the biological parents' relinquishments and consents to adoption. The county court found that the relinquishments and consents were valid, and the Department of Social Services appealed.[25] We dismissed the appeal for lack of a final, appealable order, concluding that the court's order had not affected a substantial right.[26] We reasoned that the validity of the relinquishments and consents was only one of the matters which must be determined in an adoption proceeding.[27] The court's order had done nothing more than permit the county court to entertain the adoption proceedings.[28]

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[23] *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[24] *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

[25] See *id.*

[26] See *id.*

[27] See *id.*

[28] See *id.*, citing *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

Our decision in *In re Estate of Isaac*[29] is also pertinent here. In that case, a guardian ad litem was appointed to represent the interests of a decedent's widow, who was alleged to be incompetent. A guardian ad litem was appointed, who elected on the widow's behalf to take an elective share of the decedent's estate. When the decree of distribution was finally made, the widow was awarded her elective share. On appeal, the authority of the guardian ad litem to elect on behalf of the widow was questioned, but it was argued that the order appointing the guardian ad litem could not be attacked because it had been a final order from which no appeal had been taken.[30]

We disagreed, concluding that the order appointing the guardian ad litem "does not fall within the statutory definition of a final order."[31] Such an order, we explained, "is merely an incident in the proceedings, and of itself affects no substantial right, although such rights may be affected by subsequent action, or omission to act, by the appointee."[32] So, we found, "[t]he authority of the appointee to act may be challenged at the time of the final hearing, and may be reviewed in an appellate court."[33]

[13] Those principles are applicable here. Under *In re Estate of Isaac*, it is clear that Edward Sr. could not have himself appealed from the court's order on the ground that a guardian ad litem was appointed. The authority of the guardian to act would instead be challengeable on an appeal from the court's final decree.[34] And a substantial right under § 25-1902 is not affected when that right can be effectively vindicated in an appeal from the final judgment.[35] An order appointing a guardian ad litem in lieu of a next friend is, similarly, not appealable. In short, the court's orders merely permitted the

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[29] *In re Estate of Isaac*, 108 Neb. 662, 189 N.W. 297 (1922).

[30] See *id.*

[31] *Id.* at 665, 189 N.W. at 298-99.

[32] *Id.* at 665, 189 N.W. at 299.

[33] *Id.* at 665-66, 189 N.W. at 299.

[34] See § 43-112.

[35] *In re Estate of Muncillo, supra* note 23.

court to evaluate Edward Sr.'s competency with the assistance of a guardian ad litem, and perhaps to continue entertaining the adoption proceedings.[36] And if Edward Sr. could not have appealed, it is axiomatic that Edward Jr. cannot appeal, when Edward Jr.'s only claim to standing is based upon standing in Edward Sr.'s shoes.

We note, in passing, Edward Jr.'s argument that the pleadings purportedly filed on Edward Sr.'s behalf should be stricken because Edward Sr. does not have the capacity to retain counsel. We do not consider this argument for two reasons. First, it is intertwined with the merits of the dispute, over which we have no jurisdiction.[37] Second, Edward Jr. does not dispute that Ethel has capacity to retain counsel and standing to litigate as a party to these proceedings, so the disputed pleadings were properly filed at least on her behalf.

CONCLUSION

For the foregoing reasons, we conclude that Edward Jr.'s appeal was not taken from a final, appealable order. Edward Jr. could not appeal on his own behalf because he has asserted no personal stake in this controversy. And Edward Jr. could not appeal on Edward Sr.'s behalf because the court's dismissal of Edward Jr. did not affect any of Edward Sr.'s substantial rights. Therefore, we lack jurisdiction over this appeal, and it is dismissed.

APPEAL DISMISSED.

WRIGHT, J., not participating in the decision.

HEAVICAN, C.J., not participating.

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[36] See *In re Adoption of Krystal P. & Kile P., supra* note 24.

[37] Cf. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. JEFFREY LAKE DEVELOPMENT, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

810 N.W.2d 144

Filed December 2, 2011. No. S-10-1196.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim for 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.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Daniel E. Klaus and Donald L. Dunn, of Rembolt Ludtke, L.L.P., and Michael C. Klein, of Anderson, Klein, Swan & Brewster, for appellant.

Steve Windrum for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

The Central Nebraska Public Power & Irrigation District (Central) filed this action against Jeffrey Lake Development, Inc., and other sublessees (collectively JLDI) to quiet title to land owned by Central and leased by JLDI. JLDI sought to dismiss the action. The district court sustained the various motions to dismiss. Central appeals, and JLDI cross-appeals. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

This is the third time in approximately 10 years that these parties have appeared before this court on issues regarding a 1980 lease agreement.[1] In addition, the Nebraska Court of Appeals decided another case involving this lease in 1997.[2]

Since 1944, Central and JLDI have entered into a series of leases concerning portions of lakefront property surrounding Jeffrey Lake, which is owned by Central. JLDI is a nonprofit association that was created to manage property leased from Central. At issue is the lease entered into by the parties in 1980. That lease had a primary term of 31 years, but provided for an automatic annual extension unless JLDI breached the lease or the parties agreed to modify it. Like other leases between these parties, this lease did not provide for the payment of cash rent to Central.

In approximately 1994, Central's board of directors determined that rent should be charged for the land surrounding Jeffrey Lake and passed a resolution to that effect. JLDI sued, contending that Central could not modify the leases. The Lincoln County District Court granted summary judgment to JLDI. Central appealed, and the Court of Appeals reversed, concluding that fact issues remained.[3]

On remand, and after a trial, the district court held for JLDI. This court affirmed, concluding, as relevant, that there was consideration for the leases and that public policy was not violated by the lack of cash rent.[4]

Having lost its battle to charge rent under the existing leases, Central decided to terminate the leases. As such, it filed a declaratory judgment action in the Phelps County District Court seeking interpretation of the parties' rights under the lease agreement. However, the district court in that case

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[1] *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004); *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001).

[2] *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 974, 568 N.W.2d 585 (1997).

[3] *Id.*

[4] *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, *supra* note 1.

declined to decide the action, concluding that it was not justiciable, because Central had indicated that it "'wishe[d]'" to terminate the lease, not that it had actually done so. This court affirmed.[5]

In response, Central sent notices to JLDI terminating the lease and subleases. Central then filed declaratory judgment and quiet title actions against JLDI on July 6, 2010, this time in Lincoln County District Court. Subsequently, in response, JLDI filed motions to dismiss, arguing that Central's complaint failed to state a claim. A hearing was held in October on the motions to dismiss, and on November 12, the district court, without comment, sustained the motions and overruled JLDI's motion for attorney fees.

Though none are in the record, Central subsequently filed three additional motions: a motion for new trial, a motion for specific conclusions of fact and law, and a motion to alter or amend the judgment. A hearing was held on those motions on November 22, 2010. On November 29, those motions were also denied. Central appeals, and JLDI cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Central assigns that the district court erred in dismissing its complaint. On cross-appeal, JLDI assigns that the district court erred in denying its motion for attorney fees.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[6] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[7]

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[5] *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra* note 1, 267 Neb. at 1003, 679 N.W.2d at 241.

[6] See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[7] *Id.*

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.[8]

ANALYSIS

Motions to Dismiss.

On appeal, Central assigns that the district court erred in dismissing its complaint for failing to state a claim. Central argues that its complaint states a cause of action for declaratory judgment and to quiet title.

We conclude that the district court erred in granting JLDI's motions to dismiss. In this case, Central alleged that it had terminated the leases in question. That allegation, along with the remainder of the allegations in Central's complaint, taken as true, are plausible and, thus, were sufficient to suggest that Central had presented a justiciable controversy. This conclusion is reinforced by our decision in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*,[9] which suggests that the issue in Central's complaint was its phrasing with regard to termination of the leases.

Nor do we find merit to JLDI's contention that the motions to dismiss should have been granted because of the doctrines of judicial estoppel, collateral estoppel, and res judicata. We have said that a complaint is subject to dismissal for failure to state a claim when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy.[10] For that to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion.[11]

Even if we assume, without deciding, that the affirmative defenses raised on appeal appear on the face of Central's complaint, Central would be entitled to ask for leave to amend

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[8] *Id.*

[9] *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra* note 1.

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

[11] *Id.*

its complaint to remedy any defect—but that would require Central to have been properly notified that JLDI was asserting an affirmative defense. But the motions to dismiss filed in this case were all generic in form and simply indicated that Central's complaint should be dismissed because it failed to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) and, thus, provided no such notice.

We noted in *Weeder v. Central Comm. College*[12] that "while the Nebraska Rules of Pleading in Civil Actions . . . have a liberal pleading requirement for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided." It cannot be said that these generic motions provided fair notice to Central of the affirmative defenses that JLDI planned to rely upon.

For these reasons, we conclude that the district court erred in dismissing Central's complaint for failure to state a claim. We therefore reverse the decision of the district court and remand the cause for further proceedings.

JLDI's Cross-Appeal.

In its cross-appeal, JLDI assigns that the district court erred in denying its motion for attorney fees. Because we conclude that the district court erred in granting JLDI's motions to dismiss, we need not reach JLDI's cross-appeal.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

WRIGHT, J., not participating in the decision.

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[12] *Weeder v. Central Comm. College*, 269 Neb. 114, 125-26, 691 N.W.2d 508, 517 (2005).

STATE OF NEBRASKA, APPELLEE, V. JAMES A. NELSON, APPELLANT.

807 N.W.2d 769

Filed December 2, 2011. No. S-11-003.

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. **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.
3. **Constitutional Law: Motor Vehicles: Search and Seizure: Appeal and Error.** To determine whether an unauthorized driver has a privacy interest in a rental vehicle, an appellate court must consider whether the person who claims the protection of the Fourth Amendment and Neb. Const. art. I, § 7, has a legitimate expectation of privacy in the invaded place.
4. **Constitutional Law: Search and Seizure.** To determine if an individual may make a challenge under the Fourth Amendment and Neb. Const. art. I, § 7, one must determine whether an individual has a legitimate or justifiable expectation of privacy. Ordinarily, two inquiries are required. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.
5. **Constitutional Law: Motor Vehicles: Search and Seizure.** Regarding a detention during a traffic stop, such action constitutes a seizure of the person and the individual traveling in an automobile does not lose all reasonable expectation of privacy.
6. **Constitutional Law: Search and Seizure: Standing.** A "standing" analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment.
7. **Standing: Motor Vehicles: Search and Seizure: Contracts.** A driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement.
8. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the

driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants.

10. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the stop.
11. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
12. **Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.
13. **Probable Cause.** Reasonable suspicion exists on a case-by-case basis.
14. ____. Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.
15. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
16. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
17. **Constitutional Law: Due Process: Evidence.** Under certain circumstances, the Due Process Clause of the 14th Amendment to the U.S. Constitution may require that the State preserve potentially exculpatory evidence on behalf of a defendant.
18. **Due Process: Evidence: Police Officers and Sheriffs.** Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.
19. **Judgments: Due Process: Evidence: Appeal and Error.** A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error.
20. **Evidence: Proof.** Because of its obvious importance, where "material exculpatory" evidence is destroyed, a showing of bad faith is not necessary.
21. ____: ____. Where evidence that is destroyed is only "potentially useful," a showing of bad faith under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988), is required.

Appeal from the District Court for Cheyenne 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 Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

A rental vehicle driven by James A. Nelson, appellant, was stopped for speeding by a Nebraska State Patrol trooper. After a conversation and further observations, consent to search was denied. Nelson was detained, and a drug detection canine called to the scene alerted. A search disclosed a package of cocaine. Nelson was charged with possession of cocaine with intent to deliver or distribute and another count which was later dismissed.

A first motion to suppress challenging the detention was initially granted by the district court for Cheyenne County, but it was reversed by a single judge of the Nebraska Court of Appeals under the procedure set forth in Neb. Rev. Stat. § 29-824 (Reissue 2008). See *State v. Nelson*, No. A-09-082, 2009 WL 2342734 (Neb. App. July 28, 2009) (selected for posting to court Web site). The propriety of the detention is before us as an issue on appeal. Upon remand, a second motion to suppress—addressed to the execution of the search, the reliability of the canine, and the existence of probable cause to search—was overruled, and this ruling is not at issue on appeal.

At a jury trial, Nelson was found guilty of possession of cocaine with intent to deliver or distribute. Nelson's motion for new trial, asserting newly discovered evidence and other bases, was denied. Nelson was sentenced to imprisonment for a term of 20 to 21 years. Nelson appeals. Although Nelson was not the driver authorized on the rental agreement, he had permission from the authorized driver, and we conclude he had standing to challenge the search and seizure. Because we conclude that there was reasonable, articulable suspicion to detain Nelson, the denial of his first motion to suppress was not error. Further, the district court did not err when it denied the motion for new trial. We affirm.

STATEMENT OF FACTS

On August 7, 2008, Nelson was driving a rental vehicle on Interstate 80 in Cheyenne County, Nebraska, when he was stopped for speeding. The facts surrounding that stop are derived primarily from the first of two hearings on Nelson's motions to suppress. During the hearing on Nelson's first motion to suppress, Trooper Ronald Kissler, who is trained in drug interdiction, testified. Kissler stated that he stopped the vehicle being driven by Nelson for speeding. At 12:58 p.m., Kissler approached Nelson's vehicle. Nelson provided Kissler with his driver's license and told Kissler that the vehicle was a rental vehicle. Nelson provided Kissler with the rental agreement, which listed Cornell Nelson as the lessee. Nelson told Kissler that Cornell is his uncle. Kissler asked Nelson to come back to his patrol car. Once in the patrol car, at approximately 12:59 p.m., Nelson commented to Kissler that Nelson had observed that Kissler had both a long rifle and a shotgun in his patrol car, which Kissler acknowledged. Upon questioning, Nelson told Kissler that he had flown to California to visit his grandmother. Nelson stated the trip was 3 days. He stated that because he does not like to fly, he was driving back home to Missouri instead of flying. At this point in the conversation, Nelson asked Kissler about the local geography, cities, and attractions.

At about 1:05 p.m., Kissler asked dispatch to run a license plate check on the vehicle, a check for prior arrests on Nelson, a check on Nelson and his uncle for involvement with drugs, and a check on the validity of Nelson's driver's license and whether there were any outstanding warrants on Nelson. While waiting for this information, Kissler began filling out the warning citation and advised Nelson that he intended to issue a written warning. Nelson then asked Kissler whether Kissler was wearing boots. At 1:09 p.m., dispatch advised Kissler that Nelson's license was valid and that there were no outstanding warrants for him. Kissler was also advised that there was a positive arrest check on Nelson, but the nature of the arrest was not initially given.

Kissler and Nelson discussed the rental agreement and the fact that Nelson was not an authorized driver on the rental agreement. Kissler then asked Nelson whether there were any

problems with his driving record, to which Nelson responded that he had had a traffic violation in 1991. At about 1:11 p.m., Kissler asked whether Nelson had had any arrests, to which Nelson responded "not that I remember." At approximately 1:20 p.m., Nelson asked about the location of the nearest town. He also asked whether he could place his feet outside of the cruiser or whether he could go get his shoes from his car, as his feet were cold. Kissler testified that at this point, Nelson had his car keys in his hand. Nelson also asked Kissler about the proximity of other troopers in the area and whether Kissler was working alone.

At approximately 1:24 p.m., Kissler advised Nelson that he was making Kissler a little nervous and that Nelson's actions and questions indicated that there may be a concern for Kissler's safety or an intention on the part of Nelson to "bolt." Kissler also advised Nelson that these actions, in addition to the issue of the rental agreement, created suspicion. Kissler also advised Nelson that he noticed that the duffelbag in the back of Nelson's vehicle did not have airline tags on it, to which Nelson responded that he had carried the bag onto the airplane.

At approximately 1:27 p.m., Kissler received a response from dispatch that Nelson had a previous drug-related arrest. At 1:28 p.m., Kissler gave Nelson a warning citation and returned his driver's license and the rental agreement. Kissler then asked Nelson whether there was anything in the vehicle that should not be there. Nelson responded in the negative to this question. Kissler then asked Nelson whether he had a problem with Kissler's searching the vehicle, and Nelson did not give his consent. Kissler testified that Nelson was "visibly shaking hard." Kissler requested the drug detection dog at 1:31 p.m., and another trooper arrived with the drug detection dog at 1:46 p.m. The dog ultimately alerted to the presence of drugs, and following the search, cocaine was found in the duffelbag on the back seat of the vehicle. Nelson was charged with possession of cocaine with intent to deliver or distribute and another count which was later dismissed.

Nelson filed his first motion to suppress. The parties stipulated that the hearing would be limited to the propriety of the stop and continued detention and that, with the court's approval,

Nelson reserved the right to another hearing addressed to probable cause to search. A hearing was held. On January 16, 2009, the district court entered an order in which it found facts and sustained Nelson's first motion to suppress. The district court concluded that under the totality of the circumstances, there was insufficient articulable suspicion of criminal activity to justify Nelson's continued detention and therefore ordered that the evidence from the subsequent search be suppressed.

The State appealed the district court's suppression order pursuant to § 29-824. This statute generally provides that the State may appeal an order granting a motion to suppress to a single judge of the Court of Appeals, whose ruling is binding for trial purposes but may be challenged after conviction.

A single judge of the Court of Appeals determined that the district court did not err in implicitly concluding that, although he had not rented the vehicle, Nelson had standing to object to the detention and search. See *State v. Nelson*, No. A-09-082, 2009 WL 2342734 (Neb. App. July 28, 2009) (selected for posting to court Web site). The single judge generally accepted the facts as found by the district court. The single judge concluded, however, that the district court had erred when it concluded that Kissler did not have a reasonable, articulable suspicion that Nelson was involved in unlawful activity and that thus, the district court had erred when it concluded that the continued detention was improper. *Id*. The single judge reversed the district court's grant of Nelson's motion to suppress and remanded the cause for further proceedings. *Id*. In accordance with the mandate, Nelson's challenge to his detention was therefore rejected. The issue of Nelson's continued detention is the subject of Nelson's first assignment of error on appeal.

Upon remand, Nelson filed a second motion to suppress, asserting that the officers lacked probable cause to conduct a search of the rental vehicle. Specifically, Nelson argued that the officers lacked probable cause because they mishandled the drug detection dog deployed at the scene, that the drug detection dog was not properly trained or certified, and that the drug detection dog failed to alert the officers to any contraband which would give the officers probable cause to search

the vehicle. A hearing was held, including testimony regarding proper dog handling.

On August 26, 2010, the district court overruled Nelson's second motion to suppress. The district court determined that the State provided sufficient evidence to show that the drug detection dog and the officer were properly trained and certified at the time of the sniff and alert. The district court also found that the drug detection dog reliably indicated an alert and concluded that the alert and other facts provided the officers with probable cause for a warrantless search of the vehicle. The district court overruled Nelson's second motion to suppress. The substance of this ruling is not challenged on appeal.

A jury trial was held. At trial, the State played an audio and visual recording of Nelson's interview with a Nebraska State Patrol investigator at the State Patrol office in Sidney, Nebraska, where Nelson was transported after the cocaine had been discovered. The investigator testified that before the interview, he advised Nelson of his *Miranda* rights. During the interview, Nelson stated that he picked up two men at a truckstop in Nevada and gave them a ride until he left them in Utah at a fast-food restaurant. At trial, Nelson similarly testified that he picked up two men in Nevada and left them in Utah. Nelson testified he was unaware that the cocaine was in the car. On September 28, 2010, the jury found Nelson guilty of possession of cocaine with intent to deliver or distribute, a Class IB felony, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 2008).

On November 17, 2010, prior to sentencing, Nelson filed an amended motion for new trial, based on a claim of newly discovered evidence which Nelson asserted was material for his defense. Nelson also claimed an error of law had occurred at trial, based on a claim that the State had lost or destroyed evidence which would have aided his defense. Nelson stated that after the trial, he learned of two Styrofoam cups and cigarette butts that had been in the vehicle and were destroyed or lost by the officers. Nelson asserted that the Styrofoam cups and cigarette butts belonged to the two men to whom Nelson had given a ride during his trip. Nelson asserted that because

this potentially exculpatory evidence was not turned over to him and was destroyed before trial, he was not able to corroborate his theory of defense that the two men put cocaine in his duffelbag. He claimed he was denied a fair trial. The district court denied the motion for new trial by reference to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

A presentence investigation report was prepared. At the sentencing hearing, Nelson sought a sentence of probation and the State brought to the district court's attention that Nelson had been previously convicted of a felony for attempted arson, second degree. The presentence investigation report shows a conviction for driving under the influence and several arrests, including a drug-related arrest, the disposition of which is not clear. On December 17, 2010, Nelson was sentenced to imprisonment for a term of 20 to 21 years. Nelson appeals his conviction.

ASSIGNMENTS OF ERROR

Nelson claims (1) that the officer lacked reasonable suspicion to detain him after the conclusion of the traffic stop and that his first motion to suppress should have been sustained; (2) that the district court erred when it denied his motion for new trial based on newly discovered evidence, including the fact that the State had destroyed exculpatory evidence; and (3) that the district court erred when it denied his motion for new trial, because the destruction of evidence deprived him of valuable corroboration of his testimony and violated his due process right to a complete defense.

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. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). Regarding historical facts, we review the trial court's findings for clear error. *Id.* 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. *Id.*

[2] 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. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

ANALYSIS

Nelson asserts that the evidence found as a result of the search of the vehicle should have been suppressed, because Kissler lacked reasonable suspicion to detain him while awaiting the arrival of the canine unit. Nelson additionally asserts that the district court erred when it denied his motion for new trial.

Nelson Has Standing.

We must initially determine whether Nelson has "standing" to file a motion to suppress challenging his detention and the search of the rental vehicle. Nelson was driving a rental vehicle, and his name was not on the rental agreement. The record shows that the deposition of Nelson's uncle was received in evidence and established that Nelson had permission from his uncle, whose name was on the rental agreement, to drive the vehicle. We have not had occasion to directly address the question of whether an individual who has permission to drive a rental vehicle but is not an authorized driver under the rental agreement has standing under the Fourth Amendment and Neb. Const. art. I, § 7 (collectively Fourth Amendment), to challenge a detention and search of the rental vehicle.

[3-5] To determine whether an unauthorized driver has a privacy interest in a rental vehicle, we must consider whether "the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To determine if an individual may make a challenge under the Fourth Amendment, we must determine whether an individual has a legitimate or justifiable expectation of privacy. Ordinarily, two inquiries are required. First, an individual must have exhibited an actual (subjective) expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. *State v. Smith*, 279 Neb.

918, 782 N.W.2d 913 (2010). Regarding a detention during a traffic stop, we have noted that such action constitutes a seizure of the person and that an individual traveling in an automobile does not lose all reasonable expectation of privacy. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[6] Although the right to challenge a search on Fourth Amendment grounds is generally referred to as "standing," the U.S. Supreme Court has clarified that the definition of that right "is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Rakas*, 439 U.S. at 140. See *Minnesota v. Carter*, 525 U.S. 83, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998). We have stated: "A 'standing' analysis in the context of search and seizure is nothing more than an inquiry into whether the disputed search and seizure has infringed an interest of the defendant in violation of the protection afforded by the Fourth Amendment." *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996). As the Court of Appeals for the Fifth Circuit has stated, and we tend to follow: "We [nevertheless] use the term 'standing' somewhat imprecisely to refer to this threshold substantive determination." *U.S. v. Sanchez*, 943 F.2d 110, 113 n.1 (1st Cir. 1991).

In *U.S. v. Thomas*, 447 F.3d 1191 (9th Cir. 2006), the Court of Appeals for the Ninth Circuit described three approaches courts have developed to determine when an unauthorized driver of a rental vehicle has standing to challenge a search. The first approach is seen in the opinions from the Third, Fourth, Fifth, and Tenth Circuits. See, *U.S. v. Kennedy*, 638 F.3d 159 (3d Cir. 2011); *U.S. v. Wellons*, 32 F.3d 117 (4th Cir. 1994); *U.S. v. Seeley*, 331 F.3d 471 (5th Cir. 2003); *U.S. v. Roper*, 918 F.2d 885 (10th Cir. 1990). The Ninth Circuit described the first approach by stating:

> These courts have all adopted a bright-line test: An individual not listed on the rental agreement lacks standing to object to a search. Their cases reason that because an unauthorized driver lacks a property or possessory interest in the car, the driver does not have an expectation of privacy in it.

Thomas, 447 F.3d at 1196-97.

The second approach is followed by the Courts of Appeals for the Eighth and Ninth Circuits. See, *U.S. v. Best*, 135 F.3d 1223 (8th Cir. 1998); *Thomas, supra*. The *Thomas* court explained this approach by stating it is

> a modification of the majority bright-line approach, and generally disallows standing unless the unauthorized driver can show he or she had the permission of the authorized driver. . . . The Eighth Circuit reasoned that an unauthorized driver would have standing after a showing of "consensual possession" of the rental car. . . . In effect, this approach equates an unauthorized driver of a rental car with a non-owner driver of a privately owned car.

447 F.3d at 1197 (citations omitted).

The third approach is used by the Court of Appeals for the Sixth Circuit, and it examines the totality of the circumstances. *U.S. v. Smith*, 263 F.3d 571 (6th Cir. 2001). The *Thomas* court stated:

> In *Smith*, the Sixth Circuit noted a broad presumption against granting unauthorized drivers standing to challenge a search. However, the court [in *Smith*] stated that the "rigid [bright-line] test is inappropriate, given that we must determine whether [the defendant] had a legitimate expectation of privacy which was reasonable in light of all the surrounding circumstances." . . . Instead, the court opted to consider a range of factors, including: (1) whether the defendant had a driver's license; (2) the relationship between the unauthorized driver and the lessee; (3) the driver's ability to present rental documents; (4) whether the driver had the lessee's permission to use the car; and (5) the driver's relationship with the rental company, and held that the defendant [in *Smith*] had standing to challenge the search.

447 F.3d at 1197 (citations omitted).

Of these three approaches, we find the approach used by the Courts of Appeals for the Eighth and Ninth Circuits to be the most compelling. The Court of Appeals for the Ninth Circuit reached its conclusion and explained its rationale by stating that

> an unauthorized driver who received permission to use a rental car and has . . . authority over the car may challenge the search to the same extent as the authorized renter. This approach is in accord with precedent holding that indicia of ownership—including the right to exclude others—coupled with possession and the permission of the rightful owner, are sufficient grounds upon which to find standing.

U.S. v. Thomas, 447 F.3d 1191, 1199 (9th Cir. 2006).

Our precedent in Nebraska supports the approach used in the Eighth and Ninth Circuits. We have stated that a defendant may demonstrate the infringement of his own legitimate expectation of privacy by showing that he owned the premises or that he occupied them and had dominion and control over them based on permission from the owner. *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). Thus, we have recognized standing of a guest as to certain areas of the home, *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000); an "occupant" in a vehicle belonging to another, *Stott, supra*; and the driver of a vehicle of which he was not the owner where a nonowner passenger gave consent to search, *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Our cases show the importance of dominion and control and that standing is not limited to property rights or ownership.

[7] In accordance with the Eighth and Ninth Circuits, we hold that a driver of a rental vehicle may have standing to challenge a detention or search if he or she has demonstrated that he or she has received permission to drive the vehicle from the individual authorized on the rental agreement.

In this case, Nelson was not the authorized driver of the rental vehicle. However, he presented undisputed evidence that he had received permission from his uncle to use the vehicle, and the uncle was the authorized driver under the rental agreement. Accordingly, Nelson had standing to challenge his detention and the search of the rental vehicle on Fourth Amendment grounds.

The Initial Traffic Stop Was Proper.

[8] Nelson does not contest the propriety of the initial traffic stop. Nor could he reasonably do so, because the undisputed facts show that Nelson was stopped for speeding. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Howard, ante* p. 352, 803 N.W.2d 450 (2011). Therefore, Kissler had probable cause to stop Nelson's vehicle.

Nelson's Continued Detention Did Not Violate His Fourth Amendment or Nebraska Constitutional Rights.

For his first assignment of error, Nelson claims that the denial of his first motion to suppress challenging the propriety of his continued detention while he and Kissler awaited the drug detection dog was error. We find no merit to this assignment of error.

[9] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *Howard, supra*. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are any outstanding warrants for any of its occupants. *Id.*

Nelson argues that after Kissler concluded these investigative procedures and issued a warning citation to him, Kissler lacked legal authority to detain the vehicle and Nelson pending the arrival of the canine unit. He claims that given the facts as found by the district court, his continued detention was improper, and that his first motion to suppress had merit. 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. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). Regarding historical facts, we review the trial court's findings for clear error. *Id.* 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. *Id.*

[10-13] In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that a person in the vehicle is involved in criminal activity beyond that which initially justified the stop. *Howard, supra.* Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *Id.* Courts must determine whether reasonable suspicion exists on a case-by-case basis. *Id.*

[14] In determining whether reasonable suspicion exists, a court may consider, as part of the totality of the circumstances, the officer's knowledge of a person's drug-related criminal history. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Moreover, factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively. *Id.* See *Howard, supra.* For example, evidence that a motorist is returning to his or her home state in a vehicle rented from another state is not inherently indicative of drug trafficking when the officer has no reason to believe the motorist's explanation is untrue. *Draganescu, supra.* But a court may nonetheless consider this factor when combined with other indicia that drug activity may be occurring, particularly the occupant's contradictory answers regarding his or her travel purpose and plans or an occupant's previous drug-related history. See *id.* A court may consider, along with other factors, evidence that the occupant exhibited nervousness. *Id.*

In this case, the district court considering Nelson's first motion to suppress made findings of fact with which the single judge of the Court of Appeals on the State's appeal under § 29-824 essentially agreed. Thus, we refer to the district court's findings. In its order, the district court found that Nelson had flown to Sacramento, California, and was driving a rental

vehicle home to Kansas City, Missouri; that Nelson's name was not listed as an authorized driver on the rental agreement; and that Nelson was nervous. The district court noted that Nelson's excursion was a 3-day trip. The district court found that many people, including drug traffickers, use I-80 to transport their goods; drug traffickers have been known to regularly use rental vehicles to transport illegal drugs in order to avoid the risk of forfeiture of their own vehicles; drug traffickers are known to fly from their base location to pick up their illegal drugs elsewhere; and drug traffickers sometimes rent a vehicle to return with the illegal drugs.

The district court also found that Nelson had made various statements while waiting in the patrol car, including asking why Kissler wore combat-type boots, asking whether he could open the car door and put his feet outside of the patrol car, asking if he could return to his vehicle to get his shoes, commenting on Kissler's weapons in the back of the patrol car, and noting the barren area and inquiring about the existence of backup officers for Kissler. The district court noted that Nelson did not mention his prior arson conviction when asked about his prior arrests and that Kissler knew that Nelson was a "positive Triple I," meaning that the driver had a prior arrest. Kissler testified that a "positive Triple I, 1040" means a criminal history with a drug-related arrest.

On appeal, we examine each of these findings in our independent review of the law. See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). We are mindful of the rule that when a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *State v. Howard, ante* p. 352, 803 N.W.2d 450 (2011). We have considered the facts and the totality of these circumstances. Among other factors, we note the short duration of Nelson's trip; the fact that he flew out and drove back; the fact that his name was not on the rental agreement; the fact that he had a prior criminal history, including a drug-related arrest which he failed to acknowledge; and the fact that he was extremely nervous. We also note Kissler's testimony as a trained officer regarding

Nelson's conduct, the significance thereof, and questions which suggested a risk of flight. We have considered each factor and conclude that these facts collectively, when viewed from the standpoint of an objectively reasonable law enforcement officer, created a reasonable, articulable suspicion that Nelson was involved in unlawful activity justifying Nelson's continued detention to await the canine unit. We reject Nelson's first assignment of error claiming that his first motion to suppress challenging his detention was wrongly overruled.

The District Court Did Not Err When It Denied Nelson's Motion for New Trial.

For his second and third assignments of error, Nelson claims that the district court erred when it denied his motion for new trial, because there was newly discovered evidence; that the State destroyed evidence material for his defense before trial and that thus, he was deprived of corroboration of his testimony; and that the foregoing violated his due process rights to a complete defense and a fair trial. As we read Nelson's argument, he asserts that after the trial, he learned of two Styrofoam cups and cigarette butts that had been in the vehicle and were destroyed or lost by the officers. Evidently, Nelson believes that these items would bear the fingerprints of the two men to whom he gave a ride during his trip and that these items were exculpatory in nature. Essentially, the district court concluded by reference to *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. E. 2d 281 (1988), that Nelson had not demonstrated that the officers acted in bad faith when the material was destroyed or went missing, that Nelson had not shown that the material would have been exculpatory, and that there was not sufficient evidence presented to find that Nelson was unable to obtain comparable evidence by other reasonably available means. Accordingly, the district court denied Nelson's motion for new trial.

[15] A new trial can be granted on grounds materially affecting the substantial rights of the defendant, including "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial." See Neb. Rev. Stat. § 29-2101(5) (Reissue

2008). A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005). We review the ruling denying a motion for new trial in a criminal case for an abuse of discretion. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). We determine that the district court did not abuse its discretion when it denied Nelson's motion for new trial and therefore reject Nelson's second and third assignments of error.

The essence of Nelson's motion for new trial and his second and third assignments of error is (1) that the existence of the Styrofoam cups and cigarette butts and their loss was not discovered until after trial, and these items form newly discovered evidence, and (2) that the unavailability of these items deprived him of valuable corroborative evidence and denied him a fair trial. We recently considered the merits of a similar challenge to the denial of a new trial based on newly discovered evidence and concluded that the evidence was not newly discovered within the meaning of § 29-2101(5) and that even if the evidence were newly discovered, it was not exculpatory. *Collins, supra*. The same analysis applies in this case.

The record shows that a photograph, exhibit 83, was received in evidence during the State's case. The two Styrofoam cups, one with cigarette butts, are pictured in exhibit 83. The sergeant who inventoried the vehicle testified about exhibit 83, and he acknowledged the existence of these items shown in the photograph. Upon cross-examination by Nelson's counsel, he stated that the practice normally was to retain items of monetary value, but not trash; that these items would be considered trash; and that he did not know what had happened to these items.

During his testimony, Nelson was shown a photograph, exhibit 86, which displays numerous items inventoried and retained by the authorities. Nelson testified that the "Kool" brand cigarettes pictured in exhibit 86 belonged to him, but that a package of "Grand" brand cigarettes, a cardboard pack of matches, and a package of crackers did not belong to him. Nelson did not attempt to obtain fingerprints or otherwise test

the "Grand" brand cigarette package, the matches, or the package of crackers. Nelson testified that he had given a ride to two men whom he picked up in Nevada and left in Utah. The theory of the defense was that these men placed the cocaine in Nelson's duffelbag before they departed in Utah and that Nelson was unaware of the cocaine. Although the closing arguments are not in the record, the district court's order which denied Nelson's motion for new trial notes that Nelson's counsel "based a fair amount of his closing argument on the loss of this evidence," which we understand to mean the loss of the two Styrofoam cups and cigarette butts.

The two Styrofoam cups and cigarette butts are not newly discovered evidence under § 29-2101(5). The existence of the two Styrofoam cups and cigarette butts could have been discovered before trial, and in any event, their existence was, in fact, produced at trial and shown to the jury. They are pictured in exhibit 83. The record shows that Nelson conducted pretrial discovery. Further, Nelson testified that numerous items in exhibit 86 did not belong to him and that this information, if believed, was therefore graphic corroboration of Nelson's claim that two men rode with him for a distance.

Even if the existence of this evidence was "newly discovered," the fact of its loss is not newly discovered, the evidence is not exculpatory, and its loss or destruction did not deprive Nelson of due process or a fair trial. The existence of the two travelers and their potential for detritus was made well known to the jury, inter alia, through the testimony of the State Patrol investigator and Nelson himself.

[16-19] We have previously considered a claim that the State's failure to preserve evidence denied a defendant of due process. In *State v. Davlin*, 263 Neb. 283, 299-300, 639 N.W.2d 631, 647 (2002), we stated:

> [The defendant] argues that the charges against him should have been dismissed because his right to due process under the state and federal Constitutions was violated by the State's failure to preserve relevant evidence. Because the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution, we apply the same analysis to [the defendant's] state and federal

constitutional claims. See, *State v. Hookstra*, [263 Neb.] 116, 638 N.W.2d 829 (2002); *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001).

Under certain circumstances, the Due Process Clause of the 14th Amendment may require that the State preserve potentially exculpatory evidence on behalf of a defendant. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999), citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). It is uncontroverted, however, that "'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" *Castor*, 257 Neb. at 590, 599 N.W.2d at 214, quoting *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). See, also, *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989). A trial court's conclusion that the government did not act in bad faith in destroying potentially useful evidence, so as to deny the defendant due process, is reviewed for clear error. See, *U.S. v. Gomez*, 191 F.3d 1214 (10th Cir. 1999); *U.S. v. Weise*, 89 F.3d 502 (8th Cir. 1996).

[20,21] Since our opinion in *Davlin*, the U.S. Supreme Court has made clear that because of its obvious importance, where "'material exculpatory'" evidence is destroyed, bad faith is not necessary. See *Illinois v. Fisher*, 540 U.S. 544, 549, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004). However, in the present case, where the evidence is only "'potentially useful,'" a showing of bad faith under *Youngblood* is required. See *Fisher*, 540 U.S. at 549. Furthermore, in the present case, it cannot be said that the Styrofoam cups and cigarette butts are irreplaceable under *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), because the potential for fingerprints showing the presence of two other persons was possible had the "Grand" brand cigarettes, matches, and crackers—which were retained—been tested.

In analyzing the motion for new trial based on the failure of the State to preserve evidence, the district court considered three factors using the standard set forth in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281

(1988): (1) Did the State act in bad faith in failing to preserve the evidence, (2) was the exculpatory value of the evidence apparent prior to its destruction, and (3) was the nature of the evidence such that the defendant would be unable to obtain comparable evidence by other reasonably available means. The district court essentially found that there was no bad faith, that the items were not exculpatory, and that Nelson could obtain comparable evidence. These findings were not clearly erroneous.

The record shows that the missing evidence consisting of trash was not preserved or retained as a matter of routine procedure. While the procedure may be unwise, nothing in the record shows bad faith by the State. The Styrofoam cups and cigarette butts are commonplace, Nelson was a smoker, and the exculpatory nature of these items was not apparent. An interview of Nelson was played at the trial, and Nelson again stated that during his trip, he gave a ride to two men from Nevada to Utah. This evidence is comparable to the evidence that may have been obtained if the Styrofoam cups and cigarette butts were not lost or destroyed; that is, the lost evidence might have shown evidence that another individual or individuals handled these materials which were found in the rental vehicle. The district court's findings were not clearly erroneous, and it did not err when it denied Nelson's motion for new trial. We reject Nelson's second and third assignments of error.

CONCLUSION

Because Nelson had permission from the driver who was authorized under the rental agreement, Nelson had standing to assert his Fourth Amendment claims. The detention of Nelson and the rental vehicle after the traffic stop was not unreasonable. The denial of Nelson's first motion to suppress was not error. The district court did not err when it denied Nelson's motion for new trial. We affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V. TIMMY ALLEN TIMMENS, APPELLANT.

805 N.W.2d 704

Filed December 2, 2011. No. S-11-217.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. ____: ____. An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
6. **Pleadings: Appeal and Error.** An appellate court reviews the denial of a motion to alter or amend the judgment for an abuse of discretion.
7. **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 as to the claims denied without a hearing.
8. **Effectiveness of Counsel: Appeal and Error.** 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. That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.
9. ____: ____. 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.
10. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
11. ____: ____. Under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
12. ____: ____. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim.

13. **Criminal Law: Effectiveness of Counsel.** Trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
14. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
15. **Effectiveness of Counsel: Attorney and Client.** The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.
16. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Jeffrey M. Wightman, of Wightman & Wightman, for appellant.

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

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

STEPHAN, J.

In 2001, Timmy Allen Timmens was convicted of second degree murder in connection with the death of Tracy Giugler and was sentenced to serve a term of 45 years' to life imprisonment. We affirmed his conviction and sentence on direct appeal.[1] Timmens was represented by different attorneys at trial and on direct appeal.

In 2008, Timmens filed a motion for postconviction relief in which he alleged that his trial counsel was ineffective in several particulars and that his appellate counsel was ineffective in failing to raise ineffective assistance of trial counsel on direct appeal. The district court for Dawson County dismissed all but one of the claims without an evidentiary hearing and denied the remaining claim following an evidentiary hearing.

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[1] *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

Timmens perfected this appeal after the district court overruled his motion to alter or amend the judgment. We affirm.

I. BACKGROUND

1. Trial

The evidence from Timmens' jury trial is fully summarized in our opinion on direct appeal[2] and will be restated here only to the extent necessary to address the postconviction issues.

At all relevant times, Timmens and Giugler were in a relationship and lived together in Overton, Nebraska. On Friday, July 21, 2000, Timmens went to a bar in Overton with Gary Paben. Appearing as a witness for the State at trial, Paben testified they arrived at the bar while it was still light outside. Paben testified he and Timmens drank whiskey and Coke. He acknowledged that he had a lot to drink and that Timmens drank the same amount. Paben testified that they stayed at the bar until approximately midnight when the bartender "shut [them] off." After leaving the bar, Paben and Timmens walked to Timmens' home.

When they arrived, Giugler was sleeping on the couch in the living room. Paben passed out on Timmens' bed but woke up when he heard "what appeared to sound like two people arguing" outside. He heard angry voices and what sounded like a woman say "'help.'" A neighbor heard what sounded like a fence being torn down and the slamming of a garbage can lid in the alley that separated her backyard from Timmens' backyard.

On July 22, 2000, after Giugler was reported missing, law enforcement officers investigated and eventually found her body in the basement of Timmens' home. The pathologist who conducted the autopsy testified that the cause of Giugler's death was blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures resulting from an extensive and forceful beating.

Timmens' counsel requested an intoxication instruction, and the jury was instructed:

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[2] *Id.*

> There has been evidence that [Timmens] was intoxicated at the time that the crime with which he is charged was committed.
>
> Intoxication is a defense only when a person's mental abilities were so far overcome by the use of alcohol that he could not have had the required intent. You may consider evidence of alcohol use along with all the other evidence in deciding whether [Timmens] had the required intent.

The jury found Timmens guilty of second degree murder.

2. Direct Appeal

On direct appeal, Timmens' new attorney assigned that the trial court erred in not suppressing certain evidence and in imposing an excessive sentence. Appellate counsel did not assert that trial counsel had been ineffective. We rejected each of the assigned errors and affirmed.

3. Postconviction Proceedings

In his motion for postconviction relief, Timmens alleged his trial counsel was ineffective in failing to file a motion to suppress evidence and in failing to make various trial objections. He also alleged trial counsel was ineffective for not vigorously pursuing an intoxication defense. Timmens alleged his appellate counsel was ineffective in failing to raise and thereby preserve the ineffective assistance of trial counsel issues on direct appeal. He further alleged that appellate counsel was ineffective for failing to assign error to the district court's denial of his pro se motion to appoint new trial counsel.

After reviewing the files and records from Timmens' trial and appeal, the district court determined that they affirmatively showed that Timmens was not entitled to relief on his postconviction claims, with the exception of the claim pertaining to the intoxication defense. The court ordered an evidentiary hearing on that claim and denied and dismissed all the other claims. At the hearing, the court received deposition testimony of Paben, Timmens, and Timmens' trial counsel.

Timmens testified in his deposition that he did not remember any of the events immediately preceding Giugler's death and

that he told his trial counsel this. But he also testified that he told his trial counsel that he was intoxicated that evening and that he understood his counsel was aware of this after deposing Paben prior to trial. Timmens testified that he did not recall discussing an intoxication defense with his trial counsel and that counsel did not argue or develop an intoxication defense at his trial. He also testified that while he was awaiting trial, his counsel arranged for him to be evaluated by a psychologist "[t]o determine [his] state of mind." According to Timmens, the evaluation was never completed, because he told the psychologist that he could not remember anything about the events leading to Giugler's death.

Timmens' trial counsel testified that Timmens never instructed him to pursue an intoxication defense and that Timmens insisted he did not kill Giugler and was wrongfully accused. Counsel testified that he obtained a court order for a mental health evaluation to explore the viability of "state-of-mind defenses," such as an intoxication defense. Counsel stated he explained the importance of the evaluation to Timmens, but Timmens refused to speak with the psychologist, "because in doing that, he would have to admit that he did something wrong, and that's something he would not do." Accordingly, counsel did not develop or argue an intoxication defense at Timmens' trial. Explaining his reason for not doing so, counsel testified, "I don't recall anything [Timmens] said about intoxication having anything to do with this case or this crime, because he didn't do it. He didn't kill this woman, he said. So that, to me, negated any effort to try to do anything, because he didn't do it."

Following the evidentiary hearing, the district court entered an order denying the intoxication defense claim and incorporating the prior order that had dismissed all other postconviction claims. The district court found that trial counsel's performance was not deficient. The court explained, "The thrust of . . . trial counsel's dilemma was Timmens was insisting he did not commit the crime, while the presentation of evidence of an intoxication defense would concede Timmens caused [Giugler's] death but without intent to do so. According to trial counsel, Timmens insisted 'he didn't do it.'" Based upon

this finding, the court concluded that trial counsel acted reasonably in selecting a trial strategy consistent with Timmens' claim that he did not commit the crime. The court further concluded that the "apparent tactic of trial counsel in requesting an intoxication instruction was to take advantage of Paben's trial testimony, adduced by the State, by having the court, not Timmens or his counsel, introduce the intoxication defense via the instructions."

Timmens filed a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008) on October 21, 2010. The motion sought reconsideration of the court's findings on the intoxication defense claim in light of a December 26, 2000, letter addressed to Timmens from his trial counsel. The motion also asked the court to consider the cumulative effect of Timmens' ineffective assistance of counsel allegations. After finding the letter was not newly discovered evidence and the motion was based on arguments previously asserted and rejected, the district court denied Timmens' motion. Timmens filed a timely notice of appeal from that order.

II. ASSIGNMENTS OF ERROR

Timmens assigns, summarized and renumbered, that the district court erred in (1) summarily dismissing all but one of his ineffective assistance of appellate counsel claims, (2) failing to find appellate counsel was prejudicially ineffective in not assigning and arguing a claim of ineffective assistance based on trial counsel's failure to vigorously pursue an intoxication defense, and (3) denying Timmens' motion to alter or amend the judgment.

III. STANDARD OF REVIEW

[1-3] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.[4] When reviewing questions of

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[3] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[4] *Id.*

law, an appellate court resolves the questions independently of the lower court's conclusion.[5]

[4,5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[6] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[7] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[8] an appellate court reviews such legal determinations independently of the lower court's decision.[9]

[6] An appellate court reviews the denial of a motion to alter or amend the judgment for an abuse of discretion.[10]

IV. ANALYSIS

1. Jurisdiction

The district court entered two separate orders denying Timmens' postconviction claims. The first order denied all claims, except that relating to the intoxication defense, without an evidentiary hearing. The second order, entered after the evidentiary hearing, denied the remaining claim. The State argues that we lack jurisdiction over any issues in this appeal arising from the first order, because Timmens did not perfect a timely appeal after entry of that order. Timmens counters that we have jurisdiction over all issues, because the second order, from which he perfected a timely appeal, incorporates the first order by reference.

[7] The State's position is correct. Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order

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[5] *Id.*; *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

[6] *Gibilisco, supra* note 5.

[7] *Id.*; *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

[8] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[9] *Gibilisco, supra* note 5; *Hudson, supra* note 7.

[10] See *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

as to the claims denied without a hearing.[11] The order denying all but one of Timmens' postconviction claims without an evidentiary hearing was entered on April 14, 2009. Timmens' notice of appeal, filed March 11, 2011, is therefore untimely with respect to that order.[12] Timmens' right to appeal the 2009 order was time barred and could not be resurrected by the district court's reference to that order in its subsequent order denying the remaining postconviction claim following the evidentiary hearing. Accordingly, our jurisdiction extends only to the assignments of error relating to the intoxication defense and the motion to alter or amend the judgment, as to which the appeal is timely.

2. Ineffective Assistance of Counsel

(a) General Principles

[8,9] Timmens argues the district court erred in failing to find that his appellate counsel was prejudicially ineffective for not raising the ineffectiveness of trial counsel on appeal. 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.[13] That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.[14] 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]

[10-12] When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel

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[11] See *Yos-Chiguil, supra* note 3. See, also, *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[12] See Neb. Rev. Stat. § 25-1931 (Reissue 2008).

[13] *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[14] *Id.*

[15] *Id.*

was ineffective under the *Strickland* test.[16] Under that test, a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense.[17] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[18] If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim.[19]

(b) Performance of Trial Counsel

[13,14] In considering whether Timmens' trial counsel performed deficiently in failing to vigorously pursue an intoxication defense, we are guided by established principles. Trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[20] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[21]

Based upon the evidence presented at the postconviction hearing, the district court found that "trial counsel knew an intoxication defense was possible [and] took the steps necessary to obtain the evidence to present the defense but was stymied by Timmens' insistence he did not commit the crime and Timmens' lack of cooperation in garnering the evidence to present the defense." This factual finding is fully supported by the record, and we accept it as the basis of our independent assessment of counsel's performance under the *Strickland* test.

[15,16] As the U.S. Supreme Court noted in *Strickland*, "The reasonableness of counsel's actions may be determined

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[16] *Id.*

[17] *Id.*

[18] *Gibilisco, supra* note 5. See *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[19] *Jim, supra* note 13; *Jackson, supra* note 13.

[20] See, *Gibilisco, supra* note 5; *Thomas, supra* note 18.

[21] *Jim, supra* note 13. See *Hudson, supra* note 7.

or substantially influenced by the defendant's own statements or actions."[22] Given Timmens' insistence that he did not kill Giugler, counsel could hardly mount a defense premised on the notion that Timmens killed her unintentionally while in a state of intoxication. Even if Timmens had been willing to assert the intoxication defense, Timmens' refusal to participate in the mental health evaluation prevented counsel from fully assessing the viability of the defense. We agree with the conclusion of the district court that by requesting an instruction on the intoxication defense based on Paben's testimony with respect to Timmens' alcohol consumption, as elicited by the State, Timmens' counsel was able to provide the jury with a basis for convicting Timmens on a lesser homicide offense while at the same time preserving "the internal consistency of Timmens' defense" that he was innocent and should be acquitted. Trial counsel is afforded due deference to formulate trial strategy and tactics.[23] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[24] Applying this well-established principle here, we independently conclude that trial counsel's performance with respect to the intoxication defense was not deficient under the *Strickland* standard. It necessarily follows that appellate counsel could not have been ineffective in not raising the issue of trial counsel's performance on direct appeal.

3. Motion to Alter or Amend Judgment

At a hearing on Timmens' motion to alter or amend the judgment, Timmens' counsel requested that it be treated as a motion for new trial based on newly discovered evidence. In a subsequent written order, the district court treated the motion as a timely motion to alter or amend the judgment filed pursuant to § 25-1329, but concluded that the letter did not constitute newly discovered evidence, because it had been in Timmens'

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[22] *Strickland, supra* note 8, 466 U.S. at 691.

[23] *Jim, supra* note 13.

[24] *Id.*; *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

possession at the time of the postconviction hearing. The court overruled the motion.

Like the district court, we consider Timmens' motion as a motion to alter or amend the judgment, which may be based upon newly discovered evidence.[25] This court has defined newly discovered evidence as evidence which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence.[26] The evidence must also be more than merely cumulative; it must be competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.[27]

We agree with the district court that the letter upon which Timmens' motion is based does not constitute newly discovered evidence. As admitted in his brief, the letter in question was in Timmens' possession at all relevant times. Its content would not warrant a different resolution of his postconviction claim. The district court did not abuse its discretion in denying the motion to alter or amend the judgment.

V. CONCLUSION

This court lacks jurisdiction over the claims summarily dismissed on April 14, 2009, because Timmens did not timely appeal from that order. Timmens' ineffective assistance claim related to trial counsel's failure to vigorously pursue an intoxication defense is without merit. Finally, the district court did not abuse its discretion in overruling Timmens' motion to alter or amend the judgment.

AFFIRMED.

WRIGHT, J., not participating.

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[25] *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[26] *Id.*; *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[27] *Id.*

STATE OF NEBRASKA, APPELLEE, V. LUCKY I. IROMUANYA, APPELLANT.

806 N.W.2d 404

Filed December 9, 2011. No. S-09-075.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** Under the two-pronged test for determining ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews counsel's performance and whether the defendant was prejudiced independently of the lower court's decision.
3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has a constitutional right to be represented by an attorney in all critical stages of a criminal prosecution.
5. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
7. **Postconviction: Constitutional Law: Effectiveness of Counsel: Proof.** To establish a right to postconviction relief for counsel's ineffective assistance, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the petitioner's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
8. **Criminal Law: Effectiveness of Counsel.** Counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
9. **Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.
10. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions.
11. ____: ____: ____: ____. Appellate courts must assess trial counsel's performance from counsel's perspective when counsel provided the assistance. An appellate court will not judge an ineffectiveness of counsel claim in hindsight.
12. **Effectiveness of Counsel: Proof: Appeal and Error.** In addressing the "prejudice" component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

13. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
14. **Effectiveness of Counsel: Presumptions.** A trial counsel's lack of relevant experience is a factor a court can consider, but it does not create a presumption of ineffective assistance of counsel.
15. **Trial: Effectiveness of Counsel: Proof.** Unless the defendant demonstrates that counsel failed to function in any meaningful sense as the prosecution's adversary, the defendant can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.
16. **Right to Counsel: Plea Bargains.** The plea bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.
17. **Trial: Attorney and Client: Effectiveness of Counsel: Plea Bargains.** A trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law.
18. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
19. **Trial: Attorney and Client: Testimony: Waiver.** The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.
20. ____: ____: ____: ____. A trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record. Instead, defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
21. ____: ____: ____: ____. The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify.
22. **Trial: Attorney and Client.** The decision whether to testify, plead guilty, or waive a jury trial involves basic trial decisions for which the defendant has the ultimate authority.
23. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: if the defendant shows that counsel interfered with his or her freedom to decide to testify or if counsel's tactical advice to waive the right was unreasonable.
24. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** Determining whether defense counsel was ineffective in failing to object to

prosecutorial misconduct requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.

25. ____: ____: ____: ____. When a criminal defendant claims his or her trial counsel was ineffective in failing to object to prosecutorial misconduct, an appellate court will focus on the "prejudice" component of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), unless the prosecutorial misconduct was so blatantly improper and highly prejudicial that even a minimally competent defense counsel would have objected.
26. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
27. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** In determining whether defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, an appellate court considers whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.
28. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
29. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
30. ____: ____. The following factors are relevant to determining whether prosecutorial misconduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.
31. **Juror Qualifications.** Voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exist sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.
32. **Constitutional Law: Juror Qualifications.** Voir dire plays a critical function in assuring the criminal defendant that his or her constitutional right to an impartial jury will be honored.
33. **Juror Qualifications: Parties.** The extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court.
34. ____: ____. A court should permit parties to ask prospective jurors questions about whether they can fulfill their duties impartially.
35. ____: ____. Parties may generally ask hypothetical questions designed to determine whether prospective jurors' preconceived attitudes or biases would prevent them from following the law or applying a legal theory or defense.
36. **Juror Qualifications: Attorneys at Law.** Counsel may not use voir dire to preview prospective jurors' opinions of the evidence that will be presented. Nor may counsel secure in advance a commitment from prospective jurors on the verdict

they would return, given a state of hypothetical facts. Parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.

37. **Criminal Law: Trial: Prosecuting Attorneys.** Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. They may not inflame the jurors' prejudices or excite their passions against the accused. This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.
38. **Juries: Prosecuting Attorneys.** Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim.
39. **Trial: Prosecuting Attorneys.** Prosecutors should not remark on evidence of questionable admissibility in an opening statement.
40. **Criminal Law: Trial: Prosecuting Attorneys: Appeal and Error.** A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.
41. **Trial: Prosecuting Attorneys: Jury Instructions: Appeal and Error.** Not every variance between a prosecutor's advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given and the remarks are not crucial to the State's case.
42. **Rules of Evidence: Witnesses: Juries.** Under Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2008), the credibility of a witness may be attacked by any party, including the party calling the witness. But a party may not use the rule as an artifice for putting before the jury substantive evidence that is otherwise inadmissible.
43. **Trial: Witnesses.** Evidence of a witness' bias is substantive, and a party can present it on direct or cross-examination.
44. **Trial: Effectiveness of Counsel.** That a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.
45. **Constitutional Law: Trial.** The right to a fair trial is a fundamental liberty secured by the 14th Amendment.
46. **Trial: Presumptions.** The presumption of innocence presents an essential safeguard of a fair trial.
47. **Trial: Evidence: Presumptions: Proof.** Under the presumption of innocence, the State must establish guilt solely through the probative evidence introduced at trial.
48. **Trial: Courts: Verdicts.** The right to a fair trial requires courts to be alert to courtroom practices that undermine the fairness of the factfinding process. The jury's verdict must rest on a dispassionate consideration of the evidence.
49. **Trial: Courts.** Where reason, principle, and common human experience indicate a probability of deleterious effects on fundamental rights, then a particular courtroom practice calls for close judicial scrutiny.
50. **Trial.** Certain procedures, such as compelling the defendant to attend trial in visible shackles, gagged, or in recognizable prison clothing, are inherently prejudicial to the defendant's right to a fair trial and, thus, subject to close scrutiny.

51. **Criminal Law: Trial: Courts: Jury Instructions.** The wearing of victim memorial buttons by spectators at a criminal proceeding could prejudice a defendant's right to a fair trial. But this conduct is not per se inherently prejudicial. Instead, the issues are whether the memorial displays rise to the level of creating an unacceptable threat to a fair trial and whether the threat can be cured by the court's admonitions and instructions to juries.
52. **Criminal Law: Trial: Courts: Juries.** To avoid potential prejudice from victim memorial displays, trial courts must act promptly to protect jurors from even a suspicion of bias or prejudice resulting from spectators' conduct in a criminal trial.
53. ____: ____: ____: ____. After receiving any information that spectators are displaying victim memorials—regardless of whether defense counsel has moved to prohibit such conduct—a trial court should immediately determine, out of the presence of the jury, who, if anyone, is displaying the memorials, and what message, if any, that the displays convey.
54. **Jury Instructions.** Whether a jury instruction is correct presents a question of law.
55. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
56. **Criminal Law: Due Process: Proof.** Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged.
57. **Criminal Law: Homicide: Presumptions.** The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed.
58. **Effectiveness of Counsel: Jury Instructions.** Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.
59. **Constitutional Law: Discrimination: Prosecuting Attorneys.** The Constitution prohibits racially biased prosecutorial arguments.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

In this postconviction proceeding, Lucky I. Iromuanya alleged multiple claims of ineffective assistance of counsel directed at

his trial and appellate counsel. The district court overruled his motion without an evidentiary hearing. Because Iromuanya has either failed to allege facts showing his counsel's deficient assistance or failed to allege facts showing that he was prejudiced by his counsel's alleged deficiencies, we affirm.

I. BACKGROUND

In *State v. Iromuanya* (*Iromuanya I*),[1] we affirmed Iromuanya's convictions for attempted second degree murder, second degree murder, and two related counts of use of a weapon. We modified his life-to-life sentence for second degree murder to not less than 50 years' imprisonment nor more than life imprisonment.

1. Factual Background

We summarize the facts from *Iromuanya I*. Iromuanya fired a single shot from a handgun that wounded Nolan Jenkins and killed Jenna Cooper. The shooting occurred at Cooper's residence during a party at which the guests were drinking. Iromuanya was dating one of the guests, Margaret Rugh. Rugh had invited Iromuanya and Aroun Phaisan, a friend of Iromuanya, to the party. About 1:30 a.m., one of the guests, Nathanial Buss, informed Cooper's roommate, Lindsey Ingram, that a male, whom he knew but did not name, had stolen some shot glasses. Buss pointed the person out, and Ingram went out to confront him. Meanwhile, Buss also informed Cooper of the theft, and Cooper went outside, followed by Buss. Iromuanya and Phaisan decided to leave because they thought someone would accuse them.

Ingram saw Iromuanya and Phaisan leaving and told them that no one could leave until the shot glasses were returned. At this point, Jenkins went outside also. Once outside, Jenkins immediately grabbed Iromuanya's sweatshirt with both hands, pushed him backward, and asked if he had stolen anything. Iromuanya stated that he had not done anything and tried to push Jenkins away. The two scuffled for about 5 seconds before they were separated. As they were being separated,

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[1] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Iromuanya punched Jenkins. Phaisan stepped between them, and Jenkins' friend placed Iromuanya in a bear hug to keep him away from Jenkins.

After being separated, Buss informed Jenkins that Iromuanya had not taken the shot glasses. Ingram attempted to calm Iromuanya several times, but he remained agitated and focused on Jenkins. After Ingram and Jenkins walked away to retrieve the shot glasses, Cooper and Buss also tried to talk to Iromuanya, but he was still agitated.

About 5 minutes after the initial confrontation, Jenkins walked toward Iromuanya to apologize. Another guest saw that Iromuanya was becoming more agitated and yelled to him that Jenkins was trying to apologize. Some witnesses testified that Jenkins had his hand outstretched to shake hands. Jenkins approached within a step of Iromuanya, and Iromuanya shoved him, knocking Jenkins backward. Phaisan and another guest stepped in front of Iromuanya to restrain him. But Iromuanya took the handgun from his trousers and shot at Jenkins, who was 5 feet away. The bullet entered Jenkins' left temple, exited above his left ear, and pierced Cooper's neck, killing her. Iromuanya and Phaisan fled in Phaisan's vehicle.

Rugh was in the house during the shooting. She spoke to Iromuanya shortly after the shooting on her cellular telephone. He told her to say that she did not know him and that his name was "Charles Allen." Later, in police interviews, including one shortly after the shooting, Rugh told officers that when she told Iromuanya he had shot a girl, he asked, "'Not a guy?'" The police arrested Iromuanya later that evening.

At trial, the court admitted his videotaped statement and handwritten statement into evidence. Iromuanya did not testify or present evidence. The same counsel represented him at trial and on direct appeal. The district court appointed different counsel for this postconviction proceeding.

2. Postconviction Motion and Order

In his postconviction motion, Iromuanya alleged a list of ineffective assistance claims. He alleged that his trial counsel

provided ineffective assistance at several stages. He also claimed that his appellate counsel was ineffective for failing to raise each claim regarding trial counsel's ineffectiveness on direct appeal.

Iromuanya alleged that during plea negotiations, he would have pleaded to a lesser offense if counsel had adequately advised him of the prosecution's offers. Regarding the jury selection process, he alleged that trial counsel failed to sufficiently use juror questionnaires and individual voir dire to determine and counter the effects of pretrial publicity on jurors. And he claimed that trial counsel failed to object to the jury selection process and failed to create a record of the community's ethnic and racial makeup. He alleged that persons of his race, and members of ethnic and racial minorities generally, were underrepresented in the jury pool.

Iromuanya alleged that trial counsel lacked the experience to defend against four major felonies and handle the pretrial publicity and complex issues presented at the trial and on appeal. And he claimed that trial counsel was ineffective in advising him whether he should testify.

More specifically, Iromuanya alleged that trial counsel failed to object to the prosecutor's remarks to jurors during jury selection, his opening statements, and his improper questioning of a witness. He also alleged that trial counsel failed to sufficiently object to memorial buttons that the victims' family members had worn and to create an adequate record for appellate review; effectively examine or cross-examine witnesses; and object to a witness' inadmissible testimony.

Next, Iromuanya alleged that trial counsel failed to present a coherent and comprehensible defense in closing argument and also failed to challenge erroneous jury instructions. Further, Iromuanya alleged that appellate counsel failed to challenge these instructions on direct appeal. Finally, he alleged that trial counsel failed to argue that Iromuanya was entitled to a self-defense instruction under Neb. Rev. Stat. § 28-1409(4) (Reissue 2008).

As noted, the court overruled his motion without an evidentiary hearing.

II. ASSIGNMENT OF ERROR

Iromuanya assigns that the court erred in failing to grant an evidentiary hearing on all of the above claims of ineffective assistance of trial counsel and appellate counsel.

III. STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[2] Under the two-pronged test set out in *Strickland v. Washington*,[3] we review counsel's performance and whether the defendant was prejudiced independently of the lower court's decision.[4]

IV. ANALYSIS

[3-6] The core issue is whether the court erred in dismissing Iromuanya's postconviction motion without an evidentiary hearing. A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[5] A defendant has a constitutional right to be represented by an attorney in all critical stages of a criminal prosecution.[6] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[7] But if a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.[8]

1. Governing Principles

[7] Because the same attorneys represented Iromuanya at trial and on direct appeal, his postconviction motion is his first

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[2] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[4] See *McGhee, supra* note 2.

[5] See *id.*

[6] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[7] *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

[8] See *McGhee, supra* note 2.

opportunity to assert trial counsel's ineffectiveness.[9] To establish a right to postconviction relief for counsel's ineffective assistance, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the petitioner's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[10]

[8-11] Counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.[11] In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness.[12] When reviewing claims of ineffective assistance, we will not second-guess trial counsel's reasonable strategic decisions.[13] And we must assess trial counsel's performance from counsel's perspective when counsel provided the assistance.[14] An appellate court will not judge an ineffectiveness of counsel claim in hindsight.[15]

[12] In addressing the "prejudice" component of the *Strickland* test, we focus on whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.[16] To show prejudice, the petitioner must demonstrate a reasonable probability that but for counsel's deficient performance, the result would have been different.[17]

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[9] See *id.*

[10] See *id.*

[11] See, *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002), quoting *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[12] See *Haas, supra* note 11.

[13] See *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

[14] See *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), quoting *Strickland, supra* note 3.

[15] *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

[16] See, *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

[17] See *McGhee, supra* note 2.

A reasonable probability is a probability sufficient to undermine confidence in the outcome.[18]

[13] Furthermore, when a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test.[19] Obviously, if trial counsel was not ineffective, then the petitioner suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.[20]

2. Trial Counsel's Lack of Experience

[14,15] We will not decide in a vacuum whether Iromuanya's trial counsel lacked the experience to defend his case.[21] It is true that a trial counsel's lack of relevant experience is a factor a court can consider, but it does not create a presumption of ineffective assistance of counsel.[22] Unless the defendant "demonstrate[s] that counsel failed to function in any meaningful sense as the [prosecution's] adversary," the defendant can "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel."[23] Iromuanya did not claim that his trial counsel's performance was so inadequate as to constitute a breakdown in the adversarial process. So we focus on his allegations of specific errors.

3. Plea Negotiations

Iromuanya argues that the court erred in rejecting his claim that he would have pleaded to a lesser offense if counsel had adequately advised him of the prosecution's plea offers.

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[18] *Gonzalez-Faguaga, supra* note 16, citing *Strickland, supra* note 3.

[19] See *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[20] See *id.*

[21] See *Joubert, supra* note 14, quoting *Strickland, supra* note 3.

[22] See *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[23] *Id.*, 466 U.S. at 666.

[16,17] The plea bargaining process presents a critical stage of a criminal prosecution to which the right to counsel applies.[24] And a trial counsel's failure to communicate a plea offer to a defendant is deficient performance as a matter of law.[25]

Iromuanya takes it one step further. He argues that a court should grant an evidentiary hearing whenever a postconviction motion alleges trial counsel's failure to communicate a plea offer. But even assuming that such allegations might require an evidentiary hearing in some circumstances—an issue we do not reach—they did not warrant a hearing here.

As the court noted, at Iromuanya's sentencing hearing, his trial counsel stated that (1) he had sent a letter to the prosecution extending Iromuanya's offer to plead guilty to manslaughter; and (2) if the prosecutor had accepted the offer, Iromuanya would have pleaded guilty. But Iromuanya's argument lacks a critical antecedent—he does not allege that the prosecutor offered him a plea agreement. Under this record, Iromuanya's allegations are insufficient to overcome the presumption that his trial counsel acted reasonably.

4. Jury Selection Process

Iromuanya argues that the court erred in rejecting his claims that his trial counsel failed to preserve his right to a fair and impartial jury. Regarding Iromuanya's argument about the ethnic and racial makeup of the jury, the court concluded that he had not alleged sufficient facts to show that African-American and other ethnic groups were available within the randomly selected jury pool. As we know, an evidentiary hearing is not required if a postconviction motion alleges only conclusions of fact or law. We conclude that Iromuanya failed to allege sufficient facts to support his claim that minorities were underrepresented in the jury pool.

Iromuanya also alleged that his trial counsel failed to counter the effects of pretrial publicity. But the record affirmatively

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[24] See, *Hill, supra* note 11; *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008); *Zarate, supra* note 11.

[25] See *Lopez, supra* note 24.

refutes Iromuanya's allegations. During jury selection, the trial judge stated that he knew from the jurors' questionnaires that most of them had already heard something about the case. Rather than risk having jurors learn from another juror's response to questioning something about the case that they did not know, the judge decided that counsel could individually question the potential jurors. And he emphasized that they must return a verdict solely on the evidence. The record reflects that counsel individually questioned the potential jurors. Iromuanya's claim lacks merit.

5. Advisement Whether to Testify

Iromuanya claimed that trial counsel was ineffective in advising him whether he should testify. He alleged that if his attorney had given him reasonable advice, he would not have waived his right to testify. The court determined that because Iromuanya waived his right to testify, this claim was refuted. We disagree that Iromuanya's waiver resolves the advisement issue. But we conclude that the record shows that the trial court did not err in denying Iromuanya postconviction relief on this claim.

[18-21] A defendant has a fundamental constitutional right to testify.[26] The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.[27] But a trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record.[28] Instead, "defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant

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[26] See *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

[27] See, *Goff v. Bagley*, 601 F.3d 445 (6th Cir. 2010); *U.S. v. Ward*, 598 F.3d 1054 (8th Cir. 2010); *Owens v. U.S.*, 483 F.3d 48 (1st Cir. 2007); *U.S. v. Mullins*, 315 F.3d 449 (5th Cir. 2002); *U.S. v. Manjarrez*, 258 F.3d 618 (7th Cir. 2001); *Chang v. U.S.*, 250 F.3d 79 (2d Cir. 2001); *Sexton v. French*, 163 F.3d 874 (4th Cir. 1998); *U.S. v. Joelson*, 7 F.3d 174 (9th Cir. 1993); *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992).

[28] See *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990).

to make."[29] In discussing this responsibility, the 11th Circuit has explained the important role counsel's advice plays in securing a defendant's right to testify or not:

> This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a *known* right or privilege." . . . Moreover, if counsel believes that it would be unwise for the defendant to testify, counsel may, and indeed should, advise the client in the strongest possible terms not to testify. The defendant can then make the choice of whether to take the stand with the advice of competent counsel.[30]

The competence and soundness of defense counsel's tactical advice is crucial to whether counsel has presented sufficient information to the defendant to permit a meaningful voluntary waiver of the right to testify.[31]

[22] Iromuanya's claim that he would have testified but for his trial counsel's advice mirrors a defendant's claim that he or she would not have pleaded guilty or waived a jury trial but for trial counsel's advice. These decisions also involve basic trial decisions for which the defendant has the ultimate authority.[32] And we have recognized that a defendant can base an ineffective assistance of counsel claim on trial counsel's unreasonable tactical advice in making these decisions.[33] In reviewing a defendant's waiver of a jury trial, we have explicitly stated that counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance when the advice is unreasonable or when counsel interferes with a client's freedom to decide to waive a jury trial.[34]

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[29] See *State v. White*, 246 Neb. 346, 351, 518 N.W.2d 923, 926 (1994), citing *Teague, supra* note 27. Accord *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

[30] *Teague, supra* note 27, 953 F.2d at 1533 (emphasis in original).

[31] See *Lema v. U.S.*, 987 F.2d 48 (1st Cir. 1993).

[32] See *Nixon, supra* note 29.

[33] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

[34] *Seberger, supra* note 33.

[23] We have implicitly applied the same ineffective assistance rule to a defendant's decision to waive his or her right to testify. Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.[35]

It is true that federal appellate courts disagree whether a defendant's voluntary waiver may be inferred from the defendant's failure to testify at trial or failure to alert the trial court to his or her desire to testify.[36] But we need not decide whether a defendant's conduct or silence can constitute a waiver of his or her right to testify. Here, the record shows that at the close of the State's evidence, Iromuanya waived his right to testify and present witnesses. In response to the court's questions, he stated that he had discussed whether to testify with his attorney; he confirmed that he had freely and voluntarily decided not to testify. He specifically stated that he knew that the decision was his regardless of his attorney's advice. Because the record shows defense counsel did not interfere with Iromuanya's decision not to testify, the only issue is whether counsel's advice was unreasonable and prevented Iromuanya from meaningfully waiving his right to testify.

Iromuanya alleged that if he had received reasonable advice, he would have testified that he had not intentionally fired a shot at Jenkins; the shooting occurred during a sudden quarrel; Jenkins was the aggressor; and Iromuanya was restrained against his will. But the jurors heard his statements to this effect when they viewed his videotaped statements and when a witness read his written statement. Trial counsel again played a part of the videotaped statement during closing argument. We conclude that because the record shows that the jury heard

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[35] See, *White, supra* note 29; *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *El-Tabech, supra* note 28; *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981). Accord *Lema, supra* note 31.

[36] Compare *Chang, supra* note 27, with *Goff, supra* note 27; *Frey v. Schuetzle*, 151 F.3d 893 (8th Cir. 1998); and *Joelson, supra* note 27.

Iromuanya's statement of events from his police interview, he was not prejudiced by his trial counsel's alleged failure to reasonably advise him to testify.[37]

6. Prosecutorial Misconduct

Iromuanya contends that the court erred in rejecting his claims that counsel was ineffective by failing to object to the following alleged instances of prosecutorial misconduct: (1) making improper remarks to jurors during voir dire; (2) making improper remarks about the victims during the opening statement; and (3) eliciting testimony from two witnesses that was intended to elicit the jurors' sympathy for the victims.

(a) Standard for Reviewing Ineffective Assistance Claims Based on Prosecutorial Misconduct

[24] Determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct obviously requires an appellate court to first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[38] But even when a prosecutor's conduct or remarks are misconduct, defense counsel might have made a sound tactical decision in not objecting: "It is not beyond comprehension to envision an instance where a surely winnable objection may still hurt the defense in the eyes of the jury."[39] Alternatively, trial counsel may decide that the prosecutor's remarks support the defense's position or are not worth distracting the jury from a more important point.

[25-27] We give defense counsel's decision not to object to a prosecutor's conduct or remark a strong presumption of reasonableness. We will not lightly conclude that counsel was ineffective for failing to object to every instance of prosecutorial misconduct. Unless the prosecutorial misconduct was so blatantly improper and highly prejudicial that even a minimally

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[37] See *U.S. v. Walters*, 163 Fed. Appx. 674 (10th Cir. 2006).

[38] See, e.g., *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[39] *Ayers v. State*, 802 A.2d 278, 283 (Del. 2002).

competent defense counsel would have objected,[40] we will focus on the "prejudice" component of the *Strickland* test. The prejudice component focuses on whether defense counsel's performance rendered the trial unreliable or the proceeding fundamentally unfair.[41] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[42] So in determining whether defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, we consider whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.[43]

(b) Relevant Factors for Evaluating Whether Prosecutorial Misconduct Prejudiced a Defendant's Right to a Fair Trial

[28-30] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[44] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[45] When a prosecutor's conduct was improper, we adopt the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the

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[40] See *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000).

[41] See, *Lockhart, supra* note 16; *Gonzalez-Faguaga, supra* note 16.

[42] See, *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009); *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[43] See, *Graves v. Ault*, 614 F.3d 501 (8th Cir. 2010); *Land v. Allen*, 573 F.3d 1211 (11th Cir. 2009); *Latchison v. Felker*, 382 Fed. Appx. 542 (9th Cir. 2010); *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

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

[45] See *id.*

court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[46]

(c) Analysis

(i) Remarks to Jurors During Voir Dire

The prosecutor asked prospective jurors to think of how a person's intent can be inferred and reasons that a person might lie about his or her intent after committing an act. He also explained the theory of transferred intent and asked whether anyone thought the theory was unfair as applied to a hypothetical example. Later, he asked whether any potential jurors had training in the use of firearms and whether they had been trained to fire a warning shot. When a prospective juror stated that his work protocol called for firing a warning shot, the prosecutor responded that he thought it was "probably a pretty good idea, too." The prosecutor's questions about what weight jurors would give to evidence were limited to asking whether jurors believed they could give the same weight to circumstantial evidence as to direct evidence. He made no reference to the facts of the case.

The postconviction court concluded that the prosecutor had properly questioned potential jurors about their views on intent, whether they could apply the theory of transferred intent, and their familiarity with firearm safety. It further concluded that the prosecutor's comments on the necessity of firing a warning shot did not prejudice Iromuanya. The court stated that at trial, it had instructed jurors that they should not consider comments made during voir dire as evidence and again instructed the jury at the close of evidence that counsel's comments were not evidence.

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[46] See, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *U.S. v. Reid*, 625 F.3d 977 (6th Cir. 2010); *U.S. v. Bell*, 624 F.3d 803 (7th Cir. 2010); *Graves, supra* note 43; *U.S. v. Whitten*, 610 F.3d 168 (2d Cir. 2010); *U.S. v. Davis*, 609 F.3d 663 (5th Cir. 2010); *Hein v. Sullivan*, 601 F.3d 897 (9th Cir. 2010); *U.S. v. Lopez*, 590 F.3d 1238 (11th Cir. 2009); *U.S. v. McElroy*, 587 F.3d 73 (1st Cir. 2009); *U.S. v. Portillo-Quezada*, 469 F.3d 1345 (10th Cir. 2006); *U.S. v. Scheetz*, 293 F.3d 175 (4th Cir. 2002).

In his postconviction appeal, Iromuanya argues that in questioning the jurors, the prosecutor impermissibly presented evidence and his personal opinion on whether a warning shot was required before shooting a firearm in the direction of a person. He also argues that the prosecutor improperly argued transferred intent and improperly solicited information on the weight potential jurors would give to circumstantial evidence and the type of circumstantial evidence that they believed would show intent.

[31] In questioning prospective jurors, a court should allow attorneys reasonable leeway to ask questions relevant to exercising a party's peremptory challenges:

> [V]oir dire examination of prospective jurors "requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists [sic] sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge."[47]

[32,33] Although this statement is correct, voir dire also "'plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.'"[48] Nonetheless, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court.[49] But there are, of course, limits to a court's discretion.

[34-36] A court should permit parties to ask prospective jurors questions about whether they can fulfill their duties impartially.[50] So parties may generally ask hypothetical questions

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[47] *State v. Shipps*, 265 Neb. 342, 349, 656 N.W.2d 622, 629 (2003), quoting *Oden v. State*, 166 Neb. 729, 90 N.W.2d 356 (1958), citing Neb. Rev. Stat. § 25-1106 (Reissue 1943).

[48] *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992), quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981) (plurality opinion). Accord *Wilson v. Sirmons*, 536 F.3d 1064 (10th Cir. 2008).

[49] See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[50] See *Morgan, supra* note 48.

designed to determine whether prospective jurors' preconceived attitudes or biases would prevent them from following the law or applying a legal theory or defense.[51] But counsel may not use voir dire to preview prospective jurors' opinions of the evidence that will be presented. Nor may counsel secure in advance a commitment from prospective jurors on the verdict they would return, given a state of hypothetical facts.[52] Summed up, the parties may not use voir dire to impanel a jury with a predetermined disposition or to indoctrinate jurors to react favorably to a party's position when presented with particular evidence.[53]

Applying these standards, we conclude that the prosecutor's questions and remarks about transferred intent were intended to ensure that prospective jurors could apply this legal theory impartially. He asked if any of them considered the theory of transferred intent unfair. He did not ask them if they could convict a defendant based upon a set of hypothetical facts that the State intended to prove. These questions fall short of misconduct.

But the prosecutor improperly remarked and questioned prospective jurors about what type of circumstantial evidence would show a person's intent and whether a warning shot is required before firing a gun in the direction of a person. He did not limit his questions on circumstantial evidence to whether prospective jurors could infer a person's intent from indirect evidence. Instead, his questions about why persons might lie about their intent and his remarks about warning shots were clearly intended to persuade prospective jurors to the State's viewpoint of the evidence before they heard it.

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[51] See, e.g., *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000); *State v. Moore*, 122 N.J. 420, 585 A.2d 864 (1991); *Wells v. State*, 848 N.E.2d 1133 (Ind. App. 2006).

[52] See, *People v. Abilez*, 41 Cal. 4th 472, 161 P.3d 58, 61 Cal. Rptr. 3d 526 (2007); *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007); *State v. Taylor*, 875 So. 2d 58 (La. 2004); *State v. Jones*, 347 N.C. 193, 491 S.E.2d 641 (1997); *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001); *State v. Frederiksen*, 40 Wash. App. 749, 700 P.2d 369 (1985).

[53] *People v. Bowel*, 111 Ill. 2d 58, 488 N.E.2d 995, 94 Ill. Dec. 748 (1986); *State v. Clark*, 981 S.W.2d 143 (Mo. 1998).

As explained, voir dire is not the time for closing argument. Yet, we cannot conclude that the prosecutor's remarks prejudiced Iromuanya's right to an impartial jury. Before voir dire, the court advised prospective jurors that the attorneys' statements and arguments were not evidence. And Iromuanya's trial counsel produced ample evidence and argument to rebut the State's viewpoint. He forcefully argued in closing that Iromuanya did not shoot at Jenkins with an intent to kill, and he played Iromuanya's statement to the police in closing arguments specifically to bolster that argument. Because of the court's instruction and trial counsel's countervailing arguments, the prosecutor's comments during voir dire did not prejudicially influence the jury.

(ii) Improper Appeal to Jurors' Sympathies

Iromuanya contends that during opening statements, the prosecutor made improper statements about the personal attributes of the victims. He argues that these statements prejudiced his right to an impartial jury and that the prosecutor could not have reasonably believed that they would be supported by admissible evidence. Iromuanya also contends that the prosecutor improperly used Jenkins' testimony to display his emotions upon learning of Cooper's death at the hospital.

At the beginning of his opening argument, the prosecutor stated that Cooper had been studying mechanical engineering, was named a "First Team All Big 12" soccer player, was voted most valuable player, and would have led her team into the National Collegiate Athletic Association tournament if she had not been killed. Regarding Jenkins, he listed Jenkins' high school athletic endeavors and stated that Jenkins had earned a Regents Scholarship and would be receiving a nursing degree.

[37-39] In deciding this issue, we are guided by the following principles. Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[54] They may not inflame the jurors' prejudices or

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[54] See *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, McCulloch, supra* note 42.

excite their passions against the accused.[55] This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.[56] As relevant here, prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim. These facts lack any relevance to the criminal prosecution[57]—and they have the potential to evoke jurors' sympathy and outrage against the defendant.[58] Prosecutors also should not remark on evidence of questionable admissibility in an opening statement.[59]

[40,41] But "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[60] "[N]ot every variance between [a prosecutor's] advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given" and the remarks are not crucial to the State's case.[61]

As noted, the court orally instructed prospective jurors before trial that the attorney's statements and arguments were

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[55] See *id.*

[56] See, e.g., *U.S. v. Conrad*, 320 F.3d 851 (8th Cir. 2003); *U.S. v. Hands*, 184 F.3d 1322 (11th Cir. 1999); *U.S. v. Vaulin*, 132 F.3d 898 (3d Cir. 1997); *United States v. Millen*, 594 F.2d 1085 (6th Cir. 1979). See, also, Annot., 19 A.L.R.4th 368 (1983).

[57] See *Iromuanya I, supra* note 1.

[58] See, *Clark v. Com.*, 833 S.W.2d 793 (Ky. 1991); *State v. Rodriguez*, 365 N.J. Super. 38, 837 A.2d 1137 (2003).

[59] See, *U.S. v. Valencia*, 600 F.3d 389 (5th Cir. 2010); *U.S. v. Brassard*, 212 F.3d 54 (1st Cir. 2000); *U.S. v. Adams*, 74 F.3d 1093 (11th Cir. 1996); *U.S. v. Novak*, 918 F.2d 107 (10th Cir. 1990); *United States v. Hernandez*, 779 F.2d 456 (8th Cir. 1985); *Occhicone v. State*, 570 So. 2d 902 (Fla. 1990); *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994), *disapproved on other grounds, State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

[60] *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[61] *Frazier v. Cupp*, 394 U.S. 731, 736, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969).

not evidence. And the prosecutor's improper remarks in his opening statement were followed by a long trial. Many witnesses testified on Iromuanya's intent in firing the shot at Jenkins that wounded Jenkins and killed Cooper. As we stated in *Iromuanya I*,[62] whether Iromuanya fired the shot with the intent to kill Jenkins was the critical issue. The court's written instructions informed the jurors that they must not decide the case on sympathy or prejudice. In attempting to extol the victims, the prosecutor stepped out of bounds. But we conclude that the prosecutor's opening statement did not so influence the jurors that they could not follow the court's instruction to dispassionately weigh all the evidence that followed on the issue of intent.[63]

For the same reason, we conclude that the prosecutor's questioning of Jenkins did not deny Iromuanya a fair and impartial trial. The prosecutor asked Jenkins to recall what he remembered from being in the hospital and when he had learned that Cooper had died. This questioning elicited Jenkins' emotional testimony that while he was still in the hospital, he was wheeled down to see Cooper and held her hand but did not realize that she had died. He stated that he learned of her death the next day when he asked Ingram how Cooper was doing and Ingram started crying. When trial counsel finally objected and moved for a mistrial, the court overruled the motion as untimely. In his affidavit accompanying the motion for a new trial, trial counsel stated that by the time he understood where the questioning was going, he saw at least two jurors crying and the rest staring intently at Jenkins.

Obviously, evidence showing that Jenkins was shot in the head was relevant to whether Iromuanya intended to kill him. But even if Jenkins' mental functioning at the hospital had been relevant to Iromuanya's intent to kill, no proper purpose existed for the prosecutor's questions to Jenkins about when he learned of Cooper's death. Those questions could only elicit irrelevant testimony, and the prosecutor should have known

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[62] *Iromuanya I, supra* note 1.

[63] See *Frazier, supra* note 61.

that the questions would elicit highly emotional testimony. We conclude that the questioning was improper.

But on this record, we conclude that even if Iromuanya's trial counsel had timely objected to this questioning or testimony, no reasonable probability exists that the jury would have acquitted Iromuanya. This testimony was only a small part of the State's evidence. Like the emotional testimony of Cooper's mother that we discussed in *Iromuanya I*, Jenkins' testimony, "[w]hile legally irrelevant, . . . had no prejudicial bearing on the issue of intent."[64] Here, the State's evidence on intent was strong and the court instructed the jury not to decide the case on sympathy or prejudice. So while the prosecutor's appeal to jurors' sympathies was improper, the prejudicial effect was tempered by the strength of the evidence and the court's instructions. We conclude that the improper questioning did not deprive Iromuanya of a fair trial.

(iii) Prosecutor's Impeachment of State's Witness

Iromuanya also argues that the prosecutor's impeachment of Phaisan constituted prosecutorial misconduct. First, he argues that Phaisan's testimony in response to the prosecutor's impeachment questions prejudiced him. Phaisan testified that he lived with a woman who was the sister of a woman with whom Iromuanya had fathered out-of-wedlock children.

The record shows that after the prosecutor established that Iromuanya and Phaisan were longtime friends, Iromuanya's trial counsel asked to approach the bench. He moved in limine to exclude from evidence facts about Iromuanya's out-of-wedlock children. He argued that the court should exclude the evidence under Neb. Evid. R. 403[65] and that it was improper character evidence. The court overruled that motion, concluding that the evidence was admissible on Phaisan's credibility. Trial counsel repeated his objections during the prosecutor's questioning.

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[64] *Iromuanya I, supra* note 1, 272 Neb. at 198, 719 N.W.2d at 284.

[65] Neb. Rev. Stat. § 27-403 (Reissue 2008).

Despite Iromuanya's claim that this questioning was prosecutorial misconduct that his trial counsel failed to address, the record affirmatively shows that his trial counsel did object to this line of questioning. Because this claim fails to show ineffective assistance, it is without merit in this postconviction appeal.

Iromuanya also claims that his trial counsel failed to object to the prosecutor's improper questioning of Phaisan on redirect examination about the number of times that he had visited Iromuanya in jail. Iromuanya's trial counsel did not object to this questioning, but we conclude that it was not prosecutorial misconduct.

[42,43] Under Neb. Evid. R. 607,[66] the credibility of a witness may be attacked by any party, including the party calling the witness.[67] But a party may not use the rule as an artifice for putting before the jury substantive evidence that is otherwise inadmissible.[68] Evidence of a witness' bias, however, is substantive, and a party can present it on direct or cross-examination.[69] Showing bias appears to have been the prosecutor's purpose in this questioning. Because the evidence was admissible to show bias, the questioning did not constitute prosecutorial misconduct.

Summing up, we conclude that Iromuanya has either failed to allege facts that show prosecutorial misconduct or, under our balancing test, has failed to allege facts that show that the prosecutorial misconduct prejudiced Iromuanya's right to a fair trial. Because he has failed to allege facts showing that any prosecutorial misconduct deprived him of a fair trial, he cannot show prejudice from his trial counsel's alleged ineffective assistance regarding these claims.

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[66] Neb. Rev. Stat. § 27-607 (Reissue 2008).

[67] See *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982).

[68] See, e.g., *State v. Jackson*, 217 Neb. 363, 348 N.W.2d 876 (1984); *Brehmer, supra* note 67.

[69] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), citing *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984). Compare *U.S. v. Dunson*, 142 F.3d 1213 (10th Cir. 1998).

7. Ineffective Questioning of Witnesses

[44] We also reject Iromuanya's claims that trial counsel was ineffective in his questioning of two of the State's witnesses: Nathaniel Buss and Margaret Rugh. He argues that trial counsel should not have attempted to impeach the credibility of these witnesses. We have reviewed the record and conclude that these claims involve issues of trial strategy that we will not second-guess. That a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.[70]

8. Spectators' Memorial Buttons

In *Iromuanya I*, we affirmed the trial court's denial of a new trial for spectator misconduct. We stated that trial counsel had moved in limine before the second day of voir dire started to preclude spectators from wearing memorial buttons "'with Jenna Cooper's face or photo or something like that.'"[71] But the court took the objection under advisement, and its ruling was not part of the record. We noted that trial counsel had submitted an affidavit with his motion for a new trial. In that motion, he stated that on the third day of trial, the court had instructed spectators not to wear the buttons in court. In denying Iromuanya's motion for a new trial, the court stated that there was no evidence any juror saw the buttons or was influenced by them.

On appeal, we concluded that trial counsel had failed to create an adequate record to determine that the court had abused its discretion. We stated that the record failed to show how many people wore buttons, where they sat, the size and contents of the buttons, or the precise reason for the court's ruling on the motion in limine. We distinguished these facts from the evidence presented in *Musladin v. Lamarque*.[72] There, "[a] divided panel of the Ninth Circuit Court of Appeals held that

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[70] See *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[71] See *Iromuanya I, supra* note 1, 272 Neb. at 199, 719 N.W.2d at 284.

[72] *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), *overruled sub nom. Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

the defendant was entitled to a writ of habeas corpus because the wearing of the buttons created an unacceptable risk that impermissible factors came into play, which was inherently prejudicial."[73] In *Iromuanya I*, we stated that trial counsel could not fail to timely move for a mistrial, gamble on a favorable result, and then assert a previously waived error.

In his postconviction motion, Iromuanya claimed his trial counsel was ineffective in failing to (1) timely object to the victims' family members' wearing of memorial buttons, (2) demand an immediate ruling on his objection or a mistrial, and (3) make an adequate record for appellate review. In denying Iromuanya postconviction relief for this claim, the district court concluded that the presence of memorial buttons did not prejudice Iromuanya because (1) "what little evidence there is" suggested that the buttons were worn only during jury selection; (2) Iromuanya had not alleged that any juror was exposed to the buttons; and (3) the court had instructed jurors not to permit sympathy or prejudice to influence their decision.

Iromuanya contends that the district court erred in denying him postconviction relief on the ground that the record was insufficient to show that jurors were exposed to the memorial buttons. He argues that his claim is based on his trial counsel's failure to create an adequate record to evaluate prejudice. But this argument ignores Iromuanya's burden to allege how his trial counsel's alleged deficient performance prejudiced his defense. We conclude that he has not satisfied this burden.

[45-49] The right to a fair trial is a fundamental liberty secured by the 14th Amendment.[74] The presumption of innocence presents an essential safeguard of a fair trial.[75] Under the presumption of innocence, the State must establish guilt solely

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[73] See *Iromuanya I, supra* note 1, 272 Neb. at 201, 719 N.W.2d at 286, citing *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

[74] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008), citing *Estelle, supra* note 73.

[75] See *id.*, citing *Estelle, supra* note 73.

through the probative evidence introduced at trial.[76] The right to a fair trial requires courts to be alert to courtroom practices that undermine the fairness of the factfinding process.[77] The jury's verdict must rest on a dispassionate consideration of the evidence.[78] "[W]here 'reason, principle, and common human experience' indicate a 'probability of deleterious effects on fundamental rights,' then the procedure 'calls for close judicial scrutiny.'"[79]

[50] As we have recognized, "certain procedures, such as compelling the defendant to attend trial in visible shackles, gagged, or in recognizable prison clothing, [are] 'inherently prejudicial' to the defendant's right to a fair trial and, thus, subject to close scrutiny."[80] In these cases, the scene presented to the jurors simply poses an unacceptable threat of "'"impermissible factors coming into play"'" in the jury's determination of guilt.[81]

In *Musladin*,[82] the case we distinguished in *Iromuanya I*, the Ninth Circuit granted habeas relief on an unfair trial claim connected to memorial buttons worn by the victim's family members. There, the defendant's murder trial lasted 14 days. At least on some days of the trial, some members of the victim's family, who were sitting in the front row of the gallery, wore buttons with the victim's photograph. Before opening statements, the trial court had denied defense counsel's motion to order the family members not to wear the buttons during trial.[83]

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[76] See *id.*, citing *Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

[77] See *id.*, quoting *Estelle, supra* note 73.

[78] See *id.*, quoting *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960).

[79] *Id.* at 668, 757 N.W.2d at 15, quoting *Estelle, supra* note 73.

[80] *Id.*, citing *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005).

[81] *Id.* at 669, 757 N.W.2d at 15, quoting *Holbrook v. Flynn*, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[82] *Musladin, supra* note 72.

[83] See *Carey, supra* note 72.

Relying on the U.S. Supreme Court's decision in *Holbrook v. Flynn*,[84] a California Court of Appeal concluded that the practice should be discouraged because the displays constituted an impermissible factor coming into play. But it concluded that because the jurors in the defendant's case were unlikely to have interpreted the buttons as anything but a sign of normal grief—the buttons did not brand the defendant with an unmistakable mark of guilt.[85]

In granting the state inmate habeas relief, the Ninth Circuit in *Musladin* determined that the state court's requirement that the spectators' conduct brand the defendant with a mark of guilt was an unreasonable application of clearly established federal law. It held that when a court concludes that courtroom conduct allows an impermissible factor to come into play, the "inherent prejudice" test is satisfied. It relied on its decision in *Norris v. Risley*,[86] an earlier case applying Supreme Court precedent on prejudicial courtroom practices to spectator conduct.

In overruling *Musladin*, the Supreme Court stated that only its holdings constituted clearly established federal law in deciding whether to grant habeas relief from a state court decision. It acknowledged that it had previously stated that the test for "inherent prejudice" is "'whether "an unacceptable risk is presented of impermissible factors coming into play."'"[87] But it distinguished its earlier cases as dealing only with "government-sponsored practices."[88] It also noted that state courts had diverged widely on whether memorial displays by spectators prejudiced a defendant's right to a fair trial. Because the prejudicial effect of spectators' memorial displays was still an open question in the Court's jurisprudence, the state court's decision was neither contrary to nor an unreasonable application of its holdings.

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[84] *Holbrook, supra* note 81.

[85] See *Carey, supra* note 72.

[86] *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990).

[87] *Carey, supra* note 72, 549 U.S. at 75.

[88] *Id.*

Yet, in a well-reasoned concurrence, Justice Souter concluded that the Court's unacceptable risk standard did reach the conduct of courtroom visitors and clearly applied to spectators' memorial displays:

> Nor is there any reasonable doubt about the pertinence of the standard to the practice in question; one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim's photo can raise a risk of improper considerations. The display is no part of the evidence going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them. On the jurors' part, that expected response could well seem to be a verdict of guilty, and a sympathetic urge to assuage the grief or rage of survivors with a conviction would be the paradigm of improper consideration.[89]

But he concluded that the issue was whether the risk in each case was unacceptable and declined to embrace a per se rule of inherent prejudice for the presence of memorial buttons in any criminal trial. We agree.

[51] We implicitly concluded in *Iromuanya I* that the wearing of victim memorial buttons by spectators at a criminal proceeding could prejudice a defendant's right to a fair trial. But under the Supreme Court's decision in *Carey v. Musladin*,[90] which overruled the Ninth Circuit's decision, this conduct is not per se inherently prejudicial.[91] That is, this type of spectator conduct is not on the same level as state-sponsored procedures showing a probable deleterious effect on fundamental rights and calling for close judicial scrutiny. Instead, we view the issues as whether the memorial displays rise to the level of creating an unacceptable threat to a fair trial and whether the threat can be cured by the court's admonitions and instructions to juries. Many courts have adopted the "unacceptable risk"

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[89] *Id.*, 549 U.S. at 82-83 (Souter, J., concurring in the judgment).

[90] *Carey, supra* note 72.

[91] See, e.g., *U.S. v. Farmer*, 583 F.3d 131 (2d Cir. 2009).

standard for spectator conduct. They have frequently concluded that spectators' wearing of memorial buttons or shirts did not pose an unacceptable threat to a fair trial, especially when they were worn for only a short period and the trial court stopped the practice shortly after being informed of it.[92]

We disagree with the district court that the evidence indicated the buttons were worn only during jury selection. As stated, in his affidavit in support of a new trial, Iromuanya's counsel stated that sometime on the third day of trial, the court ordered spectators not to wear the buttons. But we agree with other courts that the jurors were likely to have viewed the buttons as signs of grief instead of a collective call for Iromuanya's conviction. And the record does show that spectators only wore the buttons for the first 2 to 3 days of a 9-day trial. Also, at the hearing for a new trial, Iromuanya's counsel did not dispute the prosecutor's statement that no witnesses had taken the stand while wearing a button. Finally, the court instructed jurors not to allow sympathy or prejudice to influence their verdict. Under these facts, we will not presume juror partiality. We conclude that there is no reasonable probability that the spectators' wearing of memorial buttons created an unacceptable threat to Iromuanya's right to a fair trial.

[52,53] But our conclusion here does not mean that spectators' memorial displays could never reach such a level. To avoid potential prejudice from victim memorial displays, we admonish trial courts to act promptly to protect jurors from even a suspicion of bias or prejudice resulting from spectators' conduct in a criminal trial.[93] After receiving any information that spectators are displaying victim memorials—regardless of whether defense counsel has moved to prohibit such conduct—a trial court should immediately determine, out of the presence of the jury, who, if anyone, is displaying the memorials, and what message, if any, that the displays convey. The

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[92] See *Carey, supra* note 72 (citing cases). Accord, e.g., *People v. Zielesch*, 179 Cal. App. 4th 731, 101 Cal. Rptr. 3d 628 (2009); *Allen v. Com.*, 286 S.W.3d 221 (Ky. 2009); *State v. Lord*, 161 Wash. 2d 276, 165 P.3d 1251 (2007).

[93] See *State v. Polinski*, 230 Neb. 43, 429 N.W.2d 725 (1988).

court should make a record of its findings and immediately prohibit such conduct. If the court concludes that jurors would have been exposed to the displays, it should inquire of jurors whether the displays would affect their ability to be impartial and admonish them to disregard any displays to which they might have been exposed.

9. Jury Instructions on Attempted Second Degree Murder

(a) Additional Facts

(i) Trial Proceedings

Jury instruction No. 3 set out the elements for attempted second degree murder of Jenkins. The instruction informed jurors that they could find Iromuanya guilty or not guilty and did not have a lesser-included offense.

Jury instruction No. 5 set out the elements for the charge of second degree murder of Cooper. It did have a lesser-included offense of manslaughter and informed jurors that they could find Iromuanya guilty of murder in the second degree, or guilty of manslaughter, or not guilty. If the jury found that the State had failed to prove second degree murder, the instruction stated that it must acquit Iromuanya of that charge and consider the crime of manslaughter.

The manslaughter elements in instruction No. 5 required the State to prove that Iromuanya killed Cooper without malice upon (1) a sudden quarrel or (2) "unintentionally while in the commission of an unlawful act, to wit: recklessly causing bodily injury to Jenna Cooper."

Instruction No. 7 explained the doctrine of transferred intent. It informed jurors that if they found Iromuanya intended to kill Jenkins, the element of intent was satisfied for Cooper even if Iromuanya did not intend to kill her. Instruction No. 10 defined "sudden quarrel" and explained the provocation issues relevant to the charge of manslaughter:

> "Sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self control. The phrase "sudden quarrel" does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and

> does not require a physical struggle or other combative corporal contact between [Iromuanya] and Nolan Jenkins. In considering the offense of manslaughter, you should determine whether [Iromuanya] acted under the impulse of sudden passion suddenly aroused which clouded reason and prevented rational action, whether there existed reasonable and adequate provocation to excite the passion of [Iromuanya] and obscure and disturb his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and reflection, rather than from judgment, and whether, under all the facts and circumstances as disclosed by the evidence, a reasonable time had elapsed from the time of provocation to the instant of the killing for the passion to subside and reason resume control of the mind. You should determine whether the suspension of reason, if shown to exist, arising from sudden passion, continued from the time of provocation until the very instant of the act producing death took place.

During the jury's deliberations, jurors sent this question to the court: "Can a 'sudden quarrel' be a consideration when making a decision of not guilty or guilty in the charge of attempted murder in the 2nd degree?" After receiving this question, the court held a teleconference with counsel. Defense counsel agreed with the prosecutor that the jury could not consider a sudden quarrel for attempted second degree murder, and that is how the court instructed the jury.

(ii) Postconviction Proceedings

Iromuanya alleged three claims regarding jury instructions. First, he alleged that trial counsel failed to challenge erroneous jury instructions on the following issues: provocation, sudden quarrel, and transferred intent. Second, he alleged that trial counsel was ineffective in failing to object to the court's erroneous negative response when the jury asked if "sudden quarrel" could be considered for attempted second degree murder. Third, he claimed that trial counsel should have argued that the court should give a self-defense instruction under § 28-1409(4). That statute justifies the use of deadly force

in specified circumstances, including when the actor believes such force is necessary to protect himself from kidnapping. He also claimed that trial counsel should have asserted that self-defense is not mutually exclusive to a sudden quarrel or lack of requisite intent defense.

The court concluded that the jury instructions as a whole, and its response to the jurors' question, correctly stated the law. It stated that jury instruction No. 3 correctly informed jurors that they could find Iromuanya either guilty or not guilty of attempted second degree murder. And it stated that the only charge for which the jurors could consider the sudden quarrel provocation was manslaughter. Regarding the self-defense claim, the court stated that in Iromuanya's direct appeal, we had upheld its decision not to give a self-defense instruction because there was no evidence which would have supported such instruction. So it concluded that trial counsel was not deficient for failing to request the instruction under § 28-1409(4).

(b) Analysis

In this appeal, Iromuanya assigns that the court erred in failing to find that trial counsel was ineffective for failing to (1) properly challenge jury instructions and (2) object to the court's response to the jurors' question during deliberations.

[54,55] Whether a jury instruction is correct presents a question of law.[94] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[95]

Iromuanya argues that the transferred intent instruction and the court's response to the jurors' question precluded the jury from deciding a critical issue: whether Iromuanya "acted intentionally but by the provocation of a sudden quarrel."[96] As noted, the court instructed the jurors that they could not consider a sudden quarrel provocation in deciding Iromuanya's intent for attempted second degree murder of Jenkins. That

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[94] *Thorpe, supra* note 44.

[95] *Id.*

[96] Brief for appellant at 24.

response was correct under the governing law at the time of Iromuanya's trial.

Neb. Rev. Stat. § 28-305(1) (Reissue 2008) provides that "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." In *State v. Jones*,[97] we specifically held that "there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill."

So under *Jones*, the district court correctly instructed the jurors that they could not consider a sudden quarrel provocation in deciding whether Iromuanya was guilty or not guilty of attempted second degree murder for shooting at Jenkins.[98] It is true that we have recently overruled our decision in *Jones* and held that sudden quarrel manslaughter is an intentional killing.[99] But this decision was issued well after Iromuanya's trial and direct appeal. The failure to anticipate a change in existing law does not constitute deficient performance.[100] We conclude that Iromuanya's trial counsel was not ineffective for failing to object to the court's response to the jury.

Instruction No. 10 informed jurors that they should consider whether the conflict between Iromuanya and Jenkins was a sufficient provocation for the charge of manslaughter. Because manslaughter was only a lesser-included offense as to Cooper, the instruction informed the jury that the sudden quarrel provocation was relevant to Iromuanya's killing of Cooper.

[56,57] We reject Iromuanya's argument that the instructions relieved the State of its burden to prove beyond a reasonable

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[97] *State v. Jones*, 245 Neb. 821, 830, 515 N.W.2d 654, 659 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[98] See, *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002); *State v. Al-Zubaidy*, 5 Neb. App. 327, 559 N.W.2d 774 (1997), *reversed on other grounds* 253 Neb. 357, 570 N.W.2d 713.

[99] See *State v. Smith, ante* p. 720, 806 N.W.2d 383 (2011).

[100] See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

doubt that the attempt to cause death was not committed during a sudden quarrel provocation. Due process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged.[101] Here, the instruction for attempted second degree murder of Jenkins informed the jury that the State had to prove Iromuanya's intent to kill beyond a reasonable doubt. The absence of a provocation is not an element of second degree murder, and no element of the charge is presumed.[102] If the jurors had believed that Iromuanya did not intend to kill Jenkins, the instructions required them to find him not guilty of attempted second degree murder.

We also reject Iromuanya's claim that his trial counsel was ineffective in failing to argue that the court should give a self-defense instruction under § 28-1409(4). We quoted this statute in *Iromuanya I* and concluded that there was no circumstance "reflected in the record [that] would warrant a reasonable or good faith belief in the necessity of using deadly force."[103]

[58] Defense counsel is not ineffective for failing to object to jury instructions that, when read together and taken as a whole, correctly state the law and are not misleading.[104] We conclude that Iromuanya's trial counsel was not ineffective for failing to object to the jury instructions.

10. Closing Arguments

Iromuanya contends that trial counsel failed to present a coherent and comprehensible closing argument. He alleged that trial counsel failed to argue that the shooting occurred during a sudden quarrel, despite evidence to support that theory. He further alleged that trial counsel never explained what crime served as the predicate act for manslaughter committed unintentionally during the commission of an unlawful act. And he

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[101] See *State v. Putz*, 266 Neb. 37, 662 N.W.2d 606 (2003), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[102] See, *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated and remanded on other grounds* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[103] *Iromuanya I, supra* note 1, 272 Neb. at 208, 719 N.W.2d at 290.

[104] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

claimed that trial counsel's argument that the only appropriate crime for conviction was involuntary manslaughter was improper and confusing for the following reasons: (1) The jury instructions did not permit the jurors to convict for involuntary manslaughter; (2) "involuntary" was not defined for jurors, so the term was both confusing and contrary to the evidence; and (3) sudden quarrel was the more appropriate manslaughter argument.

Iromuanya also claimed that trial counsel improperly injected race into closing arguments by asking jurors if they would have been frightened if they had been the only white person there with 20 black people encroaching: "It scares the shit out of me, I'm not going to kid you. I'm sorry, Lucky, but that puts a little bit of fear into me." Iromuanya is African-American.

The court concluded that any alleged deficiencies in trial counsel's closing argument did not prejudice Iromuanya because the jury found him guilty of second degree murder. It stated that a sudden quarrel is only relevant to manslaughter. It further found that trial counsel's discussion of race was a reasonable strategic decision to get jurors to put themselves in Iromuanya's place and understand his fear.

[59] "The Constitution prohibits racially biased prosecutorial arguments."[105] But defense counsel's reference to race here was legitimate and obviously distinguishable from the prosecutor's appeal to racial prejudices in the case on which Iromuanya relies.[106] Iromuanya had the burden to allege that trial counsel's closing argument was deficient and prejudiced his defense.[107] We agree that trial counsel's discussion of race in closing arguments was a reasonable attempt to get jurors to view the evidence from Iromuanya's perspective and not ineffective assistance.

Further, as discussed above, because the jurors concluded that Iromuanya intended to kill Jenkins, that intent necessarily transferred to his killing of Cooper under the doctrine of

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[105] *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *U.S. v. Doe*, 903 F.2d 16 (D.C. Cir. 1990).

[106] See *State v. Rogan*, 91 Haw. 405, 984 P.2d 1231 (1999).

[107] See *McGhee, supra* note 2.

transferred intent. Trial counsel was not ineffective for failing to argue otherwise. For the same reason, Iromuanya cannot show prejudice from counsel's failure to better explain involuntary manslaughter in closing arguments.

It is true that trial counsel could have argued that according to Iromuanya's statement, the predicate act for Iromuanya's unintentional killing of Cooper was his unlawful shooting at Jenkins to scare him away. But even if trial counsel had better explained involuntary manslaughter, the result would not have been different. Because the jurors found that Iromuanya intended to kill Jenkins, that intent transferred to his killing of Cooper. Because his intent transferred, there was no basis for finding that he killed Cooper unintentionally.

V. CONCLUSION

The district court did not err in dismissing Iromuanya's motion for postconviction relief without an evidentiary hearing. For all of his claims, Iromuanya has either failed to allege facts that show his counsel's deficient performance or failed to allege facts that show he was prejudiced by his counsel's alleged deficiencies.

AFFIRMED.

JENNIFER BASSINGER, APPELLEE AND CROSS-APPELLANT,
v. NEBRASKA HEART HOSPITAL, APPELLANT
AND CROSS-APPELLEE.
806 N.W.2d 395

Filed December 9, 2011. No. S-10-653.

1. **Workers' Compensation: Appeal and Error.** On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Courts: Appeal and Error.** An appellate court independently decides questions of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Judgments.** The interpretation and meaning of a prior opinion present a question of law.
5. **Courts: Appeal and Error.** Generally, when a party raises an issue for the first time in an appellate court, the court will disregard it because a lower court

cannot commit error in resolving an issue never presented and submitted to it for disposition.

6. ____: ____. A party is not required to ask a lower court not to follow a controlling decision from an appellate court to preserve for appeal an issue that the party claims the appellate court incorrectly decided.
7. **Workers' Compensation: Statutes: Intent: Appeal and Error.** The intent of the Nebraska Workers' Compensation Act is to provide benefits for employees who are injured on the job, and an appellate court will broadly construe the act to accomplish this beneficent purpose.
8. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.
9. **Workers' Compensation: Courts: Jurisdiction.** Because the Workers' Compensation Court does not have equity jurisdiction, it cannot apply remedies of rescission and estoppel that are not statutorily authorized.
10. **Workers' Compensation: Case Overruled.** The Nebraska Supreme Court's decision in *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979), adopting an equitable misrepresentation defense, was clearly erroneous and is overruled.

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

Tiernan T. Siems and Sara A. Lamme, of Erickson & Sederstrom, P.C., for appellant.

Brody J. Ockander, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

The Workers' Compensation trial judge found that the appellee, Jennifer Bassinger, had misrepresented her history of work-related injuries on a preemployment questionnaire and dismissed her petition for benefits. The three-judge review panel reversed, and remanded for further proceedings on whether a causal relationship existed between Bassinger's misrepresentation and her later injury.

In her cross-appeal, Bassinger argues that the review panel exceeded its authority in permitting an employer to deny benefits based on an affirmative misrepresentation defense. Summed up, she claims that the misrepresentation defense that

we adopted in *Hilt Truck Lines, Inc. v. Jones*[1] is a limitation on benefits that is not authorized by the Nebraska Workers' Compensation Act (the Act).[2] We agree.

FACTUAL BACKGROUND

Bassinger's Previous Employment History

In 1996, Bassinger started work as a certified nurse aide (CNA) at a nursing home in Syracuse, Nebraska. In 2000, she strained her lower back muscles while moving a patient, an injury that was treated with physical therapy. Workers' compensation benefits covered the treatment, and she fully recovered.

Beginning in 2001, she worked as a CNA for BryanLGH Medical Center, a hospital in Lincoln, Nebraska. In October, while lifting a patient, she developed right low-back pain. She was treated for chronic sacroiliac joint dysfunction. Later, her physician noted disk problems in addition to the joint problem, but he did not recommend treatment. He did not give Bassinger a permanent impairment rating because her pain was under control. But he noted that she had agreed with his recommendation that she should perform only light-duty work. In November 2003, she agreed to a lump-sum settlement of $5,000 for her injury at BryanLGH Medical Center.

Bassinger's Employment at Nebraska Heart Institute

In March 2006, Bassinger began work as a CNA at Nebraska Heart Hospital (the hospital). The hospital's preemployment questionnaire asked Bassinger to respond to questions about her history of work-related injuries and her physical condition. She reported only her injury at the Syracuse nursing home. She did not report her 2001 injury at BryanLGH Medical Center.

In her preemployment physical, the hospital's nurse reported that Bassinger could perform the physical tests without pain. But in April 2008, while lifting a patient, she injured her back

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[1] *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979).

[2] See Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010 & Supp. 2011).

and experienced instant pain in her lower back and down her leg. She testified that the piercing pain she experienced was different from what she had experienced in 2001. Physical therapy and medications did not alleviate her symptoms from the 2008 injury.

She continued to perform light-duty work at the hospital until she was discharged in July 2008. The hospital discharged her because she could not work during the day, the only time that the hospital offered her light-duty work. In October, she elected to undergo a spinal fusion surgery with a different physician, which successfully alleviated her symptoms.

PROCEDURAL HISTORY

In July 2008, Bassinger petitioned for workers' compensation benefits. In August 2009, the trial judge dismissed her petition. The judge found that Bassinger had willfully misrepresented her work-related injury history when she failed to disclose any information about her 2001 injury. In concluding that the hospital could deny benefits because of Bassinger's misrepresentation, the judge relied on the rule we adopted in *Hilt Truck Lines, Inc*.[3] He concluded that the hospital satisfied the causation component of the rule because the hospital would not have hired her had she truthfully reported her previous injury: "It is clear that [Bassinger's] misrepresentations allowed her to pass through the [hospital's] efforts to screen out people who are physically limited in some way that would make them either incapable of performing the tasks required or somehow be put in danger of reinjury."

Bassinger appealed to the review panel. The review panel addressed only her assignment that the trial judge erred in finding a causal connection between her misrepresentation and her 2008 injury. It concluded that *Hilt Truck Lines, Inc.* required the hospital to show a direct causal relationship between the 2001 injury that Bassinger concealed and her 2008 injury. It reversed the trial judge's order and remanded the case for further findings on causation under its corrected standard.

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[3] *Hilt Truck Lines, Inc., supra* note 1.

ASSIGNMENTS OF ERROR

The hospital assigns that the review panel erred in determining that the trial judge applied the wrong causation standard.

On cross-appeal, Bassinger assigns that the trial judge and review panel improperly applied a misrepresentation defense that the Act does not authorize.

STANDARD OF REVIEW

[1-4] On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. But we independently decide questions of law.[4] Statutory interpretation presents a question of law.[5] The interpretation and meaning of a prior opinion present a question of law.[6]

ANALYSIS

The hospital contends that the trial judge applied the correct causation standard. It argues that the review panel incorrectly interpreted *Hilt Truck Lines, Inc.* to require a direct causal relationship between Bassinger's misrepresentation and her work injury. Bassinger contends that the review panel's direct causation requirement was correct—assuming that *Hilt Truck Lines, Inc.* adopted an affirmative defense for misrepresentation under the Act.

But in her cross-appeal, Bassinger contends that *Hilt Truck Lines, Inc.* created a limitation on workers' compensation benefits that the Act does not authorize. Because we conclude that our decision in *Hilt Truck Lines, Inc.* was clearly erroneous, we do not analyze whether the lower courts correctly applied the causation factor of the misrepresentation defense.[7]

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[4] See *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[5] See *id.*

[6] *State v. Stolen*, 276 Neb. 548, 755 N.W.2d 596 (2008). See, also, *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

[7] See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

Bassinger Has Not Waived the Argument in Her Cross-Appeal

Bassinger contends that the trial court and review panel exceeded their authority by applying a misrepresentation defense because the Act does not authorize such a defense. She argues that because this court's limitation on compensation benefits from *Hilt Truck Lines, Inc.* is not supported by the Act, the trial court's reliance on that decision and the review panel's acceptance of its application were contrary to law.

The hospital responds that Bassinger has waived this argument by not presenting it to the review panel. It alternatively argues that even if she has not waived it, it is without merit because the lower court had no alternative but to follow this court's precedent. The hospital's second argument succinctly sums up why Bassinger has not waived her argument.

[5] It is generally true that when a party raises an issue for the first time in an appellate court, the court will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[8] Alternatively, the rule rests upon the principle that a party may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[9] Neither of these rationales applies here.

[6] The crux of Bassinger's cross-appeal is that our decision in *Hilt Truck Lines, Inc.* was wrong. The hospital cites no authority holding that a party must ask a lower court not to follow a controlling decision from this court to preserve for appeal an issue that the party claims we incorrectly decided. Requiring parties to ask a lower court to ignore our decision would obviously be inconsistent with the doctrine of stare decisis, which compels lower courts to follow our decisions.[10] We conclude that Bassinger has not waived her argument that we erroneously adopted a misrepresentation defense in *Hilt Truck Lines, Inc*.

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[8] See *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[9] See *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[10] See *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009).

Misrepresentation Defense in *Hilt Truck Lines, Inc.*

Although we do not analyze the lower courts' application of the three-factor test that we adopted in *Hilt Truck Lines, Inc.*,[11] we discuss it to explain what we held and why we now overrule it. There, a truckdriver's survivors sought workers' compensation death benefits after he was killed in a work-related crash. The tractor-trailer that he was driving struck and broke through a guardrail. A state trooper opined that the crash was caused by speeding and driving too fast for the weather and road conditions.

The driver died shortly after the trucking company hired him, and the company did not receive his driving records until after his death. Those records showed that in the previous 2 years, under a different name, the driver had three driving under the influence convictions. He had started using a different name shortly before he was hired. It was undisputed that the trucking company would not have hired the driver if it had known of his convictions and that it would have discharged him immediately if it had discovered his true driving record before the accident. But the record showed conflicting evidence whether intoxication had caused the crash and his death.

The Workers' Compensation Court awarded benefits. It concluded that because the evidence was insufficient to support a causal relationship between the false representation and the later accident, it was legally insufficient to void the employment relationship retroactively. It also found that under the statutory affirmative defense, the company had failed to prove that intoxication or intentional negligence caused his death.[12]

We affirmed. We agreed that under the statutory defense, the evidence was insufficient to prove that intoxication or intentional negligence caused the driver's death. We also rejected the trucking company's claim that the employment contract was void ab initio because of the driver's misrepresentations. We first stated an employment contract rule from a legal

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[11] *Hilt Truck Lines, Inc., supra* note 1.

[12] See § 48-127.

encyclopedia that essentially incorporated the misrepresentation rule:

> Plaintiff concedes the general rule that false statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation.[13]

Next, we adopted a common-law misrepresentation defense from Professor Larson's treatise to govern when an applicant's misrepresentations will bar recovery of workers' compensation benefits:

> "[I]t has been held that employment which has been obtained by the making of false statements—even criminally false statements—whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. . . . The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wil[l]fully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury."[14]

Under this rule, we affirmed the Workers' Compensation Court's finding that the evidence was insufficient to show a causal connection between the driver's misrepresentations and his subsequent accident:

> [I]ssues of causation are for determination by the fact-finder. . . . Although it is quite clear from the findings of fact here that the contract of employment was voidable or subject to rescission upon discovery of the

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[13] See *Hilt Truck Lines, Inc., supra* note 1, 204 Neb. at 121, 281 N.W.2d at 403, citing 56 C.J.S. *Master and Servant* § 180(e) (1948).

[14] *Id.* See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 66.04 (2009).

misrepresentations, the employment contract was not void from the beginning and the misrepresentations did not destroy compensation coverage.[15]

Common-Law Misrepresentation Defense Is Incompatible With the Act

Bassinger argues that *Hilt Truck Lines, Inc.* is an anomaly among our cases and contrary to our holdings that the Workers' Compensation Court has only the authority to act that is conferred upon it by the Act. Substantively, the hospital contends that the Act supports the misrepresentation defense. It points to § 48-102, which provides an employer with a statutory affirmative defense: "[I]t shall not be a defense (a) that the employee was negligent, unless it shall also appear that such negligence was willful, or that the employee was in a state of intoxication . . . ." The hospital contends that "any employee that knowingly and willingly makes a misrepresentation of the employee's physical condition, which misrepresentation causes an injury to the employee, commits a deliberate act knowingly done, which would constitute willful negligence, and therefore bar recovery."[16] We disagree that § 48-102 authorizes the misrepresentation defense.

The plain language of § 48-102 creates an affirmative defense for injury caused by an *employee's* willful negligence. Persons who misrepresent their physical condition to obtain employment are applicants, not employees. Notably, in *Hilt Truck Lines, Inc.*, we separately analyzed and affirmed the Workers' Compensation Court's conclusions about whether the benefits were barred by the statutory defense for willful negligence or intoxication, or the common-law misrepresentation defense that we adopted.

We conclude that the statutory defense under § 48-102 does not apply to applicants.

Having disposed of the hospital's argument, we now consider Bassinger's argument that the Act does not authorize a misrepresentation defense. Some states have workers' compensation

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[15] *Id.* at 122, 281 N.W.2d at 403.

[16] Reply brief and answer to brief on cross-appeal for appellant at 14.

statutes that exclude coverage for employees who knowingly made false statements about their physical condition in an application or preemployment questionnaire.[17] And it is true that many courts have adopted the "Larson rule" as a common-law misrepresentation defense. At least 12 courts, besides this court, currently apply the defense, despite the lack of a statute.[18] Conversely, many courts either currently hold that an applicant's misrepresentations to obtain employment cannot bar workers' compensation benefits absent statutory authorization or held this before the defense was codified by statute.[19]

Moreover, Bassinger correctly states that *Hilt Truck Lines, Inc.* is an exception in our workers' compensation jurisprudence. We have not applied or considered the misrepresentation defense that we adopted there in any other workers' compensation case. This is significant because in *Hilt Truck Lines, Inc.*, we did not analyze whether a common-law defense was compatible with the Act. We do so now.

[7] We have previously explained that workers' compensation laws reflect a compromise between employers and employees. Under these statutes, employees give up the complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries.[20] So we have consistently held that the Act's intent is to provide benefits for employees who are injured on the job, and we will broadly construe the Act to accomplish this beneficent purpose.[21]

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[17] See, *Akef v. BASF Corp.*, 275 N.J. Super. 30, 645 A.2d 158 (1994) (citing statutes); 2 John P. Ludington et al., Modern Workers Compensation § 115:6 n.43 (Matthew J. Canavan & Donna T. Rogers eds., 1993) (same).

[18] See Annot., 12 A.L.R.5th 658 (1993 & Supp. 2011).

[19] See, *Akef, supra* note 17 (citing cases); 12 A.L.R.5th, *supra* note 18 (same).

[20] See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003) (citation omitted).

[21] See *id.* Accord, e.g., *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

Courts holding that misrepresentations to obtain employment cannot defeat the right to compensation benefits have concluded that because of the compromise that their workers' compensation laws represent, the issue is one for legislatures to resolve: "'This problem is a legislative one and in the absence of a clear legislative intent, we do not feel at liberty to impose any limitations or exceptions upon the employee's statutory right to recover compensation.'"[22] They have concluded that judicially engrafting an affirmative defense onto their workers' compensation law to deny benefits months or years after the employee was hired is inconsistent with liberally construing these statutes in favor of providing benefits.[23] And they have reasoned that a misrepresentation defense would resurrect barriers to compensation based on an employee's fault and conflict with a legislative intent to reduce litigation by eliminating most employer defenses.[24]

We share these concerns. We believe that the Larson rule lacks a coherent rationale apart from being a rule of equity based on public policy concerns. As stated by Professor Larson, the rule does not rest on "purely contractual tests, [but] is a common-sense rule made up of a mix of contract, causation, and estoppel ingredients."[25] In effect, the Larson rule permits rescission, but only in limited circumstances.

First, the Larson rule reflects a concern that it is inequitable to permit an employer to deny compensation benefits after it has obtained the employee's services for an extended period. This concern has great force in workers' compensation cases because employees have given up the right to sue the defendant for full compensation. Second, it reflects a concern that

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[22] *Marriott Corp. v. Industrial Comm'n of Arizona*, 147 Ariz. 116, 121, 708 P.2d 1307, 1312 (1985). Accord, *Akef, supra* note 17; *Stovall v. Sally Salmon Seafood*, 306 Or. 25, 757 P.2d 410 (1988); *Blue Bell Printing v. W.C.A.B.*, 115 Pa. Commw. 203, 539 A.2d 933 (1988).

[23] See, *Akef, supra* note 17; *Stovall, supra* note 22.

[24] See, *Stovall, supra* note 22; *Goldstine v. Jensen Pre-Cast*, 102 Nev. 630, 729 P.2d 1355 (1986); *Marriott Corp., supra* note 22.

[25] See 3 Larson & Larson, *supra* note 14 at 66-26.

an applicant's misrepresentations about his or her physical condition could frustrate the employer's attempt to protect itself from liability for the aggravation of a previous injury or a causally related injury.

Both of these concerns are obviously issues of public policy. The Larson rule balances these concerns through a unique application of rescission and estoppel rules. The employer is estopped from rescinding the contract for the employee's misrepresentation about his or her physical condition unless the misrepresentation resulted in the very injury that the employer was attempting to protect itself from by asking the applicant to respond to questions about his or her physical condition and work-related injuries.

[8,9] The Larson rule may reflect a laudable goal. But it is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[26] For example, one court has declined to adopt the Larson rule because the intent of the workers' compensation statutes was to encourage employers to hire applicants with previous injuries.[27] Equally important, this court has repeatedly held that the Workers' Compensation Court does not have equity jurisdiction.[28] So it cannot apply remedies of rescission and estoppel that are not statutorily authorized.

For example, under Nebraska case law, the absence of equity jurisdiction means that the Workers' Compensation Court (1) does not have contempt power to enforce its awards[29]; (2) cannot give credit to an employer for wages that it paid to an employee, who had returned to work, before the employer filed for a modification[30]; (3) cannot permit an insurer's posttrial

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[26] *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

[27] See *Akef, supra* note 17.

[28] See, e.g., *Burnham v. Pacesetter Corp.*, 280 Neb. 707, 789 N.W.2d 913 (2010); *Risor, supra* note 4.

[29] *Burnham, supra* note 28.

[30] *Daugherty v. County of Douglas*, 18 Neb. App. 228, 778 N.W.2d 515 (2010).

intervention in an appeal[31]; and (4) cannot consider whether an employer *is estopped* from denying coverage to an independent contractor claimant because it took out a workers' compensation insurance policy to cover the claimant.[32]

We have also held that when an employer seeks to enforce its subrogation interest in a third-party settlement through an action in district court, the district court may not bar the claim on equitable grounds: "Whether the employer's defense against the workers' compensation claim is reasonable is determined by the Workers' Compensation Court under the . . . Act, not in the district court by resort to equitable principles."[33] Finally, we have stated that we have no authority to apply equitable principles to alleviate the harshness of a claimant's recovery under the Act.[34]

[10] The unavoidable consequence of these holdings is that our adoption of the equitable misrepresentation defense in *Hilt Truck Lines, Inc.* was clearly erroneous. We therefore overrule *Hilt Truck Lines, Inc.* and reverse the judgment of the review panel of the Workers' Compensation Court. We remand the cause to the review panel and direct it to remand the case to the trial judge for further proceedings to determine whether Bassinger is entitled to benefits without regard to the hospital's misrepresentation defense.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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[31] *Risor, supra* note 4.

[32] *Anthony v. Pre-Fab Transit Co.*, 239 Neb. 404, 476 N.W.2d 559 (1991).

[33] *Burns v. Nielsen*, 273 Neb. 724, 735, 732 N.W.2d 640, 650 (2007).

[34] See *Runyan v. Lockwood Graders, Inc.*, 176 Neb. 676, 127 N.W.2d 186 (1964).

CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE, V. WASTE CONNECTIONS OF NEBRASKA, INC., APPELLANT.

809 N.W.2d 725

Filed December 9, 2011. No. S-10-753.

1. **Contracts: Parties: Intent: Words and Phrases.** The term "implied contract" refers to that class of obligations that arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.
2. **Contracts: Intent.** If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.
3. **Contracts.** A claim that the parties created an enforceable contract generally presents an action at law.
4. **Contracts: Restitution: Unjust Enrichment.** A claim that a court should imply a promise or obligation to prevent unjust enrichment is sometimes referred to as an "implied-in-law contract" or a "quasi-contract." Quasi-contract claims are restitution claims to prevent unjust enrichment.
5. **Contracts: Restitution.** Any quasi-contract claim for restitution is an action at law.
6. **Actions: Contracts: Equity: Restitution.** An action in assumpsit for money had and received may be brought where a party has received money that in equity and good conscience should be repaid to another. When a party uses an assumpsit action in this sense, it is a quasi-contract claim sounding in restitution.
7. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. An appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party. And that party is entitled to every reasonable inference deducible from the evidence.
8. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
9. **Contracts.** Contract interpretation presents a question of law.
10. **Contracts: Restitution.** When a plaintiff claims that a contract governs the parties' rights and obligations and, alternatively, that it is entitled to restitution under a quasi-contract claim, a court should address the contract claim first.
11. **Contracts: Restitution: Unjust Enrichment.** Restitution is subordinate to contract as an organizing principle of private relationships, so the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach.
12. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.

13. **Contracts: Parties.** A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
14. ____: ____. Unless the parties have stated otherwise in an express agreement, extrinsic standards can only provide a basis for understanding a contract.
15. **Breach of Contract: Parties: Intent.** The circumstances must show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.
16. **Contracts: Parties: Intent.** If the parties' manifestations or conduct shows that they do not intend to be bound by a contract unless they agree upon the price for services and they fail to agree, there is no contract.
17. **Contracts: Proof.** The standard of proof for a quasi-contract claim is a preponderance, or proof by the greater weight, of the evidence.
18. **Restitution: Unjust Enrichment.** To recover under a theory of unjust enrichment, the plaintiff must allege facts that the law of restitution would recognize as unjust enrichment.
19. **Unjust Enrichment: Words and Phrases.** Unjust enrichment means a transfer of a benefit without adequate legal ground. It results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.
20. **Duress.** Normally, a plaintiff cannot recover money voluntarily paid under a claim of right to payment if the plaintiff knew of facts that would permit the plaintiff to dispute the claim and withhold payment. But exceptions exist if the plaintiff shows that its consent was imperfectly voluntary, or ineffective, for a legally recognized reason.
21. **Unjust Enrichment: Restitution: Duress.** Duress is an exception to the voluntary payment rule. If a plaintiff's overpayment to the defendant was induced by duress, the plaintiff can seek restitution to the extent that the defendant was unjustly enriched.
22. **Contracts: Parties: Restitution.** If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the dispute obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.
23. **Duress: Words and Phrases.** Duress is coercion that is wrongful as a matter of law. Lawful coercion becomes impermissible when employed to support a bad faith demand: one that the party asserting it knows (or should know) to be unjustified.
24. **Breach of Contract: Parties: Duress.** Economic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement.

25. **Contracts: Duress.** To be voidable because of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.
26. ____: ____. The economic duress rules apply to modifications of a contract.
27. ____: ____. Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact.
28. **Contracts: Parties: Duress.** A weaker party's assent to a unilateral contract modification, which is to that party's disadvantage, should not be implied from its conduct when the weaker party has shown that its assent was obtained through economic duress.
29. **Restitution: Unjust Enrichment.** The measure of restitution is normally a defendant's unjust gain.
30. **Contracts: Courts.** A court will not supply a term necessary to create a binding contract. Nor will a court rewrite a contract or speculate as to terms of the contract which the parties have not seen fit to include. It is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.
31. **Contracts.** When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. This rule applies to circumstances showing that the parties to a binding contract have failed to negotiate a term to cover a future contingency.
32. ____. A court should not engage in a hypothetical bargaining analysis if applying interpretative principles shows that the parties did not agree on a contract term necessary to determining their rights and duties. In that circumstance, it must supply a term that comports with community standards of fairness and policy.
33. ____. Good faith performance excludes an abuse of a power to specify the terms of a contract.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

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

CONNOLLY, J.

I. SUMMARY

This dispute is over the rates that the appellant, Waste Connections of Nebraska, Inc. (Waste Connections), charged

to dispose of solid waste for the City of Scottsbluff (the City). The parties had two separate contracts. Under the first contract, the City's trucks collected the waste and took it to Waste Connections' transfer station. Waste Connections then hauled the waste to a landfill that it operated. After this contract expired, Waste Connections charged the City $42.50 per ton for temporarily accepting its waste at the transfer station. About a month later, Waste Connections increased the City's rate to $60 per ton.

Under the second contract, Waste Connections performed collection and disposal services for the City and charged the same disposal rate that it charged under the first contract. So after the first contract expired, Waste Collections increased the City's rate to $60 per ton under the second contract.

After a bench trial, the district court entered judgment for the City. This appeal presents several contract, quasi-contract, and restitution issues. We affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

Around 1992, the City closed its landfill. To negotiate better rates for using another landfill site, the City and other western communities formed an interlocal organization called SWAP. SWAP is an acronym for Solid Waste Agency of the Panhandle. In November 1996, SWAP contracted with J Bar J Land, Inc., for solid waste disposal services (the SWAP contract) for 10 years, until November 30, 2006. J Bar J Land and another company were Waste Connections' predecessors in interest. Waste Connections acquired the entire operation in 2000, and we will refer only to Waste Connections for ease of discussion.

1. The SWAP Contract

Waste Connections operated a transfer station for collecting and weighing waste from SWAP members before hauling it to its landfill in an over-the-road truck. The SWAP members collected and hauled their solid waste to the transfer station at their own expense. Hauling the waste to the landfill, which was south of Ogallala, Nebraska, required a 200-mile round trip from the transfer station. Waste Connections also collected

the waste for some smaller communities, but the City's waste accounted for about 70 percent of Waste Connection's business. The City wielded most of the voting power on the SWAP board.

The parties amended their agreement in December 1997 and again in November 1998. The amended agreement expired on June 30, 2007. Under the amended agreement, Waste Connections originally charged a $35-per-ton disposal rate. This rate included a base rate of $20.50 per ton, which could increase annually on adjustments pegged to the Consumer Price Index; a scheduled "Tipping Fee," which was paid to the landfill; and a state surcharge. Waste Connections agreed not to charge any SWAP member more than it charged other communities in its service area.

2. Roll-Off Contract

In April 2005, the City entered into an additional and separate contract with Waste Connections, with a 3-year term scheduled to expire on April 30, 2008. The parties refer to this contract as the "roll-off" contract. Under the roll-off contract, Waste Connections leased self-contained compactor units to the City. Waste Connections also provided the City, at no charge, with open roll-off containers for construction waste. The City charged the users of the compactor or roll-off containers; Waste Connections charged the City to collect the units and dispose of their contents at a SWAP-approved facility. The parties agreed that Waste Connections would pay for disposal services under the rate established by the SWAP contract and that the City would reimburse it.

3. Waste Connections Increases Its Rates

Shawn Green, the district manager for Waste Connections, knew that the company's fuel costs would be substantially increasing in January 2006. Beginning in October 2005, the parties disputed the price of Waste Connections' services. Because of increasing fuel costs, Waste Connections sought to increase its rate. The SWAP board refused to agree or only approved a smaller increase. The City began looking at other options and informed Green that it was considering contracting

with the city of Gering, Nebraska, to accept the City's waste at Gering's landfill. Gering was not a SWAP member.

Shortly before the SWAP contract expired, the City informed Green that if the City reached an agreement with Gering, it would terminate the roll-off contract with Waste Connections. Green advised SWAP that Waste Connections wanted another long-term agreement. He offered a 5- or 10-year agreement that allowed the City to retain the lower rate with Consumer Price Index adjustments.

On June 30, 2007, when the SWAP contract expired, Waste Connections' rate was $40.52 per ton. On July 2, the next business day, Waste Connections increased its rate for accepting the City's waste at the transfer station to $42.50 per ton. It charged this rate to any person or entity using the transfer station. The city manager testified that the City knew Waste Connections was losing money and believed that this rate was reasonable.

4. The City Enters Into an Agreement With Gering

Also on July 2, 2007, the City entered into an interlocal agreement with Gering to dispose of its waste at Gering's landfill. Subject to the City's terminating its roll-off contract with Waste Connections, Gering also contracted to provide roll-off and compactor unit services directly to the City's businesses or citizens. But under the landfill agreement, Gering would not begin accepting the City's waste until November 1, 2007. Because of regulatory requirements, Gering could not immediately accept the City's waste. The City did not consider other landfills to be reasonable alternatives to Waste Connections because of their distance or inability to accept the City's volume of waste. So it continued to use Waste Connections' transfer station until Gering could accept the City's waste.

On July 9, 2007, Gering passed a resolution to collect the City's waste, including services for roll-off and compactor units, as soon as the time restriction expired under Neb. Rev. Stat. § 18-1752.02 (Reissue 2007). That section required Gering to wait 1 year, until July 8, 2008, to perform the

collection services that Waste Connections had been performing under the roll-off contract.

On July 10, 2007, Gering notified Waste Connections of its intent to provide the City's waste collection services in 1 year. Green responded that Waste Connections would continue to provide services under the roll-off contract until July 2008 unless otherwise notified.

On August 7, 2007, Waste Connections increased its rate for accepting the City's waste at the transfer station to $60 per ton. It charged the increased rate only to the City. Also in August, Waste Connections increased the disposal rate that it charged the City under the roll-off contract to $60 per ton. Within 2 to 3 weeks of receiving a charge ticket with the increased rate, the City objected to the increase in price. Green responded that the rate reflected its increased costs, including fuel costs. The City terminated its SWAP membership on November 1, when it began taking its waste to Gering's landfill. In May 2008, the City gave Waste Connections 60 days' notice that it was terminating the roll-off contract. The notice stated that the City would consider the contract terminated on July 8.

5. Court's Order

(a) The Court's Award Under the SWAP Contract

In its complaint, the City alleged it was entitled to recover the payments that Waste Connections had received for disposal services above the rate of $42.50 per ton. Under theories of an implied contract and unjust enrichment, the City claimed that Waste Connections received payments in excess of the reasonable value of its services.

Regarding Waste Connections' services under the SWAP contract, the court agreed that Waste Connections had been unjustly enriched by the City's overpayments for its services at the transfer station. The City had continued to pay Waste Connections' charges after it increased its rate to $60 per ton. But the court concluded that the City had protested and had no reasonable alternative but to use the transfer station because of the unexpected delay in gaining access to Gering's landfill. It concluded that the parties had intended to and did continue

their contractual relationship after the SWAP contract expired but had failed to agree on a price.

The court concluded that immediately after the SWAP contract expired, Waste Connections had unilaterally determined that the $42.50-per-ton rate was a reasonable rate. Thus, the court determined that this rate was the best evidence of the reasonable value of its services. It ruled that the City was entitled to the difference between the charges it paid under the reasonable rate of $42.50 per ton and the charges it paid under the unjustified rate of $60 per ton, or $51,280.82. Because it considered the City's payments involuntary under these circumstances, it rejected Waste Connections' defenses of waiver, estoppel, and failure to mitigate.

(b) The Court's Award Under the Roll-Off Contract

The court determined that the roll-off contract was valid and in effect until Gering took over providing those services. It recognized that the disposal rate under the roll-off contract was determined by reference to the SWAP contract and that the roll-off contract failed to specify how the rate would be determined after the SWAP contract expired. The court concluded, however, that the roll-off contract did not authorize Waste Connections to unilaterally increase the disposal rate beyond the last rate that the SWAP board had authorized under the SWAP contract, which was $40.52 per ton. But in its pleadings, the City had asked for the difference in charges between the $42.50-per-ton rate and $60-per-ton rate. So to calculate what Waste Connections should have charged the City, the court used the $42.50-per-ton rate as a judicial admission of the correct charges. It concluded that Waste Connections was unjustly enriched by the amount that it had received above the rate of $42.50 per ton. It awarded the City $48,124.11 for these overpayments.

III. ASSIGNMENTS OF ERROR

Waste Connections assigns that the district court erred as follows:

(1) ruling that the expired SWAP contract controlled the disposal rate under the roll-off contract;

(2) failing to apply a clear and convincing burden of proof to the City's unjust enrichment claim;

(3) concluding that justice and fairness required Waste Connections to refund any charges to the City;

(4) failing to require the City to articulate a specific legal principle permitting it to recover under a theory of unjust enrichment;

(5) finding that after the SWAP contract expired, the reasonable disposal rate was $42.50 per ton;

(6) finding that Waste Connections' fee of $60 per ton was unjust without addressing Waste Connections' reasons for charging the fee;

(7) failing to apply the requirements for an implied contract theory of recovery to the extent that the court relied on this theory;

(8) failing to address Waste Connections' claim that the City should be estopped from claiming that the increased rate was unjust because it had voluntarily paid the charges under this rate;

(9) failing to find that the City had waived its right to recover any of the increased charges by its actions or inactions;

(10) ruling that the City was not required to mitigate its damages for its payments made under the roll-off contract; and

(11) ruling that the evidence failed to show that the City had failed to mitigate its damages.

IV. NATURE OF THE CITY'S CLAIMS

Before addressing Waste Connections' assignments of error, it would be helpful to determine the type of action that is under review and, thus, our standard of review. The parties' arguments and the court's order reflect some confusion about the distinction between implied contracts and quasi-contracts and whether an unjust enrichment claim is an action at law or at equity. So we pause to clarify these issues.

1. Implied Contracts Versus Quasi-Contracts

[1-3] The term "implied contract" refers to that class of obligations that arises from mutual agreement and intent to promise, when the agreement and promise have simply not

been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.[1] If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.[2] A claim that the parties created an enforceable contract generally presents an action at law.[3]

[4] In contrast, a claim that a court should imply a promise or obligation to prevent unjust enrichment is sometimes referred to as an "implied-in-law contract" or a "quasi-contract." A quasi-contract is not a contract. These claims are distinct from implied contract claims. Quasi-contract claims are restitution claims to prevent unjust enrichment.[4] Quasi-contractual obligations do not arise from an agreement. The law imposes them when justice and equity require the defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff's expense.[5] The defendant's liability arises under the law of restitution, not contract.[6] In our analysis, the term "implied contract" refers only to an "implied-in-fact contract."

2. Nature of Quasi-Contract Claims

[5] Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law determines an appellate court's

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[1] See, *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000); *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999).

[2] See Restatement (Second) of Contracts § 4 & comment *a*. (1981).

[3] See, *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

[4] See 1 Dan B. Dobbs, Dobbs Law of Remedies § 4.2(3) (2d ed. 1993).

[5] See, *Professional Recruiters v. Oliver*, 235 Neb. 508, 456 N.W.2d 103 (1990); *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 326 N.W.2d 182 (1982), quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* § 2 (1973); *First Nat. Bank v. Fairchild*, 118 Neb. 425, 225 N.W. 32 (1929); Dobbs, *supra* note 4, § 4.1(1).

[6] Restatement (Third) of Restitution and Unjust Enrichment § 1, comment *a*. (2011).

scope of review.[7] As stated, quasi-contract claims are restitution claims. Historically, restitution, in different forms, developed separately in both courts of law and courts of equity.[8] All quasi-contract claims developed out of the assumpsit form of action, which a party brought in a court of law.[9] So we hold that any quasi-contract claim for restitution is an action at law.[10]

3. Claims Presented in City's Complaint

Without attempting to characterize the City's action, Waste Connections agrees that this is an action at law. But it argues that it is not a contract action. Some of the City's claims, however, are enforceable contract claims. The City alleged that the parties continued to perform their obligations under the SWAP contract after it expired. The parties litigated this issue at trial, and the court ruled that the parties had continued their relationship under the SWAP contract. The court also ruled that the roll-off contract was valid and in force. So we consider enforceable contract claims to be a part of this action.[11] As stated, the City's claim that the parties created an enforceable contract is an action at law.[12]

But the City also purported to raise two separate theories of recovery: an implied contract and unjust enrichment. It alleged that an agreement that the City would pay the reasonable value of Waste Connections' services was implied. And it alleged that Waste Connections had been unjustly enriched by its excessive charges. But the City did not claim that Waste Connections had breached an implied contract. Instead, it asked the court to order Waste Connections to disgorge the City's overpayments that it had received.

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[7] See *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 121, 738 N.W.2d 813 (2007).

[8] See Dobbs, *supra* note 4, §§ 1.1 and 1.2.

[9] See *id.*, §§ 4.2(1) and 4.2(3).

[10] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 4, comments *c.* and *d.*

[11] See Neb. Ct. R. Pldg. § 6-1115(b).

[12] See, *Donaldson, supra* note 3; *Gard, supra* note 3.

[6] We have held that

> [a]n action in assumpsit for money had and received may be brought where a party has received money [that] 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.[13]

When a party uses an assumpsit action in this sense, it is a quasi-contract claim sounding in restitution. Restitution is predominantly the law of unjust enrichment.[14] And we have stated several times that an assumpsit action for money had and received is an action at law.[15]

Because the City sought to disgorge overpayments to prevent unjust enrichment, its allegations presented an assumpsit claim for restitution[16] under the alleged continuation of the SWAP contract and the roll-off contract. And the court granted restitution by imposing a quasi-contractual obligation. We conclude that the City's purported separate theories of "implied contract" and "unjust enrichment" claims presented a quasi-contract claim, which is an action at law.

V. STANDARD OF REVIEW

[7-9] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. We do not reweigh the evidence but consider the judgment in a light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party. And that party is entitled to every reasonable inference deducible from the evidence.[17] But

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[13] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 201, 794 N.W.2d 700, 711 (2011).

[14] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 1, comment *b*.

[15] See, e.g., *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000).

[16] See *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[17] See *Hastings State Bank v. Misle, ante* p. 1, 804 N.W.2d 805 (2011).

we independently review questions of law decided by a lower court.[18] Contract interpretation presents a question of law.[19]

VI. ANALYSIS

1. Charges for Disposal Services at the Transfer Station After the SWAP Contract Expired

(a) The Parties Were Not Bound by the Terms of the Expired SWAP Contract

Waste Connections argues that the court erred in concluding that it could not charge $60 per ton, because the SWAP contract no longer governed the price of its services. It argues that the SWAP contract expired by its terms on June 30, 2007. The City concedes that the SWAP contract expired on this date. But it contends that because Waste Connections continued to provide services and the City continued to use its services, an implied contract arose between the parties that required the City to pay the reasonable value of the disposal services.

[10,11] When a plaintiff claims that a contract governs the parties' rights and obligations and, alternatively, that it is entitled to restitution under a quasi-contract claim, a court should address the contract claim first. We have held that a contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.[20] Stated differently, restitution is subordinate to contract as an organizing principle of private relationships: "[T]he terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."[21] So we first address the City's claim that the parties were continuing to perform their SWAP contract obligations.

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[18] *Johnson v. Johnson, ante* p. 42, 803 N.W.2d 420 (2011).

[19] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[20] See *Professional Recruiters, supra* note 5.

[21] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 2, comment *c*. at 17.

The parties obviously could have agreed to extend the SWAP agreement before it expired.[22] But the contract did not provide for automatic renewals, and the City concedes that it expired. Whether they intended to be bound by a new contract with the same terms presents a factual question, and, except in the clearest cases, the question is for the finder of fact to resolve.[23]

Following the City's lead, the court mistakenly conflated the implied contract claim with the City's quasi-contract claim. But the question is, aside from whether Waste Connections was unjustly enriched: Did the circumstances show that the parties intended to be bound by the same terms of their expired contract?

[12,13] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.[24] A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.[25]

In limited circumstances, the parties' failure to specify an essential term does not prevent the formation of a contract. The Restatement (Second) of Contracts[26] provides that "the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon." The parties' reference to an extrinsic standard can render an essential term reasonably certain.[27] Sometimes, a court can also ascertain

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[22] See, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 352 N.W.2d 556 (1984).

[23] See *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

[24] *Id.*

[25] *Id.*

[26] Restatement (Second) of Contracts, *supra* note 2, § 33, comment *a*. at 92.

[27] See, *Gerhold Concrete Co., supra* note 23; *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness standard.[28]

[14-16] But unless the parties have stated otherwise in an express agreement, extrinsic standards can only provide a basis for understanding a contract.[29] The circumstances must still show that the parties manifested an intent to be bound by a contract. And their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.[30] "The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound[.]"[31] As relevant here, if the parties' manifestations or conduct shows that they do not intend to be bound by a contract unless they agree upon the price for services and they fail to agree, there is no contract.[32]

We agree with Waste Connections that the parties were not operating under the terms and conditions of the expired SWAP contract, despite failing to agree on the price of services. The parties' conduct showed that the price of services would have been an essential term to any agreement to extend that contract and that Waste Connections never agreed to be bound by those terms. Moreover, their conduct did not show an intent to be bound by the expired contract in any other sense. So the court was clearly wrong in concluding that Waste Connections was accepting the City's waste at the transfer station under an implied agreement to continue the terms of the SWAP contract.

(b) An Implied Contract Existed for Temporary Services

Despite the court's incorrect conclusion that the parties were operating under the terms of the expired SWAP contract,

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[28] See Restatement (Second) of Contracts, *supra* note 2, § 33.

[29] See, e.g., *id.*, § 223.

[30] See *id.*, § 33.

[31] *Id.*, comment *f.* at 95.

[32] See *id.*, comment *e.*

the evidence showed that the parties were operating under an implied contract for temporary disposal services. But the new contract did not require the court to supply a missing term.

The city manager testified that he believed the parties were operating under the SWAP agreement based on his conversations with Green, the district manager for Waste Connections. Because of these conversations, he understood that Waste Connections would continue to accept the City's waste at the transfer station and that the City would pay for its services. The city manager clearly meant that Waste Connections would continue to accept the City's waste until the Gering landfill was available because after this date, the City would be using Gering's landfill. And Green knew that Waste Connections would be providing its services only until the Gering landfill became available to the City in November.

These negotiations established that Waste Connections had agreed to temporarily accept waste from the City's trash trucks at its transfer station until November 1, 2007. Green testified that before the SWAP contract expired, he had informed the mayor that if the parties did not reach an agreement for a SWAP contract, the price of Waste Connections' services would go up substantially. Immediately after the SWAP contract expired, Waste Connections increased its rate at the transfer station to $42.50 per ton. This price was reflected on each charge slip that the City's drivers received from the transfer station and on the City's monthly invoice. The City manifested its assent to Waste Connections' price by paying for its services without protest.

It is true that Waste Connections simultaneously raised its price to $42.50 per ton for any individual customer bringing solid waste to the transfer station. But despite that action, Waste Connections would not have accepted the City's volume of waste without planning, and its negotiations with the City showed that it was not treating the City as just another customer. If that were true, in August 2007, it would have also raised its price to $60 per ton for all customers. In sum, the evidence showed that the parties negotiated for services, that the City assented to Waste Connections' price ($42.50 per ton), and that an implied contract existed between the parties for temporary disposal services at the transfer station.

Although the City continued to pay for Waste Connections' services when it increased the disposal rate to $60 per ton, it did so under protest. The City's restitution claim raised only the $60-per-ton disposal rate. Having determined that an implied contract for temporary services existed, we consider Waste Connections' claims that the court incorrectly applied unjust enrichment principles.

(c) Standard of Proof for Quasi-Contract Claims

Before reaching the merits of Waste Connections' challenge to the unjust enrichment ruling, we address its argument that the court erred in failing to require clear and convincing proof for any unjust enrichment claim. Waste Connections contends that a clear and convincing standard of proof applied here. But the cases it cites show only that we have applied a clear and convincing burden of proof in actions to impose a constructive trust for the defendant's alleged fraud or constructive fraud.[33]

[17] An action to impose a constructive trust is an equitable action.[34] In contrast, we do not impose a clear and convincing burden of proof for fraud claims in actions at law.[35] As discussed, a quasi-contract claim is an action at law. We recognize that some courts have imposed a clear and convincing standard of proof in actions to avoid a contract because of duress.[36] But the City was not seeking to avoid a contract. It was seeking to recover an overpayment under a valid contract to prevent unjust enrichment. Courts generally require proof by a preponderance, or the "greater weight," of the evidence for quasi-contract

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[33] See, *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007), citing *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[34] See *Johnson v. Anderson*, 278 Neb. 500, 771 N.W.2d 565 (2009).

[35] See, *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

[36] See 28 Samuel Williston, A Treatise on the Law of Contracts § 71:10 (Richard A. Lord ed., 4th ed. 2003).

claims.[37] We conclude that a preponderance standard is appropriate here.

(d) While the Parties Were Operating Under Their Implied Contract, the City Paid Waste Connections' $60-Per-Ton Rate Under Economic Duress

Relying on our decision in *Wrede v. Exchange Bank of Gibbon*,[38] Waste Connections contends that the court erred in failing to require the City to articulate a specific legal principle underlying its theory of unjust enrichment. In *Wrede*, we stated:

> Although it appears we have not expressly so written heretofore, there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of assumpsit for money had and received. . . . Stated otherwise, one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contract right.[39]

We have stated this rule in other cases since *Wrede* was decided.[40] But as we have explained, much of the law of restitution developed in actions at law. So this rule is incorrect to the extent that it implies that a restitution claim for unjust enrichment is always an action in equity. As stated, an assumpsit action for money had and received is a quasi-contract claim for restitution, which presents an action at law. So the rule also incorrectly implies that a plaintiff must advance an equitable theory of recovery to prevail in an action at law.

[18] The confusion reflected in this rule stems from the equitable nature of restitution liability even when it is imposed

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[37] See, e.g., *Key Pontiac, Inc. v. Blue Grass Sav. Bank*, 265 N.W.2d 906 (Iowa 1978); 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 87 and 164 (2011).

[38] *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

[39] *Id.* at 917, 531 N.W.2d at 530.

[40] See, *Kissinger, supra* note 15; *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

in an action at law. It is also true that a court exercises its equitable powers when it determines a just and equitable restitution remedy. But the nature of the remedy does not determine the nature of the cause of action. Restitution constitutes "an independent basis of liability in common-law legal systems—comparable in this respect to a liability in contract or tort."[41] And as explained, the origin of that liability could have been in an action at law or equity. So we clarify our holding in *Wrede* as follows: To recover under a theory of unjust enrichment, the plaintiff must allege facts that the law of restitution would recognize as unjust enrichment.

[19] This rule does not mean that the decisional law must have recognized a specific fact pattern as unjust enrichment. Unjust enrichment is a flexible concept. The Restatement (Third) of Restitution and Unjust Enrichment[42] clarifies that its categories of unjust enrichment do not constitute an exclusive list. But it is a bedrock principle of restitution that unjust enrichment means a "transfer of a benefit without adequate legal ground."[43] "[I]t results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights."[44]

[20] The issue here involves Waste Connections' purported unilateral modification of its agreement with the City for temporary services by increasing its rate to $60 per ton. Normally, a plaintiff cannot recover money voluntarily paid under a claim of right to payment if the plaintiff knew of facts that would permit the plaintiff to dispute the claim and withhold payment.[45] But exceptions exist if the plaintiff shows that its

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[41] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 1, comment *a*. at 3.

[42] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6.

[43] *Id.*, § 1, comment *b.* at 6.

[44] *Id.* at 5.

[45] See, *Malec v. ASCAP*, 146 Neb. 358, 19 N.W.2d 540 (1945); Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 6, comment *e*.; 66 Am. Jur. 2d, *supra* note 37, § 92. Compare *First Nat. Bank, supra* note 5.

consent was imperfectly voluntary, or ineffective, for a legally recognized reason.[46]

[21,22] One of the exceptions to the voluntary payment rule is duress.[47] If a plaintiff's overpayment to the defendant was induced by duress, the plaintiff can seek restitution to the extent that the defendant was unjustly enriched.[48] The Restatement (Third) of Restitution and Unjust Enrichment specifically includes restitution claims for performance in excess of contractual requirements that result in the recipient's unjust enrichment:

> (1) If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the dispute obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.[49]

[23] "Duress is coercion that is wrongful as a matter of law."[50] "Lawful coercion becomes impermissible when employed to support a bad-faith demand: one that the party asserting it knows (or should know) to be unjustified."[51] Coercion does not include hard bargaining, but it can include circumstances in which

> the stronger party exploits the other's vulnerability in a manner that passes the bounds of economic self-interest. Legitimate self-interest (and lawful coercion) encompasses the usual freedom to deal with another on one's

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[46] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, ch. 2, Introductory Note. Compare *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562 (1987).

[47] See, *Malec, supra* note 45; *First Nat. Bank, supra* note 5.

[48] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, and comment *g*.

[49] *Id.*, § 35(1) at 571.

[50] *Id.*, § 14(1) at 181.

[51] *Id.*, comment *g*. at 188.

> own terms or not at all. So long as the stronger party is not responsible for the other's vulnerability, driving a hard bargain does not constitute duress. But the exploitation of a superior bargaining position will predictably be found wrongful when the stronger party seeks additional leverage by exploiting a vulnerability to which the weaker party (in dealing the stronger) is not properly subject.
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> . . . Threats to exercise what would normally be a legal right may constitute duress when employed to achieve an advantage unrelated to the interests that the legal right is supposed to protect.[52]

Threatening to take advantage of business exigency to impose unjust demands is commonly referred to as "economic duress" or a "business compulsion." We have stated that "[t]he doctrine of business coercion [or economic duress] is directed at some inequalities in bargaining power."[53] And we have clarified that duress can occur even if the defendant had a legal right to take a threatened action:

> This rule has been stated in a form which arguably implies that no threat is wrongful unless there would be independent liability for the threatened act. . . . If the implication was made, the rule was overstated. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of a duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts.[54]

[24] Economic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement.[55] We have

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[52] *Id.* at 190.

[53] See *McCubbin v. Buss*, 180 Neb. 624, 627, 144 N.W.2d 175, 178 (1966).

[54] *Id.* at 628, 144 N.W.2d at 178. Accord *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981).

[55] See, Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, comment *g*.; Restatement (Second) of Contracts, *supra* note 2, § 175, comment *b.*

applied the doctrine of economic duress in a case involving circumstances similar to those in this appeal.

In *Carpenter Paper Co. v. Kearney Hub Pub. Co.*,[56] a newspaper publisher had a year-to-year contract with a distributor to supply it with newsprint until either party canceled the contract. The distributor later decided that it was more profitable for it to purchase all the newsprint from its sole paper mill source and sell it directly to its customers. As a direct seller, the distributor increased its price per ton. The publisher paid the increased price under protest until it could obtain supplies from a different source. We agreed that it had no other practical source for newsprint.

We rejected the publisher's argument that the parties were still operating under their express contract. We concluded that the parties' conduct showed they had mutually agreed to cancel the contract. But we concluded that their further transactions constituted a new agreement to which the economic duress doctrine applied:

> We think the making of a contract may be done under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover back any money paid thereunder or excuse him from performing the contract. . . . The same would be true of an agreement obtained to cancel an existing contract and to enter into a new one.[57]

[25] We adopted the following economic duress rule: "'To be voidable because of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.'"[58] We stated that the distributor had a right to sell the newsprint on a more profitable basis unless it made "unjust demands upon

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[56] *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 163 Neb. 145, 78 N.W.2d 80 (1956).

[57] *Id.* at 151, 78 N.W.2d at 83-84.

[58] *Id.* at 151, 78 N.W.2d at 84, quoting *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953). Accord, *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *First Data Resources, Inc., supra* note 54.

[the publisher] in view of all the circumstances then existing."[59] Under the new agreement, the distributor increased its price by 4.6 percent over the direct mill price. We concluded that this increase did not result in an unjust agreement: "We do not find such a raise to be unjust, considering the increased cost of doing business which occurred during these years, and certainly not a factual situation which would permit the [publisher], on the grounds of business compulsion, to avoid the effect of its agreement . . . ."[60]

[26] Under the Restatement's principles, we believe that these economic duress rules apply to modifications of a contract also. But the facts here are different from those in *Carpenter Paper Co.*

[27] Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact.[61] The court specifically found that the City was in a disadvantaged bargaining position because it had to dispose of 40 tons of solid waste each day. It specifically found that the City had no reasonable alternative immediately available for disposing of its waste except to pay Waste Connections' $60-per-ton rate.

This finding was not clearly wrong. We also note that the City could not have litigated its dispute with Waste Connections before paying for its services when it had no reasonable alternative for disposing of its waste. The issue is whether Waste Connections took advantage of the circumstances to impose unjust demands. Unlike the facts in *Carpenter Paper Co.*, here there was evidence to support a finding that Waste Connections was exploiting the exigency that its denial of services would create by unjustifiably increasing its price only for the City.

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[59] *Carpenter Paper Co., supra* note 56, 163 Neb. at 152, 78 N.W.2d at 84.

[60] *Id.* at 153, 78 N.W.2d at 84.

[61] See, *Raintree Homes v. Village of Long Grove*, 389 Ill. App. 3d 836, 906 N.E.2d 751, 329 Ill. Dec. 553 (2009); *Crown Life Ins. Co. v. Smith*, 657 So. 2d 821 (Ala. 1994); *Speckert v. Bunker Hill Arizona M. Co.*, 6 Wash. 2d 39, 106 P.2d 602 (1940). See, also, *Kosmicki, supra* note 58, citing *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985).

In contrast to the 4.6-percent price increase that we considered in *Carpenter Paper Co.*, Waste Connections' $60 rate represented a 41-percent price increase over the $42.50 rate that the City had agreed to pay immediately after the SWAP contract expired. It increased its price by this amount in the span of a month, immediately after it learned that the City would terminate the roll-off contract in a year. And it did not charge this price to any other customer using its services.

Green had admitted that by raising its rate to $60 per ton only for the City, Waste Connections was attempting to compensate for losing the City's business under the SWAP contract. At trial, Green stated that he had meant that Waste Connections could not reduce its workforce at the transfer station if it had to keep enough people to handle the City's waste. But before Green learned that the City intended to cancel the roll-off contract, Green's only complaint to the City had been Waste Connections' increasing fuel costs, not its personnel costs.

Green admitted that Waste Connections had particularly wanted to keep the roll-off contract with the City. But he denied that the company had increased its disposal rate only for the City because it had learned the City would terminate the roll-off contract. Green also admitted that Waste Connections' fuel costs had decreased significantly in the month before it increased its rate to $60 per ton for the City. He maintained, however, that Waste Connections had imposed the increased price because it was operating the transfer station at a loss. He stated that Waste Connections did not increase the fees for other users of the transfer station because they were small in comparison.

But the court obviously did not find Green's explanations credible. It found no economic justification for Waste Connections' charging the City $17.50 more per ton than it charged to smaller volume customers. The court noted Green's deposition testimony in finding that the $60-per-ton rate was intended to compensate Waste Connections for its loss of the City's business to Gering. It concluded that Waste Connections' attempt to cover its anticipated losses was not a valid justification for its price increase.

Under our standard of review, we cannot say that the court's findings were clearly wrong. Sufficient evidence supported its finding that the City was not voluntarily paying the $60-per-ton rate. The record showed that the City had no reasonable alternative and that Waste Connections took advantage of the circumstances that its denial of services would have created to unjustly enrich itself. Because the facts support a finding of economic duress, we conclude that the court did not err in determining that the City was entitled to restitution. That brings us to Waste Connections' claim that the court incorrectly determined the restitution award.

(e) Court's Restitution Award Was Correct

Waste Connections contends that even under the City's unjust enrichment claim, the court erred in requiring it to disgorge any part of the payments that the City made to it under its $60-per-ton rate. It argues that it had the right to charge whatever rate it wished after the SWAP contract expired. It contends that justice and fairness did not require it to disgorge the City's payments when it was operating the transfer station at a loss. We disagree.

As explained, the parties were operating under an implied contract for temporary services after the SWAP contract expired. Waste Connections agreed to provide these temporary services, and the City agreed to pay its increased rate of $42.50 per ton. But Waste Connections' later increase of its rate to $60 per ton was a unilateral modification of the contract, to which the City assented under economic duress and for which no new consideration existed.

We recognize that our decision in *Carpenter Paper Co.* seems to require a court to consider whether a defendant's profit from an unjust demand was reasonable before concluding that the defendant was unjustly enriched. Because duress does not include hard bargaining, that may be a relevant factor in determining whether a party used duress to obtain unfair advantage in negotiating a new contract after a previous one has expired. In some negotiations for a new contract, a relevant consideration is whether a party exploited the other's vulnerability in a manner that passes the bounds of

economic self-interest.[62] But we conclude that this reasoning does not apply when a plaintiff has proved that its assent to a unilateral modification of an implied contract was obtained under duress.

[28] We have held that the parties may orally modify the terms of a written executory (not fully performed) contract after its execution and before a breach has occurred, without any new consideration.[63] But a modification of an existing contract that substantially changes the liability of the parties requires mutual assent.[64] That assent may be express or implied.[65] But a weaker party's assent to a unilateral contract modification, which is to that party's disadvantage, should obviously not be implied from its conduct when the weaker party has shown that its assent was obtained through economic duress. Without any new consideration or negotiations for the modification, a court should not analyze whether the defendant's profit from the duress was reasonable.

We conclude that because the City did not voluntarily assent to the modification, it did not change the implied contract. That is, the City's contractual liability under the implied contract obligated it to pay $42.50 per ton for disposal services.

[29] The measure of restitution is normally a defendant's unjust gain.[66] When a party to a contract shows that because of duress, it agreed under protest to the other party's demands for overperformance of its obligation, it may seek restitution for "the value of the benefit conferred in excess of the recipient's contractual entitlement."[67] So the court correctly determined that the City was entitled to recover its involuntary payments

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[62] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, comment *g*.

[63] See, e.g., *Pennfield Oil Co., supra* note 22.

[64] See, e.g., *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992).

[65] See *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

[66] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[67] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 35(1) at 571.

that were over the City's contractual obligation to pay $42.50 per ton after the SWAP contract expired. We affirm its restitution award for these overpayments.

Because the City protested the charges under circumstances that showed it was reasonable for it to accede to Waste Connections' demand, the court properly rejected Waste Connections' waiver and estoppel claims.[68]

2. Price of Service Under the Roll-Off Contract

(a) Parties' Contentions

The court concluded that because the roll-off contract incorporated the SWAP rate for disposal services, Waste Connections could only charge the last rate that the parties had agreed to ($40.52 per ton) under the SWAP contract. But because the City had judicially admitted that it should pay $42.50 per ton, the court used that rate as the price that the City was obligated to pay. Waste Connections contends that the court erred in using the $42.50 rate. It agrees with the court's ruling that the roll-off contract was valid and in effect after the SWAP contract expired on June 30, 2007. But because the roll-off contract's rate could no longer be determined by referring to the SWAP contract, Waste Connections contends that after the SWAP contract expired, it could charge whatever it wished under the roll-off contract.

The City contends that if the court had not used the last price agreed to before the SWAP contract expired, it would have been required to find that the parties failed to create a contract because they did not agree on price. It argues that this result would be untenable because the parties clearly intended to continue performing the roll-off contract even after the SWAP contract expired. Alternatively, the City contends that even if the parties did not agree on the price of services, they were operating under an implied contract and that Waste Connections was only entitled to the reasonable value of its services. It argues that the court determined the reasonable

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[68] See *id.*

value of Waste Connections' disposal services was $42.50 per ton.

(b) Parties Created a Binding Contract

[30] We disagree with the City that the roll-off contract would be unenforceable if the parties failed to agree on the price for services in the event that they did not continue their relationship under the SWAP contract. It is true that a court will not supply a term necessary to create a binding contract.[69] Nor will a court rewrite a contract or speculate as to terms of the contract which the parties have not seen fit to include.[70] It is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.[71] But this is the unusual case of a contract that was sufficiently definite in forming a binding agreement but failed to clarify the parties' rights and duties in the event of a contingency that they both assumed would not occur.

In their written roll-off contract, the parties agreed on the services to be performed through April 30, 2008. Before that term expired, however, the parties had stated in writing their intent to continue performing their obligations under the contract until July 2008. So the contract was modified to include the longer term. The roll-off contract also contained a term for the price by incorporating the rate charged under the SWAP contract.

In sum, the roll-off contract contained all the terms that the parties would have considered essential to form a binding agreement: subject matter, price, and duration. And the parties clearly intended to be bound by their agreement. They simply failed to negotiate a foreseeable contingency: that SWAP and Waste Connections might not continue the SWAP contract or create a new one for a period that covered the life of the

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[69] *Kubicek v. Kubicek*, 186 Neb. 802, 186 N.W.2d 923 (1971).

[70] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[71] *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 747 N.W.2d 383 (2008).

roll-off contract. Here, the question is what rule governs the gap-filling that the omission in their contract requires.

(c) Court Could Supply a Reasonable Term to Cover the Gap

[31] The Restatement (Second) of Contracts provides a default rule for the omission of terms necessary to determining the parties' obligations under an enforceable contract: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."[72] As this case illustrates, this rule does not apply when the parties' manifestations or conduct show that they do not intend to be bound unless they agree upon a term and they fail to agree. But we agree with this rule, and adopt it, for circumstances showing that the parties to a binding contract have failed to negotiate a term to cover a future contingency.

But under the Restatement principles, the court erred in concluding that it could simply use the last price charged under the SWAP contract or, alternatively, the price that the City had judicially admitted to owing in its complaint. These are not valid default rules when a court concludes that the parties have not agreed on an essential term to cover a contingency.

[32] The first step in an omitted-term case is to determine whether interpretative principles show what the term should be. That is, a court should first consider whether there exists a "tacit agreement or a common tacit assumption" or whether it can supply a term "by logical deduction from agreed terms and the circumstances."[73] But a court should not engage in a hypothetical bargaining analysis if applying interpretative principles shows that the parties did not agree on a contract term necessary to determining their rights and duties. In that circumstance, it must supply a term that "comports with community standards of fairness and policy."[74]

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[72] Restatement (Second) of Contracts, *supra* note 2, § 204 at 96-97.

[73] See *id.*, comment *c*. at 97.

[74] See *id.*, comment *d*. at 98.

[33] We reject Waste Connections' contention that because a nonnegotiated contingency occurred, Waste Connections could charge the City whatever it wished. Such a term would obviously be contrary to the implied covenant of good faith and fair dealing that every contract carries.[75] Good faith performance excludes an "abuse of a power to specify terms."[76]

But here, neither the agreed-upon terms of the roll-off contract nor the circumstances would permit a court to find the parties had a tacit agreement on the price to use for this contingency. The evidence showed that the parties entered the roll-off contract under the assumption that the rate under the roll-off contract would be the same as the rate under the SWAP contract. By the time the SWAP contract expired, however, they clearly did not agree on the price of disposal services.

Nonetheless, for the period that the parties' implied agreement for temporary services was in effect, we conclude that the court could reasonably supply the price of those services by referring to their implied contract. As discussed, after the SWAP contract expired, the parties were operating under an implied contract for the same services for the next 4 months. In supplying this price as the reasonable value of Waste Connections' services for this 4 months, the court specifically relied on Waste Connections' unilaterally set price of $42.50 per ton. If the City had accepted either of Waste Connections' long-term proposals to continue the SWAP relationship, it would have paid less for disposal services during that 4-month period. So we conclude that the court properly used the $42.50-per-ton rate. This price was indicative of what Waste Connections considered to be a fair price in the absence of a long-term commitment from the City.

But whether the court correctly applied this rate to the remaining 8 months of the roll-off contract is less certain. After the 4-month term of the implied contract expired, there was no unilateral price to rely on to show what Waste Connections considered to be a fair price, absent a long-term commitment

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[75] See *RSUI Indemnity Co. v. Bacon, ante* p. 436, 810 N.W.2d 666 (2011).

[76] Restatement (Second) of Contracts, *supra* note 2, § 205, comment *d.* at 101.

from the City. We do not consider the $60-per-ton rate to be indicative of a fair price. The evidence supported the court's finding that Waste Connections was using its superior bargaining position to compensate itself for losing the City's future business.

It is true that the evidence showed that the roll-off contract was profitable to Waste Connections under its $42.50-per-ton rate. But Waste Connections presented evidence that its fuel costs were increasing by the end of the 4-month period. So the court could not simply supply the $42.50 rate to the remaining 8 months of the roll-off contract without considering whether this rate was fair and reasonable to both parties. So we remand this cause for the limited purpose of determining a reasonable price to supply for Waste Connections' services for the period from November 1, 2007, when the implied contract expired, to July 8, 2008, when the roll-off contract expired.

In supplying the reasonable price of Waste Connections' services on remand, the court may consider the fair market value of disposal services in the region when Waste Connections' services were rendered.[77] This factor could include the price that Waste Connections was charging to other municipalities in the area for comparable services. The court should also consider whether its solution treats the parties evenhandedly given their objectives.[78]

Finally, "[b]oth the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances."[79] As applied here, this factor permits the court to consider the profit margin that Waste Connections had previously considered reasonable under the parties' roll-off contract and whether its increased fuel costs were affecting that margin.

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[77] See, *Sachau v. Sachau*, 206 N.J. 1, 17 A.3d 793 (2011); *KW Const. v. Stephens & Sons Concrete*, 165 S.W.3d 874 (Tex. App. 2005).

[78] See *Browning-Ferris Industries v. Casella*, 79 Mass. App. 300, 945 N.E.2d 964 (2011).

[79] Restatement (Second) of Contracts, *supra* note 2, § 204, comment *d*. at 98.

We emphasize, however, that the court correctly determined that Waste Connections' mitigation of damages defense was without merit in this case. The issue here is an omitted term, not whether the City could have avoided damages.[80]

VII. CONCLUSION

We conclude that the parties did not intend to be bound by the terms of their expired SWAP contract. But we conclude that they were operating under an implied contract for Waste Connections to temporarily accept the City's waste at the transfer station until the City began taking its waste to a new landfill.

We affirm the court's conclusion that during the time the parties were operating under the implied contract, the City involuntarily paid Waste Connections' charges after Waste Connections significantly increased its rate. We conclude that Waste Connections obtained the City's assent to its unilateral modification of the price for services through economic duress. The modification was therefore invalid, and Waste Connections was unjustly enriched by the overpayments. We affirm the court's restitution award for the full amount of these overpayments under the implied contract.

Under the parties' roll-off contract, we conclude that the parties formed a binding agreement despite their failure to negotiate a term for a foreseeable contingency. Because they were bound by the contract, the court could supply a term for this contingency—the reasonable value of Waste Connections' services when the contingency occurred. But we reverse the court's determination of the reasonable value of Waste Connections' services and remand the cause for further proceedings on this issue.

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

WRIGHT, J., not participating.

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[80] See *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

CARLA MCKINNEY, APPELLANT, V. MATTHIAS I. OKOYE AND NEBRASKA FORENSIC MEDICAL SERVICES, P.C., APPELLEES.

806 N.W.2d 571

Filed December 16, 2011. No. S-10-722.

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. **Libel and Slander.** Whether a communication is privileged is a question of law.
3. **Appeal and Error.** An appellate court reviews questions of law independently of the trial court's decision.
4. **Actions: Proof.** A plaintiff in a malicious prosecution case must prove that proceedings were commenced or instituted against him or her, that the defendant caused the proceedings to be commenced or instituted, that the proceedings terminated in the plaintiff's favor, that the defendant lacked probable cause to institute or procure the proceedings, that the defendant acted with malice, and that the plaintiff suffered damages.
5. **Libel and Slander.** An absolute privilege bars an action for libel or slander.
6. **Libel and Slander: Liability: Immunity.** Judges, attorneys, parties to proceedings, witnesses, and jurors may assert an absolute privilege as an immunity from liability for defamation for publications made during judicial proceedings if the defamatory matter has some relation to the proceedings.
7. **Libel and Slander.** Absolute privilege applies to statements within a judicial proceeding and statements preliminary or ancillary to judicial proceedings.
8. **Criminal Law: Torts.** At common law, a private citizen who initiated or procured a criminal prosecution can be sued for the tort of malicious prosecution.
9. **Libel and Slander: Case Overruled.** Absolute privilege does not bar an action for malicious prosecution. To the extent that *Central Ice Machine Co. v. Cole*, 2 Neb. App. 282, 509 N.W.2d 229 (1993), holds otherwise, it is overruled.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

George H. Moyer, of Moyer & Moyer, for appellant.

James A. Snowden and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

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

CONNOLLY, J.

This appeal requires us to decide whether a person who gives information to a prosecutor that results in a criminal prosecution against another has an absolute privilege from liability for malicious prosecution.

Carla McKinney sued Matthias I. Okoye, a pathologist, and Nebraska Forensic Medical Services, P.C. (collectively the appellees), for malicious prosecution. She alleged that Okoye had reported in an autopsy report that an infant under McKinney's care died of injuries from child abuse and that the State charged McKinney with child abuse but later dropped the charges. The district court granted the appellees' motion to dismiss McKinney's complaint. It concluded that an absolute privilege barred McKinney's claim. We reach the opposite conclusion; absolute privilege does not bar a claim for malicious prosecution. We reverse, and remand for further proceedings.

BACKGROUND

McKinney alleges the following facts, which, given the procedural posture of the case, we accept as true.[1]

McKinney operated a daycare center in Lincoln, Nebraska. On October 17, 2007, McKinney attempted to wake an infant under her care. The infant was unresponsive, so McKinney called the 911 emergency dispatch service. Paramedics were unable to revive the infant, who was later pronounced dead.

Okoye, who was working for Nebraska Forensic Medical Services, conducted an autopsy on the infant. He reported to prosecutors that the child had died from blunt force trauma to the head, asphyxia, and hemorrhaging into the brain from child abuse. McKinney alleges Okoye acted maliciously and without probable cause in reporting his findings. McKinney was arrested and charged with felony child abuse.

Using the opinions of two other forensic pathologists, McKinney eventually persuaded authorities to drop the charges against her. Nevertheless, she claims that her name remains on a child abuse registry, which prevents her from operating

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[1] See *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 793 N.W.2d 445 (2011).

a daycare. And she claims that the incident has greatly diminished her earning capacity.

Under Neb. Ct. R. Pldg. § 6-1112(b)(6), the appellees moved to dismiss McKinney's complaint. The district court granted the appellees' motion. The court concluded that McKinney could not base an action for malicious prosecution on Okoye's statements, because an absolute testimonial privilege shielded them. The court went further, concluding that the privilege shielded Okoye's statements from liability for any tort, and so the court concluded that no amendment could cure McKinney's complaint.

ASSIGNMENTS OF ERROR

McKinney assigns that the district court erred in (1) applying the testimonial privilege to Okoye's report and (2) refusing to allow McKinney to amend her complaint.

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.[2]

[2,3] Whether a communication is privileged is a question of law.[3] An appellate court reviews questions of law independently of the trial court's decision.[4]

ANALYSIS

Absolute Privilege Does Not Bar McKinney's Malicious Prosecution Claim

McKinney's complaint is somewhat unclear as to whether she is alleging a claim for defamation or malicious prosecution. The district court considered both. But before this court, McKinney claims that she is asserting a claim only for malicious prosecution. So we will address only that claim.

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[2] *Id.*

[3] See *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[4] See *id.*

[4] The rules governing malicious prosecution are grounded on competing public policies: A person who knows that a crime has been committed should not be deterred from reporting it to public officials out of fear of civil liability.[5] Conversely, a person wrongly charged with criminal conduct has an important interest in his freedom and his reputation.[6] A plaintiff in a malicious prosecution case must prove that

- proceedings were commenced or instituted against him or her;
- the defendant caused the proceedings to be commenced or instituted;
- the proceedings terminated in the plaintiff's favor;
- the defendant lacked probable cause to institute or procure the proceedings;
- the defendant acted with malice; and
- the plaintiff suffered damages.[7]

Here, the appellees do not argue that McKinney has failed to allege any of these elements. Instead, the appellees argue that an absolute privilege bars McKinney's claim.

[5-7] An absolute privilege bars an action for libel or slander.[8] Although referred to as a "privilege" because of historical reasons, in reality, it is an immunity because it is based on the speaker's position or status.[9] Absolute privilege recognizes the necessity that certain persons, because of their special position or status, should be as free as possible from fear that their actions might have an adverse effect upon their own personal

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[5] See *Kersenbrock v. Security State Bank*, 120 Neb. 561, 234 N.W. 419 (1931). See, also, *Bhatia v. Debek*, 287 Conn. 397, 948 A.2d 1009 (2008).

[6] See *Bhatia, supra* note 5.

[7] See, *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001); *Prokop v. Hoch*, 258 Neb. 1009, 607 N.W.2d 535 (2000); *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980); *Cimino v. Rosen*, 193 Neb. 162, 225 N.W.2d 567 (1975); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Kersenbrock, supra* note 5.

[8] See *Kocontes, supra* note 3.

[9] Restatement (Second) of Torts ch. 25, Title B, Introductory Note (1977).

interests.[10] In defamation actions, we have, at least in part, adopted the rule of absolute privilege from the Restatement (Second) of Torts.[11] Under the Restatement, judges,[12] attorneys,[13] parties to proceedings,[14] witnesses,[15] and jurors[16] may assert an absolute privilege as an immunity from liability for defamation for publications made during judicial proceedings if the defamatory matter has some relation to the proceedings.[17] We have stated that this privilege applies to statements within a judicial proceeding and statements preliminary or ancillary to judicial proceedings.[18]

The absolute privilege rule appears in the Restatement as a defense to defamation, injurious falsehood, and invasion of privacy.[19] At common law, absolute privilege was "an immunity only against slander and libel actions."[20] Before our decision in *Kocontes v. McQuaid*,[21] this court had seldom, if ever, extended absolute privilege beyond actions for defamation. But in *Kocontes*, we stated that the privilege would bar a claim for interference with a business expectancy.

While we have historically been reluctant to apply absolute privilege to bar torts other than defamation, the Nebraska Court

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[10] *Id.*

[11] See, e.g., *Kocontes, supra* note 3; *Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984).

[12] Restatement, *supra* note 9, § 585.

[13] *Id.*, § 586.

[14] *Id.*, § 587.

[15] *Id.*, § 588.

[16] *Id.*, § 589.

[17] See, e.g., *Kocontes, supra* note 3; *Cummings, supra* note 11; *Beckenhauer v. Predoehl*, 215 Neb. 347, 338 N.W.2d 618 (1983).

[18] See *Kocontes, supra* note 3. See, also, Restatement, *supra* note 9, § 586, comment *e.*; § 587, comment *e.*; and § 588, comments *b.* and *e.*

[19] See Restatement, *supra* note 9, §§ 588, 635, and 652F.

[20] *Kalina v. Fletcher*, 522 U.S. 118, 133, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (Scalia, J., concurring).

[21] *Kocontes, supra* note 3.

of Appeals has applied it to bar other tort actions—including malicious prosecution.[22]

In *Central Ice Machine Co. v. Cole*,[23] the Court of Appeals held that the absolute privilege barred claims for malicious prosecution. In *Cole*, Central Ice Machine Company (Central Ice) sued Ronald A. Cole for malicious prosecution for statements he had made while consulting one of Central Ice's customers. Cole had told the customer that products the customer had purchased from Central Ice were defective. Later, Cole testified as an expert witness in a lawsuit between Central Ice and the customer.

Central Ice later sued Cole for malicious prosecution, claiming that Cole's statements were the reason that its customer had sued the company. The district court granted summary judgment to Cole, finding that because he was an expert witness in the later legal proceedings, he was immune from liability. The Court of Appeals affirmed. The court noted that a witness generally enjoyed an absolute immunity from civil liability for his or her testimony. But the Court of Appeals refused to find any distinction between statements Cole made as a consultant and those he made as a witness. And the court refused to recognize an exception to witness immunity for malicious prosecution claims.

In *Cole*, the underlying action that the defendant was alleged to have instigated was civil, while here, the underlying action is criminal. But this presents merely a difference in nomenclature, not substantive elements. The elements for malicious prosecution—which deals with the wrongful institution of criminal proceedings—and wrongful use of civil proceedings are essentially identical.[24] Further, while the Restatement assigns different names to the tort depending on whether the action that

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[22] See *Central Ice Machine Co. v. Cole*, 2 Neb. App. 282, 509 N.W.2d 229 (1993). See, also, *Drew v. Davidson*, 12 Neb. App. 69, 667 N.W.2d 560 (2003).

[23] *Cole, supra* note 22.

[24] Compare *Prokop, supra* note 7, and *Schmidt, supra* note 7. Compare Restatement, *supra* note 9, § 653 with § 674.

the defendant instigated was civil or criminal, Nebraska courts have not. We have referred to both causes of action as "malicious prosecution."[25]

[8] Upon further analysis, we conclude that *Cole* was incorrectly decided. This is because at common law, "[a] private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution . . . ."[26]

Moreover, *Cole* is also inconsistent with both the Restatement and this court's case law. The Restatement makes clear that a citizen can be liable for providing information to a public prosecutor if the citizen knows the information is false or if the citizen directed, requested, or pressured the prosecutor to institute proceedings.[27] We applied this rule in a case predating *Cole*. There, we considered a malicious prosecution action stemming from a report that a store security officer had given prosecutors.[28] But under *Cole*, no such case could proceed. Absolute privilege would shield any statements an informant made to a prosecutor, even if those statements were knowingly false. Extending the rule in *Cole* would cripple, if not kill, the tort of malicious prosecution.[29]

Furthermore, because the elements of the tort are difficult to prove, it is unnecessary to grant informants absolute privilege. "[T]here [is] a kind of qualified immunity built into the elements of the tort."[30] Indeed, "all those who instigate litigation are given partial protection by the rules that require a plaintiff claiming malicious prosecution to show improper purpose, a lack of probable cause for the suit or prosecution, and other elements."[31] These elements effectively act as and could be analogized to the defamation defense of qualified or

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[25] See, e.g., *Prokop, supra* note 7; *Schmidt, supra* note 7.

[26] *Kalina, supra* note 20, 522 U.S. at 132 (Scalia, J., concurring).

[27] See Restatement, *supra* note 9, § 653, comment *g*.

[28] See *Schmidt, supra* note 7.

[29] See *Rioux v. Barry*, 283 Conn. 338, 927 A.2d 304 (2007).

[30] *Kalina, supra* note 20, 522 U.S. at 133 (Scalia, J., concurring).

[31] Dan B. Dobbs, The Law of Torts § 429 at 1215 (2000).

conditional privilege, which protects speakers in certain situations, but is lost if the speaker abuses it.[32]

For example, merely reporting the details of the crime is insufficient to establish liability if the reporting is made in good faith. In *Schmidt v. Richman Gordman, Inc.*,[33] we approvingly cited an Eighth Circuit decision that said that "'a person who supplies information to prosecuting authorities is not liable for his action as long as any ensuing prosecution is left entirely to the official's discretion.'" To be liable for malicious prosecution, a defendant must either knowingly give false or misleading information or otherwise direct or counsel officials in such a way as to actively persuade and induce the officer's decision.[34]

In addition, a plaintiff must prove the absence of probable cause.[35] We have previously said that lack of probable cause is the gist of malicious prosecution.[36] Finally, the plaintiff must prove that the defendant acted with malice, which means that the defendant initiated the proceedings *primarily* for a purpose other than that of bringing an offender to justice.[37] Summed up, a plaintiff has a steep climb in prosecuting a malicious prosecution action.

The dissenting opinion seemingly agrees that an absolute privilege for a witness statement does not apply in this case. Instead, it argues that Okoye is shielded by the same privilege that protects a prosecutor's decision to prosecute. But this misses the mark in several respects. Okoye never raised an agency theory of prosecutorial privilege. But even if he had not waived that claim, it is without merit. It is true that in *Koch v.*

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[32] See Restatement, *supra* note 9, §§ 593, 599, and 600.

[33] *Schmidt, supra* note 7, 191 Neb. at 351, 215 N.W.2d at 109, quoting *White v. Chicago, Burlington and Quincy Railroad*, 417 F.2d 941 (8th Cir. 1969). See, also, *Jensen v. Barnett*, 178 Neb. 429, 134 N.W.2d 53 (1965); *Gering v. Leyda*, 91 Neb. 430, 136 N.W. 53 (1912).

[34] See, *Holmes, supra* note 7; *Johnson, supra* note 7; *Schmidt, supra* note 7. See, also, Restatement, *supra* note 9, § 653, comment *g*.

[35] See, e.g., *Rose v. Reinhart*, 194 Neb. 478, 233 N.W.2d 302 (1975).

[36] *Id.*; *Jones v. Brockman*, 190 Neb. 15, 205 N.W.2d 657 (1973).

[37] Restatement, *supra* note 9, § 668.

Grimminger,[38] we held that public prosecutors are entitled to a qualified privilege in deciding whether to prosecute:

> [A] public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that *where he acts in good faith* he is immune from suit for an erroneous or negligent determination.

But the qualified privilege in *Koch* does not apply to communications made to a prosecutor that inform his or her decision to prosecute. It is correct that county attorneys are charged with coroner duties and with appointing a coroner's physician. But the powers and duties of coroners are not judicial,[39] and the dissent cites no authority conferring a privilege on a coroner's communications to a prosecutor. Because a county attorney's prosecutorial and coroner duties represent separate functions, a prosecutorial privilege cannot extend to a coroner through an agency theory. Moreover, the dissent's reasoning that a coroner physician conducting an autopsy acts in tandem with a prosecutor has disturbing implications. We reject any suggestion that a pathologist's findings during a criminal investigation should not be completely independent from a prosecutor's decision to prosecute.

Finally, under the difficult-to-prove elements of a malicious prosecution claim, good faith mistakes are already immunized and will not render a defendant liable for malicious prosecution. As the Connecticut Supreme Court said:

> These stringent requirements [of the tort] provide adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation. Thus, because the tort of [malicious prosecution] strikes the proper balance, it is unnecessary to apply an additional layer of protection to would-be litigants in the form of absolute immunity.[40]

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[38] *Koch v. Grimminger*, 192 Neb. 706, 714, 223 N.W.2d 833, 837 (1974) (emphasis supplied).

[39] *State, ex rel. Crosby, v. Moorhead*, 100 Neb. 298, 159 N.W. 412 (1916).

[40] *Rioux, supra* note 29, 283 Conn. at 347, 927 A.2d at 310.

[9] We conclude that absolute privilege does not bar an action for malicious prosecution. To the extent that *Cole* is inconsistent with this opinion, we disapprove.

CONCLUSION

We conclude that the district court erred in holding that an absolute privilege barred McKinney's malicious prosecution action. We reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

HEAVICAN, C.J., dissenting.

It is well established that

> a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination.[1]

This case presents the question of whether a pathologist, appointed by the prosecutor in accordance with state law, is entitled to that same immunity in connection with his official duties. Because I believe that such a physician should be granted that immunity, I respectfully dissent from the decision of the majority.

Under Nebraska law, one of the primary duties of the county attorney in each Nebraska county is, of course, to act as a prosecuting attorney against those accused of violating the law.[2] But the county attorney is also vested with all the duties enjoined by law on the county coroner.[3] And one of those duties is the statutory requirement that the county attorney appoint a coroner's physician, a physician whose duties include certifying the cause of death for each death in the county not

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[1] *Koch v. Grimminger*, 192 Neb. 706, 714, 223 N.W.2d 833, 837 (1974). See, also, Restatement (Second) of Torts § 656 (1977).

[2] Neb. Rev. Stat. § 23-1201 (Reissue 2007).

[3] Neb. Rev. Stat. § 23-1210 (Reissue 2007).

otherwise attended by another physician and conducting an autopsy when requested by the county coroner or when otherwise required by law.[4] In this case, where the death was that of a minor and under suspicious circumstances, state law required that an autopsy be performed.[5]

Here, Okoye was appointed as required by and in accordance with state law. He was vested with the duty to conduct an autopsy in connection with the minor in the underlying case. During the course of that autopsy, Okoye was tasked with attempting to establish, "by a reasonable degree of medical certainty, the cause or causes of the death" and was further required to "certify the cause or causes of death to the county attorney."[6]

Under the circumstances presented by this case, I would find that in his role, Okoye was acting in tandem with the county attorney, who was ultimately responsible for bringing any necessary criminal charges. I would find that the coroner's physician's duties, like the duties of a prosecutor in the same situation, are quasi-judicial in nature. As such, I would find that Okoye is entitled to the same immunity as enjoyed by the county attorney.

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[4] Neb. Rev. Stat § 23-1820 (Reissue 2007).

[5] Neb. Rev. Stat. § 23-1824(1) (Reissue 2007).

[6] § 23-1824(2).

Melissa Alsidez, Special Administrator of the Estate of Anthony Alsidez, deceased, and Melissa Alsidez, individually, appellants, v. American Family Mutual Insurance Company, appellee.

807 N.W.2d 184

Filed December 16, 2011. No. S-10-1220.

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, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Judgments: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
4. **Insurance: Motor Vehicles: Contracts: Statutes: Damages.** In order to be entitled to underinsured motorist coverage under the terms of both an insurance policy and the Uninsured and Underinsured Motorist Insurance Coverage Act, an insured must be legally entitled to recover compensatory damages from the owner or operator of an underinsured motor vehicle.
5. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
6. **Insurance: Contracts: Statutes: Legislature: Public Policy.** An exclusion in an insurance policy cannot be void as against public policy when it mirrors a statutory exclusion and when the statute, which has not been found wanting, is the Legislature's expression of the public policy of this state.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed.

Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Tanya J. Janulewicz, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this automobile accident insurance coverage appeal, the appellants, Melissa Alsidez, individually and as special administrator of the estate of Anthony Alsidez (collectively the appellants), appeal the order of the district court for Scotts Bluff County in which the court granted summary judgment in favor of American Family Mutual Insurance Company (American Family) and dismissed the complaint. Because we agree with the district court's conclusions that the recovery the appellants seek is not available under the underinsured motorist coverage endorsement of the policy issued to Melissa by American

Family and the policy is not void as against public policy, we affirm.

STATEMENT OF FACTS

The material facts in this appeal are not in dispute. On April 27, 2009, Anthony Alsidez was in a single-car accident on South Mitchell Road near Mitchell, Nebraska. Anthony was driving a 1996 Jeep Grand Cherokee Laredo, which was owned by Melissa, Anthony's mother. Gregory Segura was riding in the front passenger seat, and two others were riding in the back seat. At one point, Segura grabbed the steering wheel, which caused the vehicle to veer to the right. Anthony attempted to correct the vehicle, but overcorrected, which caused the vehicle to slide across the road and into a ditch, where the vehicle rolled and crashed. On May 1, Anthony died as a result of the injuries he received in the accident.

The appellants filed a negligence suit against Segura, combined with a coverage action against American Family. In May 2010, the appellants settled their claims against Segura for $50,000, which was the liability limit of Segura's policy with State Farm Automobile Insurance Company for a vehicle that was not involved in this accident. This limit did not compensate the appellants for their claimed loss. The appellants moved to dismiss their claims against Segura with prejudice, and the district court granted this motion on July 6. Accordingly, American Family was the only remaining defendant in the lawsuit.

The appellants sought to recover underinsured motorist coverage from American Family through the policy issued by American Family to Melissa individually, which was in effect on the date of the accident. The policy stated:

> **UNDERINSURED MOTORISTS (UIM) COVERAGE ENDORSEMENT** . . . .
>
> . . . .
>
> **We** will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** must be sustained by an

> **insured person** and must be caused by accident and arise out of the **use** of the **underinsured motor vehicle**.
>
> . . . .
>
> As used in this endorsement:
>
> 1. **Insured person** means:
>
> a. **You** or a **relative**.
>
> b. Anyone else **occupying your insured car**.
>
> . . . .
>
> 3. **Underinsured motor vehicle** means a **motor vehicle** which is insured by a liability bond or a policy at the time of the accident and the amount of the bond or policy:
>
> a. Is less than the limit of underinsured motorists coverage under this policy . . . .
>
> . . . .
>
> **Underinsured motor vehicle**, however, does not mean a vehicle:
>
> a. Insured under the Liability coverage of this policy.
>
> . . . .
>
> c. Owned by or furnished or available for the regular use of **you** or a **relative**.

The policy stated in its definitions section: "**Use** means ownership, maintenance, or use," and "[**r**]**elative** means a person living in **your** household, related to **you** by blood, marriage or adoption." The policy defines "**insured car**" as "[a]ny **car** described in the declarations . . . ." The Jeep is listed in the policy's declarations section.

American Family filed a motion for summary judgment, which the district court granted on November 18, 2010. The district court reasoned that the language of the American Family policy made it clear that the Jeep cannot be considered an "underinsured vehicle" under Melissa's policy. The district court also determined that the "'regular use'" exclusion in Melissa's policy does not violate public policy. Accordingly, the district court granted American Family's motion for summary judgment and dismissed the complaint.

The appellants appeal the order of the district court granting summary judgment in favor of American Family.

ASSIGNMENTS OF ERROR

The appellants claim generally that the district court erred as a matter of fact and law when it granted American Family's motion for summary judgment. They specifically claim that the district court erred when it determined that the Jeep was an "insured car" and not an "underinsured vehicle" under Melissa's policy and that the exclusion from the underinsured coverage in Melissa's policy for vehicles "[o]wned by or furnished or available for the regular use of **you** or a **relative**" was not void as against public policy.

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Palmer v. Lakeside Wellness Ctr.*, 281 Neb. 780, 798 N.W.2d 845 (2011). In reviewing a summary judgment, the appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

ANALYSIS

The appellants claim that the district court erred when it granted summary judgment in favor of American Family based on the provisions in Melissa's policy with American Family and further erred when it determined that such language was not void as against public policy.

With regard to the provisions in Melissa's policy, the appellants argue that under the facts of this case, the Jeep should be deemed as an "underinsured vehicle" under Melissa's policy and that the appellants should be compensated under the policy's underinsured provisions. The appellants reason that Segura

was "operating" the vehicle at the time of the accident and that because Segura's insurance policy compensated for liability that was insufficient to adequately compensate the appellants for the death of Anthony, the underinsured motorist coverage in Melissa's policy should be invoked and render the Jeep an "underinsured vehicle." The appellants claim the district court's determinations to the contrary were error.

With regard to the appellants' public policy argument, the appellants claim that the exclusion of vehicles that are "[o]wned by or furnished or available for the regular use of **you** or a **relative**" from the scope of "underinsured motor vehicles" is void as against public policy and that the district court erred when it failed to so find. The appellants point to cases from other jurisdictions which have concluded that similar "regular use" exclusions are void as against public policy. The appellants assert that the "regular use" exclusion is contrary to the purpose of Nebraska's underinsured motorist coverage statute. The appellants state that the purpose of the underinsured motorist coverage statute is to make victims of drivers who carry less than adequate liability insurance as nearly whole as possible. They assert that the purpose of the "regular use" exclusion is to prevent coverage under both the underinsured motorist and the liability portions of the same policy and that because they did not receive liability compensation under Melissa's policy, the rationale underlying the exclusion does not apply.

In response, American Family contends for a variety of reasons that the language in Melissa's policy precludes underinsured coverage in this case and that the "regular use" exclusion from the underinsured coverage in Melissa's policy is not against public policy. We agree with American Family that the Jeep was not an underinsured motor vehicle in this case and that the exclusion to which the appellants take exception is not void as against public policy.

Our resolution of this appeal relies on the provisions of Melissa's policy and references to Nebraska statutes. The underinsured motorist coverage provision of the automobile policy American Family issued to Melissa provides:

> We will pay compensatory damages for **bodily injury** which an **insured person** is legally entitled to recover

> from the owner or operator of an **underinsured motor vehicle.** The **bodily injury** must be sustained by an **insured person** and must be caused by accident and arise out of the **use** of the **underinsured motor vehicle.**

The policy describes an underinsured vehicle and states that an "[**u**]**nderinsured motor vehicle,** however, does not mean a vehicle: a. [i]nsured under the Liability coverage of this policy [or] c. [o]wned by or furnished or available for the regular use of **you** or a **relative**."

The Uninsured and Underinsured Motorist Insurance Coverage Act is implicated in our analysis of this case. As a general matter, the act requires that automobile liability insurance policies provide for protection against uninsured and underinsured motor vehicles. See Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2010). The act provides at § 44-6408(1) as follows:

> No policy insuring against liability imposed by law for bodily injury, sickness, disease, or death suffered by a natural person arising out of the ownership, operation, maintenance, or use of a motor vehicle within the United States, its territories or possessions, or Canada shall be delivered, issued for delivery, or renewed with respect to any motor vehicle principally garaged in this state unless coverage is provided for the protection of persons insured who are legally entitled to recover compensatory damages for bodily injury, sickness, disease, or death from . . . (b) the owner or operator of an *underinsured motor vehicle* . . . .

(Emphasis supplied.)

Elsewhere, § 44-6407 of the act provides in part:

> An uninsured or underinsured motor vehicle shall not include a motor vehicle:
>
> (1) Insured under the liability coverage of the same policy of which the uninsured or underinsured motorist coverage is a part;
>
> (2) Owned by, furnished, or available for the regular use of the named insured or any resident of the insured's household.

[4] In order to be entitled to underinsured motorist coverage under the terms of both the policy and the Uninsured and Underinsured Motorist Insurance Coverage Act, an insured must be legally entitled to recover compensatory damages from the owner or operator of an "underinsured motor vehicle." In the present case, in order for the appellants to be entitled to underinsured motorist compensation with respect to the April 27, 2009, accident, the Jeep involved in the accident must be an "underinsured motor vehicle." For the reasons set forth below, we conclude under both the policy issued by American Family and by reference to the Uninsured and Underinsured Motorist Insurance Coverage Act, that the Jeep was not an "underinsured motor vehicle" and that, therefore, the appellants cannot recover under the underinsured provisions of Melissa's policy.

The interpretation of an insurance policy presents a question of law that we decide independently of the trial court. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). We have reviewed the policy and the undisputed facts. We determine that the Jeep is not an underinsured vehicle under Melissa's policy for several reasons, including that it is an "insured" vehicle under the policy; that it is owned by Melissa, the policyholder; and that it was made available for the "regular use" of Anthony.

The policy issued by American Family in the present case specifically excludes from the definition of "underinsured motor vehicle" any vehicle "[i]nsured under the Liability coverage of this policy." According to the liability section of the policy, American Family "will pay compensatory damages an **insured person** is legally liable for because of **bodily injury** and **property damage** due to the **use** of a **car** or **utility trailer.**" The policy defines "[**i**]**nsured person**" as "[**y**]**ou** or a **relative**" or "[a]ny person using **your insured car.**" In the policy, "**You**" refers to Melissa. "**Your insured car**" is defined as "[a]ny **car** described in the declarations . . . ." The 1996 Jeep Grand Cherokee Laredo is listed in the policy's declarations section. Thus, because the Jeep is insured under the liability coverage section of the American Family policy, it is an insured vehicle

and excluded from the definition of "underinsured motor vehicle" under the terms of the policy. The district court did not err when it so determined.

Referring again to the policy, the Jeep is not an underinsured motor vehicle, because it was owned by Melissa, who is the named insured. The underinsured motorists coverage provision states that an "[**u**]**nderinsured motor vehicle**" does not mean a vehicle "[o]wned by or furnished or available for the regular use of **you** or a **relative**." The policy defines "[**y**]**ou** and **your**" as "the policyholder named in the declarations." The policyholder named in the declarations is Melissa. In this case, the Jeep was owned by Melissa and Melissa is the policyholder named in the declarations. Thus, because the Jeep was owned by the policyholder named in the declarations, it is excluded from the definition of "underinsured motor vehicle" under the terms of the policy. The district court did not err when it so determined.

Referring again to the policy, the policy defines "[**r**]**elative**" as "a person living in **your** household, related to **you** by blood, marriage or adoption." There is no dispute that the Jeep that Anthony was driving at the time of the accident was available to him for his regular use, that Anthony was Melissa's son, and that he was living with her at the time of the accident. Therefore, because the Jeep was made available for the regular use of Anthony, a relative of the policyholder, the Jeep was excluded from the definition of "underinsured motor vehicle" under the policy. The district court did not err when it so determined.

Similar to the policy language, the Uninsured and Underinsured Motorist Insurance Coverage Act, which mandates the availability of underinsured coverage, provides in part at § 44-6407 as follows:

> An uninsured or underinsured motor vehicle shall not include a motor vehicle:
>
> (1) Insured under the liability coverage of the same policy of which the uninsured or underinsured motorist coverage is a part;
>
> (2) Owned by, furnished, or available for the regular use of the named insured or any resident of the insured's household.

Thus, in addition to the terms of Melissa's policy, the Jeep was excluded from the definition of "underinsured motor vehicle" for purposes of the insurance requirements of the Uninsured and Underinsured Motorist Insurance Coverage Act.

Notwithstanding the dictates of the language of the policy and the act, the appellants assert that the provision in the policy excluding vehicles that are owned or furnished for the "regular use" of the insured or a relative is void as against public policy and is contrary to the purpose of Nebraska's underinsured motorist coverage statute. They claim that the district court erred when it rejected this assertion. We conclude that the district court did not err.

In connection with their public policy argument, the appellants refer us to cases from other jurisdictions. In the cases upon which the appellants rely, courts have held that various provisions in automobile insurance policies excluding vehicles owned by, furnished, or made available for the regular use of a named insured or a relative of the insured from the definition of "uninsured motor vehicles" or "underinsured motor vehicles" are unenforceable contract restrictions, because they are at odds with mandatory uninsured or underinsured motorist coverage required by statute, the purpose of which is to protect citizens from damages caused by uninsured or underinsured motorists. The appellants rely on these cases to show that the trial court erred in determining the provision in the policy is not void as against public policy. See, *Gibbs v. National General Ins. Co.*, 938 S.W.2d 600 (Mo. App. 1997); *Fontanez v. Texas Farm Bureau Ins. Companies*, 840 S.W.2d 647 (Tex. App. 1992). The decisions on which the appellants rely are distinguishable from the instant case, which must be decided with reference to Nebraska's statutes.

Unlike Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act, which excludes vehicles made available for the regular use of a named insured or any resident of the insured's household from the definition of "underinsured motor vehicle," § 44-6407(2), the state statutes involved in the cases relied on by the appellants do not require the exclusion of vehicles made available for the regular use of a relative of the insured. In *Gibbs v. National General Ins. Co., supra*, the uninsured and underinsured motorist coverage statute in

Missouri did not include a "regular use" exclusion. Similarly, in *Fontanez v. Texas Farm Bureau Ins. Companies, supra*, the uninsured and underinsured motorist coverage statute in Texas did not specifically include a "regular use" exclusion in the definition of an "underinsured motor vehicle."

Unlike the analyses in the cases relied on by the appellants which involve statutes which do not exclude vehicles provided for the regular use of the insured or a relative of the insured from the definition of "uninsured motor vehicle" or "underinsured motor vehicle," the instant case is more comparable to our analysis employed in *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001). In *Continental Western Ins. Co.*, the appellants therein asserted that the automobile policy provision which excluded from the definition of an "underinsured motor vehicle" any vehicle "'[o]wned by any governmental unit or agency'" was void as against public policy. *Id.* at 154, 629 N.W.2d at 499. We rejected this argument.

[5,6] In rejecting the contention of the appellants appearing in *Continental Western Ins. Co.*, we referred to Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act, which provides that an "'underinsured motor vehicle shall not include a motor vehicle . . . (4) [w]hich is owned by any government, political subdivision or agency thereof . . . .'" 262 Neb. at 154, 629 N.W.2d at 500. See § 44-6407(4). In *Continental Western Ins. Co.*, we stated:

> "[I]t is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state." *Clemens v. Harvey*, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994). The exclusion in the insurance policy cannot be void as against public policy when it mirrors the statutory exclusion and when the statute, which has not been found wanting, is the Legislature's expression of the public policy of this state.

262 Neb. at 157, 629 N.W.2d at 501. In *Continental Western Ins. Co.*, we therefore found that the exclusion of government-owned vehicles from the definition of an "underinsured motor

vehicle" in the insurance policy at issue was not void as against public policy.

Similar to our observation in *Continental Western Ins. Co. v. Conn, supra*, the policy exclusion challenged herein mirrors the statute's provisions. In the instant case, the policy issued by American Family excluded from the definition of an "underinsured motor vehicle" any vehicle "[o]wned by or furnished or available for the regular use of **you** or a **relative**." This policy language closely follows the language of Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act, which excludes from the definition of an "underinsured motor vehicle" a vehicle "[o]wned by, furnished, or available for the regular use of the name insured or any resident of the insured's household." § 44-6407(2). Applying our reasoning in *Continental Western Ins. Co.*, we conclude that the "regular use" exclusion in the insurance policy, which mirrors the statutory exclusion, reflects the public policy of this state and is not void as against public policy. The district court did not err when it reached the same conclusion.

CONCLUSION

Following our consideration on appeal, we agree with the district court that the Jeep is not an "underinsured vehicle" under the policy and that the "regular use" exclusion is consistent with § 44-6407(2) of the Uninsured and Underinsured Motorist Insurance Coverage Act, and not void as against public policy. The district court did not err when it entered summary judgment in favor of American Family and dismissed the complaint. We therefore affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM P. BOUDA II, RESPONDENT.

806 N.W.2d 879

Filed December 16, 2011. No. S-11-005.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. Failure to answer formal charges subjects a respondent to judgment on the formal charges filed.
3. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances, and considers the attorney's acts underlying the events of the case and throughout the proceedings.
4. ____. The Nebraska Supreme Court considers six factors in determining whether and to what extent discipline should be imposed: (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. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.
6. ____. Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts, and typically warrants disbarment.

Original action. Judgment of disbarment.

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

No appearance for respondent.

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

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against William P. Bouda II, a suspended member of the Nebraska State Bar Association, alleging Bouda violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. § 3-508.4(a), (b), and (c). Generally, the charges alleged that Bouda neglected a client's case, and then lied to his client and stole from his employer in a failed attempt to cover up the neglect. Bouda did not respond to the charges.

The Counsel for Discipline moved for judgment on the pleadings; we granted the motion and directed the parties to brief the question of appropriate discipline. For the reasons that follow, we disbar Bouda.

FACTS

Bouda was admitted to the practice of law in Nebraska in 1999.[1] This is not his first disciplinary proceeding. Formal charges were brought against him in a separate proceeding in 2008.[2] In that case, the referee found that Bouda had falsely represented to both opposing counsel and the district court that he had the authority to settle a civil case. In fact, Bouda had no such authority; instead, the truth was that the trial date for the case had arrived but Bouda was unprepared for trial. Bouda also misstated the status of the case in communicating with his client.[3] But the referee also found several mitigating factors, such as a lack of a prior record of misconduct, marital difficulties, and cooperation with the Counsel for Discipline. We suspended Bouda from the practice of law for 3 months.[4]

The present case involves comparable, but substantially more severe, allegations of neglect and misrepresentation. Jeff Finochiaro hired Bouda in January 2007 to defend him in a lawsuit between LaFarge North America, Inc., and Maverick Concrete and Piping Company, LLC (Maverick Concrete). Finochiaro was a guarantor of Maverick Concrete and a defendant in the suit. The court granted LaFarge North America's summary judgment motion around March 13, 2008, resulting in a judgment of $179,757.21 against Maverick Concrete and Finochiaro. Bouda was granted leave to file a third-party complaint against two other entities, Double D Excavating, LLC, and MCL, Inc., but never filed a complaint against either company. Neither company can now be sued on the claim because the statute of limitations has run.

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[1] See *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009).

[2] See *id.*

[3] See *id.*

[4] *Id.*

After the summary judgment, Bouda made multiple misrepresentations to Finochiaro about the status of the lawsuit and efforts to collect the judgment. Bouda told Finochiaro a third-party complaint against Double D Excavating had been filed, when it had not. He falsely said that he made a claim against Double D Excavating's bonding company and that the claim was ready for payment. Bouda falsely represented that the bonding company was in bankruptcy, but that the claim of Finochiaro and Maverick Concrete was a priority claim that was about to be paid. Then, he falsely told Finochiaro that the bonding company was in liquidation in the State of New York rather than bankruptcy, with Maverick Concrete as a preferred claimant due $160,000.

Bouda used multiple documents to mislead Finochiaro. He provided documents to back up his claim that the bonding company was in liquidation and that Maverick Concrete was a preferred claimant. He provided a document indicating that an insurance company had made a $100,000 wire transfer to LaFarge North America to partially pay Finochiaro's liability, when such payment was never made. In June 2010, Bouda gave Finochiaro a copy of a $160,000 check purporting to be a payment to LaFarge North America; that payment was never made. He gave Finochiaro a copy of a letter from someone supposedly connected with LaFarge North America stating that payment had been received and that liens were being released on Omaha, Nebraska, properties. No one at LaFarge North America wrote such a letter. He gave Finochiaro a "'Lien Release — Satisfaction of Judgment,'" which supposedly had been, but never was, filed with the Douglas County register of deeds. Bouda also gave Finochiaro a false document supposedly from LaFarge North America's attorney saying that the judgment against Finochiaro had been satisfied. And Bouda provided a copy of a "'Satisfaction of Judgment'" that had supposedly been filed in district court when no such document had been filed.

In addition to failing to file the third-party complaint, Bouda told Finochiaro he would take care of an order for examination of debtor issued to Finochiaro. Bouda failed to do so, and as a result, a capias was issued for Finochiaro's arrest. Bouda also,

after he was suspended in 2009, told Finochiaro that he was authorized to practice law in Nebraska.

In September 2010, while working as a claims recovery specialist for an insurance company, Bouda caused the company to issue a settlement check to a law firm for $160,000 in payment of Finochiaro's debt to LaFarge North America. Bouda was fired as soon as he admitted to the insurance company that he had fraudulently issued the check to satisfy Finochiaro's judgment.

The Counsel for Discipline alleged these actions violated Bouda's oath of office and § 3-508.4(a), (b), and (c). Bouda failed to respond to the charges, and the Counsel for Discipline moved for judgment on the pleadings. The motion was sustained, and the parties were ordered to brief the issue of discipline. Bouda neither filed a brief nor appeared at oral argument.

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[5] Failure to answer the formal charges subjects a respondent to judgment on the formal charges filed.[6] Because the motion for judgment on the pleadings was granted, the only issue before us is the appropriate discipline.[7] In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances.[8]

[3,4] This court evaluates each attorney discipline case in light of its particular facts and circumstances,[9] and considers the attorney's acts underlying the events of the case and throughout the proceedings.[10] We consider six factors in

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[5] *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011).

[6] *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003).

[7] *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[8] *Thew, supra* note 5.

[9] *Id.*

[10] *Samuelson, supra* note 7.

determining whether and to what extent discipline should be imposed: (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.[11]

[5] We have, in comparable cases, entered judgments of disbarment.[12] Bouda's conduct also warrants disbarment. Bouda severely neglected legal matters entrusted to him, made multiple misrepresentations, and then falsified documents to cover his misdeeds. And we have often said that because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[13] Bouda has previously been disciplined for making dishonest statements and misleading a client, but continued his misconduct. We note that several of the misdeeds underlying the present case took place during and after Bouda's previous disciplinary proceedings.

[6] In addition, Bouda's actions cost Finochiaro a potential claim against a third party and put Finochiaro at risk of arrest. And Bouda also stole from his employer to try to prevent discovery of his neglect and deception. We have often said that misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts, and typically warrants disbarment.[14] While Bouda's employer may not have technically been his "client" when he stole from it, there is no ethical distinction to be made.[15]

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[11] See *Thew, supra* note 5.

[12] See, e.g., *Thew, supra* note 5; *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006); *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 708 N.W.2d 606 (2005).

[13] See *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010).

[14] *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[15] See, e.g., *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994); *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981).

Finally, we note that because Bouda neither responded to the Counsel for Discipline nor filed a pleading, we have no basis for considering any factors that mitigate in his favor.[16] Instead, his failure to cooperate with the Counsel for Discipline and respond to the charges at any point during this disciplinary process indicates disrespect for this court's disciplinary jurisdiction.[17] Simply put, Bouda's pattern of neglect and deception, his theft from his employer, his recalcitrance and recidivism in response to previous discipline, and his complete failure to respond to the charges against him, demonstrate beyond any reasonable dispute that he is unfit to practice law.

CONCLUSION

We find that Bouda should be and hereby is disbarred from the practice of law in Nebraska, effective immediately. Bouda is hereby ordered to comply with all terms of Neb. Ct. R. § 3-316 forthwith and shall be subject to punishment for contempt of this court upon failure to do so. He is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

WRIGHT, J., not participating in the decision.

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[16] See *Samuelson, supra* note 7.

[17] See *id.*

AMERICAN AMUSEMENTS CO., A NEBRASKA CORPORATION, AND GREATER AMERICA DISTRIBUTING, INC., A NEBRASKA CORPORATION, APPELLEES, V. NEBRASKA DEPARTMENT OF REVENUE, A NEBRASKA STATE AGENCY, ET AL., APPELLANTS.

807 N.W.2d 492

Filed December 23, 2011. No. S-10-804.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Gaming: Words and Phrases.** Gambling occurs in Nebraska when a bet is placed on an outcome that is determined predominantly by chance.
6. **Injunction.** An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Jon Bruning, Attorney General, L. Jay Bartel, and Michael B. Guinan, and Mark C. Laughlin, Special Assistant Attorney General, of Fraser Stryker, P.C., L.L.O., for appellants.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee American Amusements Co.

Thomas M. Locher and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee Greater America Distributing, Inc.

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

STEPHAN, J.

This appeal focuses on the legality of a video gaming device known as Bankshot, which was developed by American Amusements Co. (American Amusements) and distributed by Greater America Distributing, Inc. (collectively appellees). Appellees filed this lawsuit after the State seized two Bankshot devices as alleged illegal gambling devices, seeking a declaration that they were not illegal. The state agencies and officers who were named as defendants filed a counterclaim seeking a declaration that Bankshot was a "game of chance" and therefore an unlawful gambling device. Following a bench trial, the district court for Lancaster County found that Bankshot was a game of chance when played in some modes, but not when played in others. The court declined the request for injunctive relief by the named state agencies and officers, who now appeal from the judgment. We affirm.

I. FACTS AND PROCEDURAL HISTORY

1. BACKGROUND

John Fox is the president of American Amusements. In mid-2007, prior to marketing Bankshot, Fox asked a Nebraska State Patrol officer, Don Littrell, to assess the legality of the prototype. Fox understood that Littrell was the State of Nebraska's gambling device expert, and Littrell agreed that he was the State Patrol's "go-to-guy" in this area. Littrell advised Fox and American Amusements that the initial prototype of Bankshot was not legal, because the game did not involve a predominance of player skill. American Amusements then redesigned Bankshot and again asked Littrell to assess its legality. Littrell recommended submitting Bankshot to a third-party testing facility and suggested two such facilities: Eclipse Compliance Testing and Gaming Laboratories International. In late summer 2007, Eclipse Compliance Testing tested the device and issued a written report in October 2007 concluding that Bankshot was predominantly a game of skill and therefore was a legal device in Nebraska.

Around January 2008, Bankshot games were placed into service in Nebraska. As many as 430 Bankshot games were located in 143 different Nebraska cities. After the Bankshot

games had been in place for approximately 1 year, American Amusements received notice from the Nebraska Department of Revenue that additional testing of Bankshot was necessary, and American Amusements agreed to provide a Bankshot device for the additional testing. But before it did so, the State seized two Bankshot devices and submitted the devices for testing at both Eclipse Compliance Testing and Gaming Laboratories International. In a letter dated April 14, 2009, the director of the Charitable Gaming Division stated that the purpose of this testing "was to obtain opinions on whether Bank[s]hot was primarily a game of chance, and therefore illegal, or primarily a game of skill." The testing again concluded that Bankshot was primarily a game of skill and was thus legal in Nebraska. At least one of the Bankshot devices submitted for testing used the same version of software that was in use at the time of trial in this case.

In September 2009, the State seized two more Bankshot devices. At the time of trial, these devices had not been returned. On September 17, appellees filed this declaratory judgment action, naming as defendants the Nebraska Department of Revenue; the Nebraska State Patrol; Col. Bryan Tuma, the superintendent of the Nebraska State Patrol; Doug Ewald, the Nebraska Tax Commissioner; and Jon Bruning, the Nebraska Attorney General (collectively the State).

2. Bankshot Game

(a) Basics of Game

The Bankshot gaming device is equipped with a 19-inch video monitor, on which all game play is displayed; a currency acceptor; and either a thermal voucher printer or a ticket dispenser. A player interacts with the game by using the touchscreen interface to complete game play, and the device also includes a single-button interface (located just below the monitor) which the player can use to initiate game play and stop on puzzles.

A player may insert $1, $5, $10, or $20 into the Bankshot currency acceptor. One hundred game credits are received for each $1 inserted into the machine. The game rules and play instructions are accessed by selecting the "Help" button on

the touchscreen. The first screen displayed explains the game play process.

To initiate a game, the player selects the number of credits to put at risk, choosing from 25, 50, 100, or 400. Each Bankshot game consists of a series of puzzles presented to the player as a three-by-three grid of pool balls, and the object of the game is to solve puzzles by creating a winning "tic-tac-toe" combination of three like-colored balls in a row. The puzzles will never by default contain a winning combination of three pool balls in a row of the same color, but a winning combination is possible with respect to each puzzle.

The game begins when the player presses the play button on the touchscreen or button panel. At that time, depending upon the mode of play selected, the pool balls will either start to spin or scroll indefinitely until the player chooses to stop on a given puzzle. Once the balls have stopped, the player then decides where to replace one of the nine displayed pool balls with a ball marked "Wild." The player does this by touching a ball displayed on the screen to replace it with the "Wild" ball.

(b) Modes of Play

A player may choose from three different modes of puzzle presentation by selecting one of three buttons labeled "Spin," "Slow," or "Fast." All three modes present the same puzzles in slightly different ways. When a player chooses to play in Spin mode, the nine pool balls displayed on the screen begin to spin in place simultaneously when the player presses start. They will then all come to a brief stop, after which they will begin to spin again. This continues indefinitely until the player presses the stop button.

The Slow and Fast modes of play both display the pool balls scrolling across the screen in a backward "S" pattern from left to right, top to bottom. When played in Slow mode, the balls continuously scroll and a green number appears on every ninth ball. The green number denotes where each puzzle in the chain starts. When the player presses the stop button, the scrolling pool balls stop when the ball with the green number then displayed on the screen reaches the lower right position of the play screen. In Fast mode, the balls will pause

on each puzzle as it is scrolled, similar to the pause during Spin mode play.

(c) Prizes

Prize amounts are based in part upon how long it takes a player to select a ball and replace it with the "Wild" ball once the player chooses a puzzle. A time meter is displayed graphically by a slider bar directly below the puzzle display. When a player chooses a puzzle, a black dot begins to move across the slider bar from left to right, through four regions colored green, yellow, orange, and red. If the player places the "Wild" ball while the black dot is in the green region, the prize amount is multiplied by 1.5. The yellow and largest region awards the amount risked, the orange region awards one-half of the amount risked, and the red region awards one-quarter of the amount risked. If the player fails to make a selection by the time the black dot reaches the far right side of the slider bar, which takes approximately 6 seconds, no prizes are awarded for that particular puzzle.

Prizes also vary depending on how many credits are put at risk and what color combination of pool balls creates the tic-tac-toe. Each pool ball has both a number and a distinct color: "1-balls" are yellow, "2-balls" are blue, "3-balls" are orange, "4-balls" are purple, "5-balls" are red, "6-balls" are green, "7-balls" are maroon, and "8-balls" are black. Pool balls labeled "Bonus" are also presented. A player may want to play one puzzle rather than another because certain puzzles contain larger possible winnings than others. The value of winning combinations is explained on the help screen and is displayed on the right side of the game screen during game play. During play, the three lowest paying matching combinations (three maroon 7-balls, three green 6-balls, or three orange 3-balls) always award the player less than the amount of credits put at risk to play the puzzle. A combination of three blue 2-balls can award at least the amount of credits put at risk. Combinations of three purple 4-balls, three yellow 1-balls, three red 5-balls, three "Bonus" balls, or three black 8-balls can award credits worth more than the amount risked.

(d) Bonus Features and Jackpot

Bankshot also offers three bonus features: The "Fast Break," the "Speed Break," and the "Pool" bonus. The Fast Break and Speed Break bonuses are earned, respectively, when a player correctly solves a specified number of the first puzzle presented and when the player quickly solves a specified number of puzzles. The Pool bonus is reached if a player creates a tic-tac-toe of three "Bonus" pool balls.

A jackpot prize is also available when a player correctly solves a puzzle with three 8-balls. When a puzzle presenting a jackpot solution will appear to a player is determined by a counter, and a jackpot puzzle will be presented either every 144,550 or 433,650 puzzles. The jackpot prize is awarded based on the number of games played at all Bankshot locations. As of February 12, 2010, Bankshot had been played 65,593,983 times and 50 jackpot prizes had been awarded.

(e) Puzzle Distribution

Bankshot puzzles are contained in software tables identified as "Table A," "Table B," and "Table C." Each table contains 10,325 puzzles, arranged in a fixed circular or loop fashion, so that once the last puzzle in a table has been presented, the next puzzle presented from that table will be the first puzzle. When a player begins a Bankshot game, the first puzzle presented will be the next sequential puzzle from Table A. If the first puzzle is not chosen for play by the player, the next puzzle presented will be the next sequential puzzle from Table B. If the second puzzle is not chosen for play by the player, the next puzzle presented will be the next sequential puzzle from Table C. If this puzzle is not chosen, the next puzzle presented will be the next sequential puzzle from Table C, and all subsequent puzzles will be presented sequentially from Table C until a puzzle is chosen for play by the player. The cycle then starts over, with the first puzzle then presented coming from Table A. There is no time constraint on the player to select a puzzle. A player is not informed during game play how the puzzles are presented.

3. Proceedings Below

After conducting a bench trial, the district court determined that the proper standard in Nebraska for determining whether a game constitutes gambling is whether the outcome bet upon is determined predominantly by skill or by chance: if by skill, it is not gambling, but if by chance, it is. Applying this standard, it found the State had proved beyond a reasonable doubt that when Bankshot was played in Slow mode, the outcome was determined predominantly by chance and thus was gambling. It found that neither party had carried its burden of proof with respect to whether playing Bankshot in Fast mode was gambling. And the court determined by a preponderance of the evidence that Bankshot when played in Spin mode was not gambling, because the outcome of the game was determined predominantly by player skill.

The court found that whether Bankshot's Pool bonus and jackpot were gambling depended upon which mode of play they arose in: when played in Spin mode, they were not gambling, but when played in Slow mode, they were. It held that both the Fast Break bonus and the Speed Break bonus were gambling beyond a reasonable doubt. Ultimately, the district court concluded that Bankshot was usable for gambling and was thus a gambling device under Nebraska law. But it refused the State's request for injunctive relief, reasoning that there was no showing that appellees knowingly used Bankshot to advance unlawful gaming activity.[1] The State filed a timely notice of appeal and a petition to bypass, which we granted.

II. ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred in (1) determining its claims for declaratory and injunctive relief presented actions at law and not equity actions; (2) determining that the State bore the burden to prove beyond a reasonable doubt that Bankshot involved gambling by use of a gambling device; (3) determining that the definitions of gambling and gambling device should be interpreted to require that chance be the predominant factor in determining outcome rather than

[1] See Neb. Rev. Stat. § 28-1107(1) (Reissue 2008).

finding that only an element of chance must determine outcome; (4) failing to determine that Bankshot involves gambling by use of a gambling device because play of the game involves betting something of value on the outcome of a future event which is determined by an element of chance; (5) failing to determine that Bankshot play involves betting something of value on the outcome of a future event which is determined predominantly by chance rather than player skill; (6) determining that the outcome of Bankshot when played in Spin mode (including the Pool bonus outcome) is determined predominantly by player skill rather than chance; (7) failing to determine that the outcome of Bankshot when played in Fast mode (including the Pool bonus outcome) is determined predominantly by chance and not player skill; (8) failing to determine that chance and not player skill is the predominant factor in determining the jackpot outcome of the Bankshot game; (9) failing to determine that the Fast Break and Speed Break bonuses in the Bankshot game, other than the determination of the amount of prize awarded, are determined primarily by chance and not by player skill; (10) finding only that Bankshot was an illegal gambling device "as currently configured and programmed" and failing to find that the device was an illegal gambling device in all play modes; and (11) denying an injunction to prevent continued use, distribution, placement, or possession of the Bankshot gaming device.

III. STANDARD OF REVIEW

[1,2] The parties sought both declaratory and injunctive relief in the district court. An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[2] Because an action for injunction sounds in equity,[3] we conclude that our standard of review for equity actions is

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[2] *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Homestead Estates Homeowners Assn. v. Jones*, 278 Neb. 149, 768 N.W.2d 436 (2009).

[3] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009); *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

appropriate here. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[4] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[5]

[3] This appeal also presents issues regarding the meaning of Nebraska statutes. Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

IV. ANALYSIS

As a preliminary matter, we note that appellees have not cross-appealed from the determinations of the district court that (1) the Speed Break and Fast Break bonus games of Bankshot are games of chance; (2) Bankshot when played in the Slow mode is a game of chance; and (3) Bankshot, as configured and programmed at the time of trial, is an illegal gambling device. At oral argument, the parties agreed that the Bankshot game has been reconfigured to remove those aspects which the district court determined to be games of chance and that the Fast mode of play has also been eliminated. Thus, the primary issue in this appeal is a narrow one: whether the district court properly found that Bankshot is not a game of chance when played in Spin mode.

1. Burden of Proof Is Beyond Reasonable Doubt

The district court determined that the State was required to prove its claims for declaratory and injunctive relief beyond a reasonable doubt. On appeal, the State contends that the district

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[4] *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010). See *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

[5] *Schauer, supra* note 4; *Shoemaker, supra* note 4.

[6] *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010); *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

court should have applied the lesser preponderance of the evidence burden.

To resolve this issue, we must view the State's claim in its proper legal context. Neb. Rev. Stat. § 28-1101(4) (Reissue 2008) provides that "[a] person engages in gambling if he or she bets something of value upon the outcome of a future event, which outcome is determined by an element of chance . . . ." Section 28-1101(5) defines "[g]ambling device" to include

> any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value, free games redeemable for something of value, instant-win tickets which also provide the possibility of participating in a subsequent drawing or event, or tickets or stubs redeemable for something of value, except as authorized in the furtherance of parimutuel wagering.

And § 28-1107(3) provides that possession of a "gambling device" is a Class II misdemeanor. In its counterclaim, the State alleged that Bankshot was an unlawful "gambling device" as defined in § 28-1101(5). It further alleged that appellees' "involvement in developing, promoting, and distributing Bankshot video gaming devices" violated Nebraska's criminal statutes prohibiting gambling.

It is thus clear that the State is claiming that appellees' conduct was criminal. In two prior cases, *Main Street Movies v. Wellman*[7] and *Tipp-It, Inc. v. Conboy*,[8] we decided declaratory judgment actions involving possible violations of criminal laws. In both cases, we determined that proof beyond a reasonable doubt was required because (1) our review was as a criminal case at law and (2) it would be inconsistent if the

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[7] *Main Street Movies v. Wellman*, 257 Neb. 559, 598 N.W.2d 754 (1999).

[8] *Tipp-It, Inc. v. Conboy*, 257 Neb. 219, 596 N.W.2d 304 (1999).

standard of proof in a declaratory judgment action involving an alleged criminal violation was less than the standard of proof in a criminal prosecution.

The State contends that *Main Street Movies* and *Tipp-It, Inc.* are distinguishable from the instant case because both were brought pursuant to a specific authorizing statute and both involved First Amendment issues. We consider these to be distinctions without a difference. The statutes, Neb. Rev. Stat § 28-801 et seq. (Reissue 1995), did not independently authorize the actions in *Main Street Movies* and *Tipp-It, Inc.*, but instead only modified the prerequisites necessary for bringing an action under the declaratory judgment act when the issue involved obscenity. Because the instant case also arises under the declaratory judgment act, the same burden of proof should apply.

Similarly, assuming without deciding that the instant case does not involve a First Amendment issue, application of the reasonable doubt burden of proof is not dependent upon the existence of a fundamental First Amendment issue. This is illustrated by our lack of any reference to the First Amendment issue in *Main Street Movies* when articulating the appropriate burden of proof.[9] The critical factor in both *Main Street Movies* and *Tipp-It, Inc.* was that the declaratory judgment sought to answer whether a criminal statute had been violated. That is the same issue presented in the instant case, and thus the district court correctly required the State to prove the allegations of criminal conduct beyond a reasonable doubt. To the extent that we have suggested otherwise, those cases are disapproved.[10]

2. Predominance of Chance Is Applicable Test

The primary issue in this appeal is the proper test for determining whether an activity constitutes a violation of Nebraska's

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[9] *Main Street Movies, supra* note 7.

[10] *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995); *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991); *State v. Two IGT Video Poker Games*, 237 Neb. 145, 465 N.W.2d 453 (1991); *Indoor Recreation Enterprises, Inc. v. Douglas*, 194 Neb. 715, 235 N.W.2d 398 (1975); *Baedaro v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953).

gambling statutes. According to our statutes, gambling occurs when a person "bets something of value upon the outcome of a future event, which outcome is determined by an element of chance."[11] We are asked to interpret the meaning of the phrase "outcome is determined by an element of chance."

Some contextual and historical background is necessary. Article III, § 24, of the Nebraska Constitution provides that "the Legislature shall not authorize any game of chance." And prior to 1977, Nebraska defined a "gambling device" as one which was "adapted, devised and designed for the purpose of playing any game of chance for money or property."[12] In *Baedaro v. Caldwell*,[13] we held that the test for determining whether a game violated the constitutional and statutory prohibition against any game of chance was "not whether [the game] contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game." *Baedaro* held that a five-ball pinball machine capable of awarding free replays was a "game of chance" under the Constitution and the statute, reasoning:

> A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.[14]

We applied the same "predominance" test when we decided in *Indoor Recreation Enterprises, Inc. v. Douglas*[15] that poker and bridge were illegal games of chance under the pre-1977 statutes. *Indoor Recreation Enterprises, Inc.* reasoned that the card games were games of chance because the players had no control over which cards were dealt.

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[11] § 28-1101(4).

[12] See Neb. Rev. Stat. § 28-945 (Reissue 1975).

[13] *Baedaro, supra* note 10, 156 Neb. at 493, 56 N.W.2d at 709.

[14] *Id.* at 494, 56 N.W.2d at 709.

[15] *Indoor Recreation Enterprises, Inc., supra* note 10.

In 1977, the Nebraska Legislature amended the gambling statutes. The "game of chance" language that tracked the constitutional language was changed, and "gambling" was instead defined as "stak[ing] or risk[ing] something of value upon the outcome of a contest of chance or a future contingent event not under [the person's] control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome."[16] "Contest of chance" was defined as "any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."[17] The operative date of these amendments was January 1, 1979.[18] We did not decide any cases addressing this statutory language during the time it was in effect.

In 1979, the Legislature again amended the statutes relating to gambling. In the course of these amendments, the definition of "contest of chance" was eliminated.[19] "[G]ambling" was defined as "bet[ting] something of value upon the outcome of a future event, which outcome is determined by an element of chance, or upon the outcome of a game, contest, or election."[20] Other than a slight modification to the definition of gambling device in 1984,[21] the 1979 gambling statutes have remained essentially unchanged.

Although we have decided gambling-based cases since the 1979 statutory amendments, we have not directly addressed the proper interpretation of the statutory phrase "outcome is determined by an element of chance."[22] The State contends that

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[16] 1977 Neb. Laws, L.B. 38, § 217(4), codified at § 28-1101(4) (Cum. Supp. 1978).

[17] *Id.*, § 217(3), codified at § 28-1101(3) (Cum. Supp. 1978).

[18] See Neb. Rev. Stat. §§ 28-1101 to 28-1113 (Cum. Supp. 1978).

[19] 1979 Neb. Laws, L.B. 152.

[20] *Id.*, § 1(4), codified at § 28-1101(4) (Reissue 1979).

[21] See 1984 Neb. Laws, L.B. 744, § 1(5), codified at § 28-1101(5) (Cum. Supp. 1984).

[22] See, *Strawberries, Inc., supra* note 10; *Two IGT Video Poker Games, supra* note 10; *CONtact, Inc*. v. *State*, 212 Neb. 584, 324 N.W.2d 804 (1982).

based on the history of amendments and the plain language of the current statutes, gambling exists if something of value is bet on the outcome of a future event and the determination of that outcome involves *any* "element of chance." Appellees contend that the predominance test we announced in *Baedaro* still applies because the current statutory language is functionally equivalent to the language interpreted in *Baedaro*.

[4] This is an issue of statutory interpretation, and our analysis is guided by well-established principles. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[23] The gambling statutes are penal statutes, and penal statutes are to be strictly construed.[24] Penal statutes are also to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[25] And an appellate court will try to avoid a statutory construction which would lead to an absurd result.[26]

Section 28-1101(4) (Reissue 2008) defines gambling as betting on an outcome that "is determined by an element of chance." The plain meaning of "determined" in this context is that the actual outcome must be caused by an element of chance. Because an outcome cannot be caused by a minor or insignificant thing, but, rather, is caused by a material or predominant thing, the present statutory language, strictly construed, simply and plainly asserts that an activity is gambling in Nebraska if its outcome is predominantly caused by chance. Restated, the present statutory language simply rewords the predominance standard that has always been applied in Nebraska.

[5] This interpretation of § 28-1101(4) is consistent with our prior interpretation of a similar statute. In *CONtact, Inc. v.*

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[23] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

[24] See, *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010); *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

[25] *Id.*

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

State,[27] we addressed language in a statute relating to lotteries which required winning chances to be "'determined by a drawing or by some other method based on an element of chance.'" We held that the predetermination of a winning ticket did not negate the existence of chance, and noted that the statutory language meant that the "predominate nature of the game, i.e., skill or chance, determines its classification."[28] To conclude that the same "determined" by "an element of chance" language used in § 28-1101(4) means something other than the predominance test would therefore be nonsensical. In addition, we note that it is clear from the record that at the time Bankshot was under development and being marketed and distributed in Nebraska, at least some of the state agencies involved in this case understood, and conveyed to appellees, that the predominance test applied in Nebraska. We reaffirm our prior holdings that gambling occurs in Nebraska when a bet is placed on an outcome that is determined predominantly by chance.

3. Bankshot Is Not Gambling in Spin Mode

The State contends that Bankshot when played in Spin mode is gambling because its outcome is determined by chance. It asserts two elements of the game in support of its position: (1) the limited amount of time a player has to select a puzzle to play and (2) the infrequent presentation of winning puzzles.

(a) Time to Select Puzzles

With respect to the time element, the State relies heavily on the testimony of its expert witness, Kenneth Deffenbacher, a cognitive psychologist and professor emeritus at the University of Nebraska at Omaha. Deffenbacher's testimony was based on the puzzle display times programmed into the Bankshot software through source codes. He experienced the Bankshot game on one occasion, when he played approximately 40 puzzles at an Omaha bar.

Deffenbacher testified that in Spin mode, Bankshot was programmed so that the pool balls would stop spinning for a

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[27] *CONtact, Inc., supra* note 22, 212 Neb. at 586, 324 N.W.2d at 805.

[28] *Id.* at 588, 324 N.W.2d at 806.

maximum of 296.5 milliseconds. He did no independent testing to verify whether the actual display times corresponded with the times in the software program. But he testified that in his career, he had never seen a "big . . . discrepancy" between the programmed times and actual display times.

Deffenbacher testified that for humans, the average reaction time required to do a simple task is 247 milliseconds. He qualified Bankshot as an intermediate task which would require 500 milliseconds for the average human to complete. Deffenbacher conceded that roughly 2½ percent of the population could do an intermediate task in 367 milliseconds, but testified that if the Spin mode display time was consistent with the 296.5 milliseconds source code program time, not even this percentage of the human population would be able to choose which puzzle they wished to play.

Deffenbacher testified that when he played Bankshot in Spin mode, he was unable to stop the Bankshot puzzle before it started spinning again. But on cross-examination, he conceded that he had played the game incorrectly. Specifically, he had tried to find two balls with the same number that were adjacent to each other during his game play. He did not realize when he played the game that the numbers on the pool balls corresponded to colors and that the object of the game was to identify balls of the same color that would appear in the same three-by-three grid if the puzzle were chosen. Deffenbacher also testified that he was trying to recognize the actual solution to the puzzle while he was deciding whether to choose that puzzle.

Fox, Bankshot's developer, testified that numbers used in software program source codes do not always correspond to actual display times in a game. He explained this was due to interactions between the computer software itself and to interactions between the software and the hardware. Christopher Shawn Green, who has postdoctoral experience in psychology and is an expert in the field of video gaming, also testified to this effect. Green took scientific measurements of the Bankshot display and determined that the source code times in the program did not correlate with the actual display times in the game. Instead, Green calculated that when Bankshot

was played in Spin mode, the balls actually stopped spinning for 500 milliseconds, not the 296.5 milliseconds programmed into the source codes. Green testified that 500 milliseconds is enough time for a human to have visual recognition and to press a button and that in his opinion, a normal adult playing Bankshot in Spin mode could stop on the puzzle he or she chose. To support his opinion, Green conducted testing on the Bankshot game and found that his subjects when directed to select a puzzle of a specific color were able to do so 80 percent of the time. Green's subjects attempted to find only maroon, green, and orange puzzles.

The district court did not make a factual finding as to how long the balls actually paused in Spin mode. It did find, however, that the puzzles were not presented so fast that a player could not exercise skill in the selection of the puzzle to be played. In doing so, it noted that Deffenbacher's testimony was "compartmentalized" due to his misunderstanding of how to play Bankshot.

Because this is an equity action, we review the facts de novo.[29] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[30] We agree with the district court's finding that Deffenbacher's testimony was compartmentalized. We further find that the puzzles in Spin mode stop spinning for approximately 500 milliseconds and that this is sufficient time for an average human to select the puzzle he or she wishes to play. The selection of the puzzle is thus determined by player skill, not by chance.

(b) Infrequency of Winning Puzzles

The State also contends Bankshot is determined by chance because of the infrequent presentation of winning puzzles. "Winning" in this context means a puzzle that pays the player more credits than the player puts at risk. It is undisputed that every Bankshot puzzle is capable of being solved. But it also is

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[29] *Schauer, supra* note 4; *Shoemaker, supra* note 4.

[30] *Id.*

undisputed that it is difficult to win more than the credits risked to play a puzzle, at least partly because of the infrequency of winning puzzles. Of the 10,325 puzzles in Table A, 1,187 pay more than the credits put at risk on the puzzle. That number is 155 in Table B and 12 in Table C.

The odds of coming away with more money than a player risks on a puzzle are remote, particularly considering that if the first puzzle (from Table A) is not chosen, the next comes from Table B, and if that is not chosen, all succeeding puzzles come from Table C, until one is chosen and the cycle repeats. To be successful at Bankshot, assuming success is defined as making money, a player must exert considerable patience while waiting for the "winning" puzzles to appear. Nevertheless, in Spin mode, Bankshot is more controlled by the player than not, and thus is predominantly a game of skill. Accordingly, Bankshot when played in Spin mode is not gambling.

4. Injunction Properly Denied

[6] An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.[31] The parties conceded at oral argument that the Bankshot game has been reconfigured to comply with the terms of the district court's order, which persuades us that injunctive relief completely banning the development and distribution of Bankshot in any form was not warranted. We conclude that Bankshot, as currently configured to allow play in only Spin mode, is not a game of chance. The court did not err in denying injunctive relief.

VI. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

Affirmed.

Wright, J., not participating in the decision.

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[31] *Strawberries, Inc., supra* note 10.

IN RE APPLICATION OF CITY OF MINDEN, NEBRASKA. CITY OF MINDEN, NEBRASKA, APPELLANT, V. SOUTHERN PUBLIC POWER DISTRICT, APPELLEE, AND BRIAN PETERSEN AND BARB PETERSEN, INTERVENORS-APPELLEES.

811 N.W.2d 659

Filed December 23, 2011. No. S-10-1055.

1. **Nebraska Power Review Board: Appeal and Error.** An appellate court will affirm a decision of the Nebraska Power Review Board if the evidence supports the decision and it is not arbitrary, capricious, unreasonable, or otherwise illegal.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Nebraska Power Review Board: Judgments: Appeal and Error.** When it appears that the Nebraska Power Review Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, an appellate court may not substitute its judgment for that of the board, and the action of the board will be sustained.
4. ____: ____: ____. An appellate court cannot interfere with a decision of the Nebraska Power Review Board unless there is no evidence to sustain the action of the board, or, for some other reason, the record shows the action of the board is arbitrary and unreasonable.
5. **Public Utilities: Rates.** The filed rate doctrine specifies that a filed tariff has the effect of law governing the relationship between the utility and its customers, operates across the spectrum of regulated utilities, and applies where state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates.
6. **Public Utilities: Rates: Presumptions.** The filed rate doctrine conclusively presumes that both the utility and its customers know the contents and effect of published tariffs.
7. **Actions: Public Utilities: Rates.** The filed rate doctrine acts to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates.

Appeal from the Power Review Board. Affirmed.

Andrew S. Pollock, David J.A. Bargen, and Mark R. Richardson, Senior Certified Law Student, of Rembolt Ludtke, L.L.P., for appellant.

David A. Jarecke, of Blankenau Wilmoth, L.L.P., and Mathew T. Watson, of Crosby Guenzel, L.L.P., for appellee.

No appearance for intervenors-appellees.

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

CONNOLLY, J.

The City of Minden, Nebraska (Minden), filed an application to construct a subtransmission line with the Nebraska Power Review Board (the Board). Southern Public Power District (Southern) objected to the application. The Board denied the application, finding that Minden's proposal was not the most economical and feasible means of supplying electrical services and also that its proposal would unnecessarily duplicate Southern's existing line. Minden appeals. Because the evidence supports the Board's decision and it is not arbitrary or unreasonable, we affirm.

BACKGROUND

In April 2010, Minden filed an application to construct an electric subtransmission line. The line consisted of about 2.12 miles of overhead line and about .04 miles of underground line. The overhead line was to have insulation that would support a voltage of 69 kilovolts, but Minden would operate it at only 34.5 kilovolts. The underground portion's insulation would support a voltage of only 34.5 kilovolts.

The proposed line would begin at a Nebraska public power district (NPPD) substation, which is outside of Minden, to the northeast. From that point, the proposed line was to proceed south before turning to the west and entering Minden. The proposed line would then connect with a substation on the north side of Minden.

Minden planned to construct this line as a replacement to an aging underground line. The underground line was about 30 years old and was reaching the end of its useful life. The existing underground line went along the same route as Minden's proposed line.

Minden initially estimated the project's cost at $750,000. Minden, however, later revised and lowered its estimate to $500,000. Minden admitted that this was just an estimate and that it could not know what the line would actually cost until it received bids. The cost could potentially vary by 20 percent.

Minden claimed that the ratepayers would not pay this cost because it had been setting aside money for several years in preparation to build the line.

Southern protested Minden's application. Southern argued that it had an existing 34.5-kilovolt line, built about 20 years after Minden had constructed its original underground line. Southern stated its line could accommodate the load that Minden hoped to carry on its proposed line. Southern's line was originally built to provide power to a nearby ethanol plant; it apparently was not initially designed with the aim of serving Minden. This line would be directly adjacent to Minden's proposed line. Southern argued that because the proposed line would duplicate and also compete with its existing line, it was contrary to Nebraska public policy regarding powerlines.

The record shows that Minden receives backup service from Southern. Minden pays Southern $4,000 a month for this service. The parties disputed whether Minden received backup power on a Southern line coming from the west side of town or on a Southern line on the east. But if Southern were to provide Minden's primary source of power, it would be through the eastern line, the one that would be adjacent to Minden's proposed line.

Southern had offered to transmit Minden's power. The price that Southern offered was one-half of Southern's usual subtransmission rate, or about $48,000 a year. Southern guaranteed this price for 5 years. After 5 years, the price would be one-half of whatever the subtransmission rate was at that time. Minden rejected this offer, apparently because it was concerned about the rate after 5 years and did not want to rely on Southern for its transmission.

The cost of transmitting the power was not the only cost to consider, there was also the cost of maintenance. Minden had a contract with NPPD under which NPPD provided Minden's maintenance on its system. Minden usually allocates between $250,000 and $300,000 a year for maintenance of its system. Representatives of Minden said that if Minden did not wish to have maintenance done, it simply did not allocate funds for it. The funds for maintenance are in addition to the cost of the power that Minden purchases from NPPD.

The record shows that if Minden built the proposed line, it planned to deenergize its underground line and cancel its backup agreement with Southern. This action would result in Minden's lacking a backup source of power. Conversely, if Minden were to leave the underground line energized, its exposure to maintenance costs would increase because it would have to maintain both the proposed aboveground and existing underground lines.

The Board issued its findings of fact and conclusions of law. The Board's factual findings are consistent with the facts we have already laid out. The underlying facts of this case do not appear to be in serious dispute. Instead, the parties have drawn their battlelines around the conclusions the Board drew from those facts.

Regarding those conclusions, the Board concluded that both Minden's proposal and the use of Southern's line would serve the public convenience and necessity. The Board based this conclusion on the age of Minden's underground line and the likelihood that failures would soon occur if Minden could not find a replacement.

But the Board concluded that Minden's proposal was not the most economical and feasible means of supplying the service. While the Board accepted Minden's $500,000 estimate to construct the line, it also noted that $750,000 was Minden's initial estimate. According to the Board, this deviation reflected the fluctuations of the prices of the materials needed and the difficulty of price estimates. The Board concluded there was no guarantee that the costs would not increase, requiring Minden's ratepayers to pay the overages for the cost of the project.

The Board was also concerned with Minden's failure to account for maintenance. Although the Board acknowledged it was possible that maintenance would not be needed, it was equally possible that a storm could cause significant damage resulting in Minden's paying the cost. The Board noted that Minden's exposure to maintenance costs would be greater if it built its own line than it would be if it used Southern's.

The Board concluded that at the current rate, Minden could use the $500,000 it had saved to receive power over Southern's

line for the next 10 years. The Board noted that Minden could pay for services even longer if it invested this money until it was needed to pay Southern. Summed up, the Board found that using Southern's line was the more economical and feasible choice for Minden.

In addition, the Board found that Minden's proposed line would be unnecessarily duplicative of Southern's. The Board noted that both lines would begin at the same place and both would be connected to the substation on the north side of Minden. Moreover, both lines would have the same voltage. And Southern's line had the capacity to carry both its load and the load that Minden wished to carry on its proposed line. In sum, the Board found that the new line would be unnecessarily duplicative of Southern's existing line.

ASSIGNMENTS OF ERROR

Minden assigns that the district court erred in

(1) determining that Minden's proposed subtransmission line was not the most economical and feasible means of providing electric service; and

(2) determining that Minden's proposed subtransmission line would constitute an unnecessary duplication of facilities.

STANDARD OF REVIEW

[1] An appellate court will affirm a decision of the Board if the evidence supports the decision and it is not arbitrary, capricious, unreasonable, or otherwise illegal.[1]

[2] Statutory interpretation is a question of law that we resolve independently of the trial court.[2]

ANALYSIS

Neb. Rev. Stat. § 70-1001 (Cum. Supp. 2010) sets out the Board's policy in part as follows:

> In order to provide the citizens of the state with adequate electrical service at as low overall cost as possible,

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[1] *In re Application of Neb. Pub. Power Dist.*, 281 Neb. 350, 798 N.W.2d 572 (2011).

[2] See *id.*

> consistent with sound business practices, it is the policy of this state to avoid and eliminate conflict and competition between public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives in furnishing electric energy to retail and wholesale customers, to avoid and eliminate the duplication of facilities and resources which result therefrom, and to facilitate the settlement of rate disputes between suppliers of electricity.

Neb. Rev. Stat. § 70-1014 (Cum. Supp. 2010) guides our analysis. This statute provides that "before approval of an application, the board 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 Board found that Minden's application would serve the public convenience and necessity. The Board, however, found that Minden could not supply the electricity most economically and feasibly. The Board also found that Minden's line would be unnecessarily duplicative of Southern's. Minden argues that the Board erred in these two findings.

[3,4] But Minden's arguments buck a strong headwind: When it appears that the Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the Board, and the action of the Board will be sustained.[3] In other words, this court cannot interfere with a decision of the Board unless there is no evidence to sustain the action of the Board, or, for some other reason, the record shows the action of the Board is arbitrary and unreasonable.[4]

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[3] See *Cornhusker P. P. Dist. v. Loup River P. P. Dist.*, 184 Neb. 789, 172 N.W.2d 235 (1969).

[4] *Omaha P. P. Dist. v. Nebraska P. P. Project*, 196 Neb. 477, 243 N.W.2d 770 (1976).

Is Minden's Application the Most Economical and Feasible Means of Providing Electric Service?

Minden first argues that the Board erred in concluding that Minden could not supply the electricity most economically and feasibly. Minden argues that this is a "matter of simple arithmetic."[5] It contends that a one-time payment to construct the line is more economical for Minden over the long term than paying $48,000 a year for the use of Southern's line because the proposed line will, over time, pay for itself.

As part of this argument, Minden raises the filed tariff, or filed rate, doctrine. According to Minden, this doctrine, which it concedes we have never applied to an entity like Southern, prohibits Southern from offering it a lower rate than it offers to other customers. Minden argues that Southern must charge twice what Southern has offered, which would be the rate that Southern charges other customers. Once Southern charges Minden the full price, Southern's proposal will no longer be the best option for Minden.

> [5-7] The filed rate doctrine specifies that a filed tariff has the effect of law governing the relationship between the utility and its customers, operates across the spectrum of regulated utilities, and *applies where state law creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates*.[6]

The doctrine conclusively presumes that both the utility and its customers know the contents and effect of published tariffs.[7] Accordingly, the doctrine acts to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates.[8]

We decline to apply the filed rate doctrine in this case for two reasons. First, the touchstone of the filed rate doctrine—that rates be filed with a regulatory body with authority

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[5] Brief for appellant at 10.

[6] 64 Am. Jur. 2d *Public Utilities* § 62 at 469 (2011) (emphasis supplied).

[7] *Id.*

[8] *Id.*

to determine reasonable rates—is not present. Minden admits that "[t]he Board has no authority to determine retail rates. Suppliers need not file their tariff, ordinance or rate schedule with the Board. The Board does not have authority to review rates."[9] And Minden has not pointed us to any other regulatory body that has such authority.

Second, Minden overlooks Neb. Rev. Stat. § 70-655(2) (Reissue 2009). This section provides in part that "[t]he board of directors may negotiate, fix, establish, and collect rates, tolls, rents, and other charges for users and consumers of electrical energy and associated services or facilities *different from those of other users and consumers*." (Emphasis supplied.) In other words, the Legislature has explicitly allowed Southern to do what Minden asks us to forbid. We decline Minden's invitation. The filed rate doctrine has no application to the facts of this case.

Under § 70-1014, the Board must decide whether Minden can "most economically and feasibly supply the electric service."[10] That means Minden's proposal must be more economical and feasible than what Southern proposed. The Board found that it was not. We conclude that evidence supports that decision and that it is not arbitrary or unreasonable.

Although Minden estimated that the line would cost $500,000 to construct, it had not yet solicited bids and acknowledged that the actual cost could be as much as 20 percent higher. The Board noted that "[t]here is no guarantee that [Minden's] ratepayers will not have to provide additional funding for the proposed line." If the costs turned out to be more than Minden had set aside, then this project or other projects may have to be put on hold, Minden's ratepayers may see an increase, or Minden may have to issue bonds.

In contrast, Southern had offered to transport Minden's electricity to Minden for one-half of its normal subtransmission rate. For the first 5 years, it would be locked in at one-half of Southern's current rate. After that, it would be one-half of

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[9] Brief for appellant at 10.

[10] See *In re Application of Neb. Pub. Power Dist., supra* note 1.

whatever Southern's rate was. With the money that Minden had already set aside, it could pay for 10 years of transmission or perhaps even more.

Finally, the Board found that Minden's exposure to potential maintenance costs would likely be lower if it accepted Southern's offer. If Minden accepted Southern's offer, Minden could potentially have little or no exposure to maintenance costs. If, however, Minden did not accept the offer, it ran the risk of having to pay for any damage to the line.

In sum, the Board concluded that a locked-in rate of about $48,000 a year for 5 years followed by 5 years at one-half of Southern's then-existing subtransmission rate was more economical and feasible than constructing a line whose exact cost was unknown. Further, the Board concluded that reducing Minden's potential maintenance cost exposure also weighed in favor of Southern's proposal. As noted, when the Board has complied with the controlling statutes and the evidence is sufficient to support its findings of fact, this court may not substitute its judgment for that of the Board, and we will sustain the Board's action.[11] We conclude that there is evidence to support the Board's decision that Southern can more economically and feasibly transmit Minden's necessary power.

Would Minden's Proposed Line Result in Unnecessary Duplication?

Section 70-1014 also requires the Board to consider "unnecessary duplication of facilities or operations." The Board found that Minden's proposal would be unnecessarily duplicative of Southern's line. Minden argues that the Board erred in determining that Minden's proposed line would result in unnecessary duplication. Minden concedes that its proposed line would be duplicative of Southern's. But Minden argues that there is no unnecessary duplication.

The Board found that Southern's line and Minden's proposed line both began at the NPPD substation located outside of Minden and were connected to Minden's substation inside of town. The two lines would operate at the same voltage. Further,

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[11] See *Cornhusker P. P. Dist., supra* note 3.

the Board noted that it was uncontested that Southern's line had the capacity to service Minden's needs and that Southern would provide this service for a fee to Minden. To summarize, the two lines were to begin at the same place and both connected to Minden's substation. And only one line was needed to carry the load. The record shows sufficient evidence to support the Board's decision that Minden's line would be unnecessarily duplicative of Southern's line, and that decision is not arbitrary or unreasonable.

CONCLUSION

We conclude the Board did not err when it concluded that Minden's line was not the most economical and feasible line. Further, the Board did not err when it concluded that Minden's line would be unnecessarily duplicative of Southern's existing line. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating in the decision.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY A. HESSLER, APPELLANT.
807 N.W.2d 504

Filed December 23, 2011. No. S-11-379.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Effectiveness of Counsel: Appeal and Error.** 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.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
6. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.

7. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.
8. **Postconviction: Mental Competency: Effectiveness of Counsel: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.
9. **Effectiveness of Counsel: Records.** Counsel is not ineffective for failing to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.
10. **Constitutional Law: Trial: Mental Competency.** An individual has a constitutional right not to be put to trial when lacking mental competency.
11. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense.
12. **Mental Competency.** There are no fixed or immutable signs of incompetence.

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

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellant.

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

CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge, and PIRTLE, Judge.

MCCORMACK, J.

I. NATURE OF CASE

Jeffrey A. Hessler filed a motion for postconviction relief from his current incarceration and sentence to death for crimes relating to the rape and murder of Heather Guerrero. The district court granted an evidentiary hearing on the limited issue of whether trial counsel was ineffective in failing to demand a competency hearing before the trial court allowed Hessler to waive counsel and represent himself at sentencing. The district court denied postconviction relief. Because Hessler failed to demonstrate a reasonable probability that he was incompetent at the sentencing hearing, we affirm.

II. BACKGROUND

Hessler was convicted for first degree murder, kidnapping, first degree sexual assault on a child, and use of a firearm to commit a felony in relation to the murder of 15-year-old Guerrero. The facts leading to the convictions are set forth in more detail in our opinion in *State v. Hessler* (*Hessler I*).[1]

After his convictions in December 2004, Hessler filed three pro se motions to waive his right to be present at the aggravation hearing. The court excused Hessler's presence, and trial counsel represented Hessler at the aggravation hearing. After the hearing, the jury found three statutory aggravating circumstances.[2] Accordingly, the case was set to proceed before the three-judge panel for consideration of the death penalty.

1. Motions to Remove Counsel and Proceed Pro Se

On March 31, 2005, Hessler sought to remove counsel, waive his right to counsel, and proceed pro se at the sentencing hearing. Hessler filed a pro se "Motion to Invoke My Sixth-Amendment Right and to Expurgate the Advocate of the State and to Delineate Myself." This motion is set forth in detail in *Hessler I*.[3] In summary, Hessler was unhappy with trial counsel because they told him they were dutybound to contest the imposition of the death penalty. Hessler wished to be put to death.

At the hearing on the motion, the court presented numerous questions to Hessler in order to determine if his waiver of counsel was made knowingly, voluntarily, and intelligently. Hessler's responses to the questions were generally appropriate. Hessler was asked to explain what "'Expurgate the Advocate of the State'" in his pro se motion meant. He responded that it was "[t]o remove [his] advocate." He told the court that he wished to discharge counsel because they "refuse[d] to comply with my wishes." Hessler further explained to the court that given the change of strategy, a scheduled presentencing hearing

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[1] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[2] See Neb. Rev. Stat. § 29-2523 (Reissue 2008).

[3] *Hessler I, supra* note 1.

challenging the constitutionality of the death penalty statute did not "need to happen."

Hessler informed the court he had been prescribed "anti-psychotics" and "antihypnotic" drugs, but he had not taken them that day. When asked about his ability to represent himself, Hessler said he had God on his side, stating, "I just go by what God tells me." The court responded that while it would not dissuade Hessler from "following God," he would have to represent himself in a way that complied with court rules. Hessler indicated that he understood this and could do so. The trial court determined that Hessler had knowingly, intelligently, and voluntarily decided to represent himself. Given the gravity of the possible punishment, the court instructed counsel to prepare for the sentencing hearing and be there on standby.

2. Sentencing Hearing

At the sentencing hearing conducted on May 16, 2005, Hessler was again questioned about his desire to proceed pro se. Hessler responded to the questions appropriately, and the court again determined that Hessler knowingly, intelligently, and voluntarily waived his right to counsel.

Hessler declined to make any opening or closing statement at the sentencing hearing. As evidence, Hessler offered a 9-page "Interlocutory Statement of the Defendant." Because indicating each spelling mistake or grammatical error in Hessler's statement and other documentation would be distracting, we reproduce Hessler's written materials in their original form. Hessler began: "As God cicerones me through this ascription to show true face I, Jeffrey Alan Hessler, now brings to light my ascription now before all." Hessler then explained that he wished to be put to death, under the doctrine of "'an Eye for an Eye.'" Hessler expressed remorse and noted that he suffered "from certain Mental Conditions that may or may not truelly explain My actions in this here Nightmare that I have caused."

Hessler explained why he had to discharge his counsel: "GOD has shown me to move into HIS LIGHT and that is why I had to finially expuregate my council of Attorney's from continuing from representing Me in this case. They refused to follow GOD's and My wishes." More specifically, Hessler

described a recent encounter with a "Brother of Christ" at the prison who was awoken from his sleep and led to Hessler's cell to "bring GOD back into My Life and understanding." When he took this man's hand, he "felt this powerful Energy to start to flow through my whole body. . . . GOD was speaking through him to Me . . . I saw a single tear . . . and . . . His eyes . . . were flaming at me."

Hessler wished for "nothing to be inveighed on Mybehalf that might change the mind set of the Judges or of the People of this society within this Matrix." He asked that his "vermiculate tabernacle be sent to the Reaper's Nirvana and for My vermiculate tabernacle to be gibbeted as soon as possible and there should be no dialectic or extrospection towards or against GOD's Purpose and My destiny."

Despite Hessler's failure to present evidence of mitigation, the three-judge sentencing panel considered possible statutory mitigators, particularly, the absence of Hessler's prior criminal history and his relative age. The panel found no nonstatutory mitigating circumstances. It found that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the panel sentenced Hessler to the death penalty.

3. Direct Appeal

For Hessler's automatic direct appeal, we appointed Hessler's trial counsel to represent him. Counsel assigned as error the trial court's grant of Hessler's request to proceed pro se at the sentencing hearing and the trial court's failure to conduct a competency hearing before allowing Hessler to proceed pro se. Hessler filed a pro se brief in which he expressed his continuing wish to be put to death.

We held that the trial court did not err when it failed to conduct a competency hearing.[4] Further, there was no error when the court did not make an explicit determination that Hessler was competent to waive counsel.[5] We explained that the trial court did not have reason to suspect Hessler's competence. We noted that when Hessler moved to waive counsel,

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[4] *Id.*

[5] *Id.*

he was still represented by counsel, and that counsel did not move for a determination of Hessler's competence at that time or at any previous time.[6] And there was "no indication . . . that Hessler was unable to consult with counsel with a reasonable degree of rational understanding. To the contrary, the record contains references to consultations between Hessler and his counsel."[7]

Furthermore, we stated that "the court had observed Hessler over many months prior to trial and at trial."[8] There was no special significance to the fact that Hessler said he was not on his medications on the day the court considered his request to waive counsel, because "the court was in a position to be satisfied that any medication Hessler was or was not on did not compromise his present competence to waive counsel."[9] Finally, we explained that although Hessler's pro se filings before the trial court "contain[ed] irrelevant matter," they nevertheless indicated that "Hessler understood the factual nature of the proceedings against him and the potential consequences of such proceedings."[10] Hessler demonstrated in the filings that he "had a rational and factual understanding that he was being prosecuted for the death of [Guerrero] and that the death penalty was a potential punishment for that crime."[11]

4. Postconviction

After we affirmed Hessler's convictions and sentences on direct appeal, Hessler changed his mind about wanting to be put to death. He filed a motion for postconviction relief and obtained appointed counsel. In his amended postconviction motion, Hessler presented several allegations, including the allegation that trial counsel was ineffective in failing to investigate Hessler's mental state and failing to object to going forward with the sentencing hearing without a formal competency

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[6] *Id.*

[7] *Id.* at 509, 741 N.W.2d at 429.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 509-10, 741 N.W.2d at 429.

[11] *Id.* at 510, 741 N.W.2d at 429-30.

investigation and hearing. After a preliminary hearing to narrow the issues, the postconviction court concluded that Hessler was entitled to an evidentiary hearing on the limited issue of whether trial counsel was ineffective for failing to raise issues of competency after Hessler's convictions but prior to mitigation and sentencing. In addition to the entire trial record, the following evidence was accepted into evidence at the postconviction evidentiary hearing.

(a) Hessler's Deposition

Hessler explained in his deposition testimony that he had informed trial counsel of his intention to terminate their representation of him on the day they were going to argue a motion alleging electrocution was unconstitutional, March 31, 2005. Hessler explained that his motivation for terminating counsel was because he wanted the death penalty and counsel refused to advocate for the death penalty.

When asked about the unusual wording of his pro se motions before the trial court, Hessler said that he came up with the words used in those motions from his thoughts and "through certain books I came across." He no longer could recall the meaning of many of the words he used. When Hessler was asked, "Was there a point in your life where you were speaking like this?" Hessler answered, "Never."

Hessler testified that from the beginning of the trial, he understood the charges against him, the potential consequences for those charges, the role of the jury and the judge, and the purpose of the trial. He testified he still understood all those things when he decided to terminate his attorneys' representation and proceed pro se at sentencing. Hessler did not specifically address whether he had ever heard voices.

(b) Arias' Report

A neuropsychological evaluation was conducted at counsel's request by Dr. Robert G. Arias in March 2003, and a 16-page report was made of this evaluation. Arias noted that Hessler claimed he "must have been chosen to pass on an evil message" and that killing Guerrero was completely out of his control. Hessler reported a history of heavy drug use and questioned whether his brain had been "'fried'" by drugs. Hessler

expressed some concern that he was a "Mafia target" because he had associated with local drug dealers.

Arias' "Diagnostic Impressions" of Hessler included "Hallucin[o]gen Persisting Perceptual Disorder" and "Depressive Disorder Not Otherwise Specified." However, Arias considered the results of the three principal psychological tests conducted on Hessler to be invalid due to "an organized attempt to portray himself in an overly negative light." Specifically: "[Hessler] clearly attempted to answer in a psychotic fashion, but validity scales revealed this to be an intentional attempt to manipulate his presentation in a negative fashion." Arias further stated that the results "reflected a broad tendency to magnify his level of experienced illness or a characterological inclination to complain or be self-pitying. . . . A similar pattern of overendorsement of depressive symptomatology was seen . . . ."

In his conclusions, Arias stated that Hessler was an individual with "a longstanding antisocial, narcissistic personality disorder." He stated that Hessler was somewhat depressed, which would be expected under the circumstances, and at moderate to high risk for suicide during his incarceration. But again, "Valid assessment of his emotional functioning on objective measures was not obtained . . . given the patient's clear and organized attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior."

(c) Scharf's Letter

In May 2003, trial counsel asked that a psychologist, Dr. Daniel L. Scharf, provide Hessler with treatment for depression. Scharf provided Hessler with treatment through the summer of 2003. In a letter written to trial counsel on September 3, 2003, Scharf explained that while he had not conducted a forensic examination, it was his impression that Hessler suffered from bipolar mood disorder. He also thought Hessler probably suffered from a "delusion disorder, persecutory type." Scharf was skeptical of whether Hessler had a mixed antisocial and narcissistic personality disorder and thought that he might instead experience "narcissism/grandiosity" as a component of the bipolar mood disorder.

(d) Medical Records

Hessler introduced into evidence at the postconviction hearing approximately 450 pages of prison psychological and medical records and related correspondence from the time period of 2003 to 2010. The records contain numerous prescriptions at different points in time. Hessler did not present expert testimony regarding those records, nor did he otherwise attempt to explain their contents as the records pertained to his competency at sentencing.

A psychological report from the prison medical records, written in September 2003, states that according to personality assessments performed on Hessler, he was "someone who seems to be either exaggerating his symptomologies or is perhaps making a cry or plea for help."

The records demonstrate that Hessler was engaged in a dispute with prison staff over his treatment and medications around the time of the sentencing hearing. Hessler made numerous written communications to prison staff on this point. Hessler was demanding a prescription or treatment plan. On April 8, 2005, Hessler wrote to the prison mental health staff "asking you if you would please advise me on what is being done to correct and restructure my treatment medication plan." On April 12, Hessler refused the treatment of a psychiatrist and refused one of his medications. On April 15, Hessler wrote to the mental health staff:

> Yes, I wrote you . . . at the beginning of this week pretaining to your findings and so feedback to the conversation we had on the morning of the 8th of April of 2005. And as of to date I have yet to hear a response back from you and you stated to me at the end of that conversation that you would respond to an interview request form that I would send. Have you reached your findings so that you can advise back to me with those findings? I have also wrote to the medical director, since the pharmacy forwarded the information that ordered the restructure of my medication treatment plan to him, but I have yet to hear a response back from him. I would greatly appreciate your services in getting some type of information . . . . I thank you for

> all your help, time, and services in this important matter at hand.

Similarly worded inmate interview requests were made on April 21 and 29, and a letter to the leading psychiatrist was sent on April 21, asking that a treatment plan recommended previously by another doctor be implemented.

A segregation mental status review on April 8, 2005, stated that Hessler's thought patterns were appropriate, on track, relevant, and consistent with reality, although his mood was irritable. A psychiatric consultation note on May 6 described that Hessler was writing to the staff psychiatrist and others concerning disputes about what medication he should be on. The staff psychiatrist did not think Hessler's current medication was properly treating his anxiety. Accordingly, the psychiatrist discontinued certain medications and prescribed others. The psychiatrist did not note any other mental or emotional disturbances requiring treatment.

On May 10, 2005, 6 days before his sentencing hearing, Hessler requested authorization for a specific cold medication that he had used in the past and found effective. The cold medicine which was available without authorization was not working to relieve his symptoms. He stated: "I have used the cold tabs on the Unit and they are hard to get when you really need one and plus they do not help relieve fully My congestion and seasonial type allergies." Many similar minor complaints are found throughout the prison records.

On May 18, 2005, Hessler filled out a health services request form to "please schedule myself for an appointment soon to fully discuss my medical/mental conditions and the treatment medications that I am currently prescribed by several doctors," and Hessler's disagreement with prison medical and psychiatric staff continued. An intake assessment dated May 19, 2005, stated that no mental health program involvement was recommended.

(e) Trial Counsel

The deposition testimonies of Hessler's trial counsel, James Mowbray and Jeffrey Pickens, were introduced. Both testified that their decision not to bring the issue of competency to the

trial court's attention was not a strategic one. Rather, they explained they had no doubt that Hessler met the legal test of competency. In light of this, Mowbray and Pickens were concerned that calling for a competency hearing would result in divulging confidential attorney-client communications and would violate their client's wishes.

(i) Pickens

Pickens testified that Hessler "seemed to me to be a bright person and he seemed to understand everything that . . . I told him." On March 23, 2005, Pickens discussed with Hessler the upcoming hearing on a motion for new trial and challenging the constitutionality of electrocution, as well as the upcoming sentencing hearing. Hessler expressed that he wanted the death penalty. Hessler also told Pickens that Hessler felt he had "lost his mind over the case." He told Pickens he was "hearing voices," or "thoughts which resemble voices," which gave him messages relating to what he perceived as his destiny. Hessler conveyed that he thought these messages were coming from God. In particular, God was telling Hessler not to fight the death penalty. This was God's "command," and Hessler told Pickens he had no choice.

Pickens told Hessler they could not ethically pursue a strategy seeking the death penalty. Hessler informed Pickens that, accordingly, he was thinking about firing Mowbray and Pickens and representing himself.

When Pickens asked Hessler if he believed he was competent, Hessler refused to answer. Hessler also refused to be seen by another psychologist in order to evaluate his competency. Upon further questioning by Pickens, however, Hessler assured Pickens that he understood the nature of the upcoming sentencing proceedings and that he was able to help with the defense of his case. Pickens explained he was trying to determine Hessler's competency under the standard set forth in *State v. Guatney*.[12] Pickens testified that based on Hessler's answers to his questions, he believed Hessler was competent.

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[12] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

(ii) Mowbray

Mowbray testified that from the beginning, Hessler went back and forth on whether he wanted to be put to death or sentenced to life imprisonment. Later, Hessler became more religious and ultimately insisted on the death penalty. Mowbray said that although they were not sure what was driving Hessler "in terms of his decision-making," "[t]here wasn't any question in our mind from a legal standpoint that he understood" the nature of the upcoming hearings and the penalties he was facing.

When asked whether he had noticed any change in Hessler's understanding of the proceedings from the beginning of their representation to the time they were discharged, Mowbray said, "No, I think he always understood what was going on. There was a change in at least what he was communicating as to who was making his decisions. But he certainly understood what we were telling him."

(f) Disposition

The district court denied postconviction relief. The court concluded that the record affirmatively showed Hessler was competent at the time of the sentencing hearing; therefore, counsel could not have been ineffective in not raising the issue of competency. Hessler appeals.

III. ASSIGNMENTS OF ERROR

Hessler assigns that the postconviction court erred by failing to find that trial counsel was ineffective in failing to raise and preserve the issue of competence.

IV. STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[13]

[2] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[14]

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[13] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[14] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

[3] 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.[15]

V. ANALYSIS

In this appeal from the denial of postconviction relief, the question is whether trial counsel was ineffective by failing to ask for a competency hearing before the court allowed Hessler to proceed pro se at sentencing. Hessler argues that an inquiry during a competency hearing might have revealed he was not competent to stand trial. Even if competent to stand trial, he argues he may not have been competent to represent himself. Hessler acknowledges that it is traditionally the burden of the petitioner to more affirmatively demonstrate prejudice, but he argues he was unable to do so in this case because counsel's failure to request a competency hearing left him with an insufficient record on which to prove a postconviction claim.

[4,5] We first address whether Hessler's postconviction motion is procedurally barred. A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review.[16] However, when a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[17] Hessler was represented by the Nebraska Commission on Public Advocacy at trial and on direct appeal. While Hessler also filed a pro se brief on direct appeal, we will, given the unusual circumstances of the appeal and the gravity of the issues alleged and sentences imposed, treat these postconviction proceedings as Hessler's first opportunity to raise claims of ineffective assistance of counsel.[18] We also note that while we determined in *Hessler I* that the trial court did not err in

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[15] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[16] *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[17] *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[18] See *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

failing to hold a competency hearing sua sponte,[19] this was a different legal question than whether defense counsel should have requested a competency hearing.[20]

[6,7] Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.[21] The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.[22] Specifically, the defendant must show, in accordance with *Strickland v. Washington*,[23] that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[24] Second, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case; that is, there was a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[25] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[26]

[8,9] In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.[27] Other courts have said

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[19] *State v. Hessler, supra* note 1.

[20] *Lawrence v. State*, 969 So. 2d 294 (Fla. 2007).

[21] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[22] *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

[23] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[24] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[25] See *id.*

[26] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[27] See, *Matheney v. Anderson*, 377 F.3d 740 (7th Cir. 2004); *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Futch v. Dugger*, 874 F.2d 1483 (11th Cir. 1989); *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010); *Ridgley v. State*, 148 Idaho 671, 227 P.3d 925 (2010).

that in order to successfully advance a claim that counsel was ineffective for failing to obtain or have a transcribed record for review, a defendant must demonstrate specific prejudice resulting from not having that record.[28] Counsel is not ineffective for failing "to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[29]

The issue of prejudice in this case is necessarily bound up in the law of competency, and we will turn to that now.[30] In doing so, we consider the state of the law at the time of the proceedings at issue.[31]

[10] An individual has a constitutional right not to be put to trial when lacking "mental competency."[32] This includes sentencing.[33] In *Guatney*, we said that the test of competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.[34] We held that the defendant in *Guatney* was clearly competent when expert witnesses agreed he could appreciate the proceedings in court; understand the nature of the roles that the judge, the prosecutor, and the defense attorney would play; and cooperate with his attorneys to provide for a defense.[35] The defendant's unstable emotional state, paranoid ideation, occasional outbursts in court and

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[28] See, e.g., *Bates v. State*, 3 So. 3d 1091 (Fla. 2009).

[29] *People v. Shelburne*, 104 Cal. App. 3d 737, 744, 163 Cal. Rptr. 767, 772 (1980).

[30] See *Hull v. Kyler,* supra note 27.

[31] See, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

[32] See *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

[33] See, e.g., *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999); *State v. Johnson, supra* note 18; Neb. Rev. Stat. § 29-1823(1) (Reissue 2008).

[34] *State v. Guatney, supra* note 12.

[35] *Id.*

"desire for undeserved punishment rather than justice," did not render him incompetent.[36]

[11] A criminal defendant also has a constitutional right to waive the assistance of counsel and conduct his or her own defense.[37] In *Godinez v. Moran*,[38] the U.S. Supreme Court held that the competency standard for determining whether a defendant may waive the right to counsel and plead guilty is the same as the standard for determining whether a defendant is competent to stand trial.

The defendant in *Godinez* was evaluated by two psychiatrists prior to trial. Both concluded that despite a suicide attempt after the crimes, the defendant was able to understand the pending proceedings and assist counsel in his defense. Two months after pleading not guilty, the defendant sought to discharge his attorneys, plead guilty, and represent himself at sentencing so he could prevent the presentation of mitigating evidence and be sentenced to death. The court found the defendant to be competent and accepted his plea as freely and voluntarily given and his waiver of counsel as knowingly and intelligently made.[39]

After being sentenced to death, the defendant asked for postconviction relief, asserting that the trial court erred in allowing him to represent himself and in accepting his plea. The Ninth Circuit Court of Appeals granted the motion, reasoning that competency to waive constitutional rights required a higher level of the "capacity for 'reasoned choice'"[40] than did the requirement to stand trial, which is that a defendant have a "'rational and factual understanding of the proceedings and is capable of assisting his counsel.'"[41] The U.S. Supreme Court disagreed. It noted that the decision to plead guilty is no more

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[36] *Id.* at 505, 299 N.W.2d at 541.

[37] See *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010).

[38] *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

[39] *Id.*

[40] See 509 U.S. at 397.

[41] See 509 U.S. at 394.

complicated than the sum total of decisions a defendant must make during the course of a trial when represented by counsel, such as whether to take the witness stand, waive the right to a jury trial, and other strategic choices.[42]

The Court reiterated that "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[43] "Requiring that a criminal defendant be competent," the Court said, "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel."[44]

Subsequently, in *State v. Dunster* (*Dunster I*)[45] and *State v. Dunster* (*Dunster II*),[46] we upheld the defendant's decision to waive counsel, plead guilty, and proceed pro se at the sentencing hearing despite defendant's strategy of pursuing "'suicide by state.'"[47] The defendant was on Prozac, Depakote, and Librium and was diagnosed with bipolar disorder. However, he had told the court that the medication and his disorder did not affect his ability to understand what was going on around him.[48] The trial court later conducted a competency hearing requested by counsel during a brief moment after pleading guilty when the defendant stated he wished to have counsel. A psychiatrist testified that the defendant was well oriented and understood the charges and the possible consequences. The defendant was subsequently allowed to again waive counsel and proceed to represent himself at sentencing.

After sentencing, the defendant filed a motion for new trial based on previously undisclosed medical records indicating an acute psychotic episode and undiagnosed depression. The trial court stated that the defendant's mental condition had "'ebbed and flowed'" during the sentencing hearing, but that he was

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[42] *Godinez v. Moran, supra* note 38.

[43] 509 U.S. at 400 (emphasis in original).

[44] 509 U.S. 402.

[45] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[46] *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

[47] *Id.* at 779, 707 N.W.2d at 417.

[48] *Dunster II, supra* note 46. See, also, *Dunster I, supra* note 45.

legally competent, and the motion for new trial was denied.[49] We affirmed, reasoning that the record and the trial court's specific findings of competency made it clear that had the newly discovered evidence been known, the trial court would have reached the same conclusion.[50]

Later, in the case of *State v. Gunther*,[51] we affirmed the trial court's implicit determination of competency as part of the waiver of counsel colloquy when there was no separate hearing on competency. Like the defendant in *Dunster I*, the defendant in *Gunther* wished to proceed pro se at trial and at sentencing in order to be put to death.[52] Although no notice of aggravating circumstances had been filed, and the death penalty was thus not a possibility, the defendant wished to discharge his attorneys because he thought they were colluding with the prosecution to deny him the death penalty.[53] We held that the record showed the defendant was sufficiently aware of his right to have counsel and to understand the charges against him, the possible sentences, and the possible consequences of foregoing counsel.[54] He was accordingly legally competent to stand trial and represent himself, despite paranoid thoughts and a desire for capital punishment.

[12] There are no fixed or immutable signs of incompetence.[55] As the above cases illustrate, a defendant can meet the "modest aim"[56] of legal competency, despite paranoia, emotional disorders, unstable mental conditions, and suicidal tendencies. The desire for capital punishment certainly does not create a reasonable probability of incompetency.[57] This is

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[49] *Dunster II, supra* note 46, 270 Neb. at 783, 707 N.W.2d at 420.

[50] *Id.*

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

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

[56] *Godinez v. Moran, supra* note 38, 509 U.S. at 402.

[57] See, also, e.g., *State v. Cowans*, 87 Ohio St. 3d 68, 717 N.E.2d 298 (1999).

not an overly uncommon or inherently irrational trial strategy. Furthermore, a rule requiring reversal when a capital defendant chooses self-representation and insists on the death penalty "could easily be misused by a knowledgeable defendant who wished to embed his trial with reversible error."[58]

Hearing voices representing messages from God does not, without evidence of how the messages affect the defendant's ability to comprehend the trial proceedings and make a rational defense, demonstrate incompetence.[59] And as one court noted, psychiatric clinicians are especially careful in characterizing religious beliefs or experiences as delusional.[60]

The fundamental question is whether the defendant's mental disorder or condition prevents the defendant from having the capacity to understand the nature and object of the proceedings, to comprehend the defendant's own condition in reference to such proceedings, and to make a rational defense.[61]

In the hundreds of pages of medical records, Hessler's correspondence, and psychological reports and evaluations, and in the testimony of Hessler's trial counsel and of Hessler himself, there is no indication that Hessler was incompetent to stand trial. Neither did Hessler's actions before the sentencing panel indicate he was unable to maneuver through those proceedings.

The "Interlocutory Statement of the Defendant" was unusually worded. It was thus difficult, but not impossible, to understand. The sentiment conveyed in the statement was reportedly guided by Hessler's religious experiences and beliefs. The vocabulary was apparently derived from religious books

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[58] *People v. Taylor*, 47 Cal. 4th 850, 865, 220 P.3d 872, 882, 102 Cal Rptr. 3d 852, 865 (2009). See, also, e.g., *State v. Cowans, supra* note 57.

[59] See, *Crawley v. Dinwiddie*, 584 F.3d 916 (10th Cir. 2009); *Ford v. Bowersox*, 256 F.3d 783 (8th Cir. 2001); *State v. Paulino*, 127 Conn. App. 51, 12 A.3d 628 (2011); *State v. Young*, 623 So. 2d 689 (La. App. 1993); *State v. Hope*, 96 N.C. App. 498, 386 S.E.2d 224 (1989). See, also, e.g., *Williams v. State*, 396 So. 2d 267 (Fla. App. 1981); *Calambro v. District Court*, 114 Nev. 961, 964 P.2d 794 (1998).

[60] See *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000).

[61] *State v. Guatney, supra* note 12.

Hessler was reading. This does not demonstrate a reasonable probability that Hessler was incompetent at the time of sentencing. Hessler testified that he never spoke in such an unusual manner. Pickens did not observe any form of incoherent or unusual speech when he met with Hessler shortly before the sentencing hearing. Hessler's written communications on other matters to prison staff reflects a completely different tone and content which were appropriate to Hessler's age and education and the topic at hand.

The only other possible evidence presented by Hessler relating to incompetence was Pickens' report that Hessler said he heard voices relaying God's messages and that he had to obey God's commands. But Pickens also described these as "thoughts which resemble voices." And, at the evidentiary hearing, Hessler failed to acknowledge ever having heard voices. He also failed to present any evidence explaining in more detail the nature of these "voices" and how they might have affected his ability to understand the sentencing proceedings.

As already discussed, we will not assume that hearing messages from God and following God's perceived commands, without more, demonstrate incompetence. Hessler provided no evidence that the alleged "voices" made him incompetent. Similarly, the evidence that Hessler was prescribed psychiatric medications which he may or may not have been taking at the time of sentencing does not demonstrate incompetence, absent some expert testimony connecting the medications to his ability to understand the proceedings and assist in his defense.

Mowbray and Pickens testified that at the time of sentencing, there was no doubt Hessler was competent under the standards set forth in *Guatney.*[62] They knew their client. Hessler's general demeanor and his responses to questions specifically geared toward assessing competency demonstrated to Mowbray and Pickens that he understood the nature of the proceedings and was capable of assisting counsel (or himself).

Hessler's profession that he was under God's control was not new. Similar sentiments had been shared with Arias, who concluded that Hessler demonstrated a "clear and organized

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[62] See *State v. Guatney, supra* note 12.

attempt to portray himself in an overly negative light, particularly with regard to psychotic symptoms to explain his behavior." Prison psychological records similarly report a tendency of "exaggerating" symptoms. A report near the time of sentencing stated that Hessler was displaying appropriate thought patterns consistent with reality and on track. As noted by the district court, rather than meeting his burden of affirmatively demonstrating incompetence, the record developed at the evidentiary hearing affirmatively shows that Hessler met the legal standard of competency required to waive counsel and proceed pro se at sentencing.

In fact, Hessler ultimately concedes he failed to demonstrate a reasonable probability that he would have been found incompetent had trial counsel demanded a competency hearing prior to the sentencing hearing. Thus, he failed to show prejudice in the traditional sense required at postconviction. Hessler instead argues the prejudice lies in the absence of a meaningful record with which he could prove such incompetency.

We have already discussed the substantial record developed at trial and during the evidentiary hearing on the issue of competency. What Hessler is truly arguing is that trial counsel's failure to call for a competency hearing resulted in the possible loss of vital additions to that evidence. Because competency changes over time, Hessler argues he can never obtain the evidence that trial counsel failed to obtain at the time of the sentencing hearing and he can never know what that evidence would or would not have been.

Recognizing that the law does not consider this to be proof of prejudice, Hessler suggests we adopt a special prejudice rule for death penalty cases. Under the proposed rule, counsel is put on "inquiry notice"[63] when a defendant reports hearing voices. Once put on notice, counsel is per se ineffective for failing to call for a competency hearing, unless there is a strategic reason not to do so.

We decline to adopt such a rule. Counsel is not required to move for a competency hearing at every alleged sign of mental illness. Counsel is not required "to undertake useless

[63] Brief for appellant at 14.

procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel."[64] Insofar as the failure to call into question the defendant's competency could conceivably be deemed prejudicial because of a lost moment in time, the defendant must still demonstrate specific prejudice resulting from not having the hearing.[65] That showing is not made through mere speculation that a hearing *might* have revealed something more.

At Hessler's disposal was a large medical file, several witnesses to Hessler's behavior, numerous exemplars of Hessler's written communications, and several psychological assessments and reports. Yet, Hessler did not present any testimony or opinion which even attempted a retrospective evaluation of the probability that Hessler was incompetent at the time of the sentencing hearing. Perhaps most notably, Hessler did not present the testimony of the prison psychiatrist who was treating Hessler at the time of the sentencing hearing and who presumably would have some insight into his competency.

Hessler was granted an evidentiary hearing and was granted the appointment of counsel at the evidentiary hearing. He was given an opportunity to present evidence demonstrating that had counsel called for a competency hearing, he would have been found incompetent to stand trial and waive counsel. He failed to make such a showing. Accordingly, the district court properly denied postconviction relief.

VI. CONCLUSION

Hessler failed to demonstrate that a constitutional violation occurred when trial counsel did not move for a competency hearing before the sentencing hearing. We affirm the judgment of the district court denying postconviction relief.

AFFIRMED.

HEAVICAN, C.J., and WRIGHT, J., not participating.

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[64] *People v. Shelburne, supra* note 29, 104 Cal. App. 3d at 744, 163 Cal. Rptr. at 772.

[65] See, e.g., *Bates v. State, supra* note 28.

STATE OF NEBRASKA, APPELLEE, V. MATTHEW A. FOX, APPELLANT.

806 N.W.2d 883

Filed December 30, 2011. No. S-11-045.

1. **Courts: Trial: Mental Competency: Appeal and Error.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
2. **Trial: Waiver.** Whether a defendant could and, in fact, did waive his or her right to attend all stages of his or her trial presents a question of law.
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 made by the court below.
4. **Constitutional Law: Trial: Mental Competency.** A person has a constitutional right not to be put to trial when lacking mental capacity.
5. **Trial: Mental Competency.** A person is competent to stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense.
6. ____: ____. The competency to stand trial standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.
7. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. The 14th Amendment makes the guarantees of this clause obligatory upon the states.
8. **Constitutional Law: Trial: Witnesses.** The Confrontation Clause guarantees the accused's right to be present in the courtroom at every stage of his or her trial.
9. **Trial: Waiver.** If a defendant is to effectively waive his or her presence at trial, that waiver must be knowing and voluntary.

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

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, 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

Matthew A. Fox appeals his convictions for first degree murder and use of a weapon to commit a felony. Fox asserts that the district court for Lancaster County erred when it found him competent to stand trial and when it allowed him to absent himself from major portions of the trial. Because we find that the district court did not err when it found that Fox was competent to stand trial or when it allowed Fox to absent himself from trial, we affirm.

STATEMENT OF FACTS

On October 25, 2008, Fox, then 19 years old, killed his mother, Sherry Fox, by striking her repeatedly in the head with an ax in the basement of their home in Lincoln, Nebraska. Fox was arrested that day, and on November 25, the State filed an information charging Fox with murder in the first degree and use of a weapon to commit a felony. Fox pled not guilty.

On February 26, 2009, Fox's attorney filed a motion for a competency examination alleging that he had reason to believe Fox was not currently competent to stand trial. After a hearing, the district court on March 11 entered an order appointing a doctor to examine Fox to determine his competency to stand trial.

After the competency evaluation had been completed, Fox's attorney moved the court to declare Fox incompetent to stand trial. On April 28, 2009, the court entered an order finding that Fox was currently incompetent to stand trial. The court's finding was based in part on the report of psychologists who concluded that Fox was not competent to stand trial because, although he had a factual understanding of his legal situation, he was "experiencing severe depressive symptoms which impede[d] his ability to meaningfully assist his attorney and participate in his defense." The court ordered Fox to be transferred to the Lincoln Regional Center (LRC) for treatment. The court further ordered LRC staff to report to the court when Fox's disability had improved to the extent he was competent

to stand trial or, in the alternative, LRC was to submit a progress report within 6 months of commencement of treatment if Fox's disability had not so improved. After a review hearing on November 13, the court ruled that Fox remained incompetent to stand trial.

The court held another review hearing on April 27, 2010, at which the State offered a report by a psychiatrist and a psychologist which concluded that Fox was competent to stand trial because he had "demonstrated an adequate understanding of the legal system" and "appear[ed] to have the ability to assist his attorney in developing a rational defense." The report noted that although Fox had the ability to assist in his defense, "thus far, [he] has not chosen to do so." The report noted that Fox's "behavior and reluctance to discuss his legal circumstances appear[ed] volitional" and that "any symptoms that he may [have been] experiencing [did] not appear to be so severe as to prevent him from assisting in his defense, if he [chose] to cooperate with legal counsel." The psychiatrist and the psychologist testified to similar effect at the hearing.

Fox offered into evidence a forensic psychologist's report, in which the forensic psychologist retained by Fox opined that Fox "appear[ed] to have the requisite capacities associated with marginal competence to proceed with adjudication" but that he had "some serious concerns about [Fox's] propensity to decompensate under stress." The forensic psychologist testified that Fox

> still has a tremendous amount of difficulty approaching the whole topic of what happened in and around the time period that his mom died, that his mom was killed. Seems to have a lot of angst around that issue, not understanding how it came to that, having some understanding that he's the cause of it, but of not knowing why or how.

The forensic psychologist called by Fox testified that in talking about what happened in connection with his mother's death, Fox was "not sure what happened, how it came to happen . . . . [H]e always says he'll either break it off or he'll say . . . I don't want to think about this any more. And he gets shaky, angry, anxious. He gets very nervous when he talks about all of this."

At the hearing, the forensic psychologist further testified that he had concerns that Fox "might decompensate during the [criminal] proceedings or prior to the proceedings because of the stress" and that he had concerns about how Fox's "inability or desire not to talk about the circumstances leading to the death of his mother [will] affect his ability to proffer an affirmative defense of insanity or other defenses that might have elements of his mental state at the time entailed."

On May 6, 2010, the district court filed an order in which it found that Fox was competent to stand trial. The court specifically found that Fox had "the mental capacity to understand the nature and object of the proceedings against him and can comprehend his own condition in reference to the proceedings and has the ability to make a rational defense and help with that defense." The court stated that it had reviewed and considered factors set forth in Nebraska cases, including the concurrence in *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980) (Krivosha, C.J., concurring), and that after such review, the court was "compelled to conclude that [Fox] is competent to stand trial in this matter." The court further ordered that pending trial, Fox should remain at LRC.

Fox thereafter filed a notice of intent to rely upon a defense that he was not responsible by reason of insanity. The district court granted the State's subsequent motion to require Fox to be examined by a psychiatrist to determine Fox's mental capacity at the time of his mother's killing.

On July 26, 2010, Fox filed a motion in which he sought to determine whether he could waive his attendance at various critical stages of the proceedings against him. Fox expressed a desire to "not be present at his trial, but most specifically during any portions of his trial involving discussions or presentation of evidence or testimony regarding the circumstances surrounding the death of Sherry Fox." However, in the motion requesting such determination, Fox's attorney asserted that

> given [Fox's] history and prior findings regarding his mental status, the current state of the record is insufficient to determine whether a) [Fox] may waive his right to attendance at the majority (if not all) of his trial, b) [Fox] is competent to make a "knowing and intelligent" waiver of his constitutional rights [to be present at trial

> and confront the witnesses against him], and c) [Fox's] desire not to attend his trial is a manifestation of his prior and current mental illness.

Fox's attorney also cited authority to the effect that a defendant may not waive his or her presence at trial, including Neb. Rev. Stat. § 29-2001 (Reissue 2008), which states in part, "[n]o person indicted for a felony shall be tried unless personally present during the trial."

At a hearing on the motion, Fox stated that at trial he did not want to "see any of the forensic stuff." He said that he would be willing to be present during voir dire, opening statements, and testimony that did not touch on forensic evidence, but that he did not want to be present during closing statements, which would include discussion of forensic evidence. Fox stated that he did not remember and did not want to remember what happened the night his mother died. Fox clarified that forensic evidence included pictures and descriptions, including the autopsy, and that he did not want to "see it or hear it or think about it."

The district court conducted a hearing, at which Fox was present, on Fox's motion to absent himself from certain proceedings. The district court advised Fox that the purpose of the hearing was to inquire "as to whether or not [Fox] should be allowed not to be present at portions of the trial." A colloquy among the parties ensued. During the hearing, Fox's counsel indicated that "it would be . . . Fox's decision [to attend some or all of the proceedings in connection with his trial] if, in fact, he was competent to make that decision and had rational and legitimate reasons not to attend." Fox's counsel confirmed that Fox had been informed that if he were to decide at the hearing he did not wish to attend trial, he would be able to change his mind at any time, and that the court would allow him to attend any particular portion of the trial he wished to attend. The district court confirmed this was an accurate statement of the proceeding. The State also stated for the record that Fox was advised that he could change his mind at any time if he wished to be present at trial.

The district court sustained Fox's motion to waive attendance at trial in an order entered October 18, 2010. In its order, the court found that Fox understood his right to be present at

trial and at all hearings and proceedings, as well as his right to face and confront the witnesses against him. The court further found that Fox understood that he could choose to be present or not present at any portion of the trial and that he had the right to change his mind at any time and be present for any or all of the trial. The court finally found that Fox had not been threatened or coerced in any way.

The jury was selected on October 25, 2010, and the verdict was returned on October 29. Fox elected not to attend much of the trial. At times throughout the trial, the court inquired of defense counsel regarding Fox's intention to attend upcoming segments of the trial, and defense counsel informed the court that Fox did not wish to be present. Fox was advised that he could observe the trial on closed circuit television when he was not present in court. Defense counsel generally reported that Fox did not wish to observe the trial on closed circuit television but that he wished to listen to the testimony of his brother and of his sister by closed circuit. The court advised the jury that Fox had the right to be present or to be absent for portions of the trial but that the jury was "to make nothing of that and make no assumptions or take that in any way as to determining his guilt or innocence in this case."

With regard to Fox's insanity defense, a psychiatrist called by the State at trial opined that at the time of the killing, Fox suffered from depression and schizoid personality disorder, but that he was not legally insane. A psychiatrist called by the defense also opined that Fox suffered from depression and schizoid personality disorder at the time of the killing but testified that there was not enough information available to make a determination whether Fox was legally insane. The jury rejected Fox's insanity defense and found Fox guilty of first degree murder and use of a weapon to commit a felony. The court sentenced Fox to life imprisonment on the murder conviction and to a consecutive sentence of 10 to 15 years' imprisonment on the weapon conviction.

Fox appeals.

ASSIGNMENTS OF ERROR

Fox claims that the district court erred when it (1) found him competent to stand trial and (2) permitted him to absent

himself from the trial because his waiver of his right to be present at trial was not knowingly or voluntarily made.

STANDARDS OF REVIEW

[1] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding. *Id.*

[2,3] Whether a defendant could and, in fact, did waive his or her right to attend all stages of his or her trial presents a question of law. *State v. Zlomke*, 268 Neb. 891, 689 N.W.2d 181 (2004). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The Court Did Not Err When It Determined That Fox Was Competent to Stand Trial.

Fox first claims that that the district court erred when it found that he was competent to stand trial. We find no merit to this assignment of error.

[4,5] A person has a constitutional right not to be put to trial when lacking "mental capacity." *Indiana v. Edwards*, 554 U.S. 164, 177, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). See, also, *State v. Hessler, ante* p. 935, 807 N.W.2d 504 (2011). We have stated that a person is competent to stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her condition in reference to such proceedings, and to make a rational defense. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *Walker, supra.*

[6] The U.S. Supreme Court has recently reiterated the standard to determine if a defendant is competent to stand trial in *Indiana v. Edwards* by stating that the competency standard includes both "(1) 'whether' the defendant has 'a rational as well as factual understanding of the proceedings against him' and (2) whether the defendant 'has sufficient present ability *to*

consult with his lawyer with a reasonable degree of rational understanding.'" 554 U.S. at 170 (emphasis in original) (citing *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam)). See, also, *Hessler, supra.* It has been stated that requiring a criminal defendant to be competent "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Godinez v. Moran*, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). See, also, *Hessler, supra.*

In this case, the district court found that Fox was competent to stand trial. At the April 27, 2010, review hearing regarding Fox's competency, a psychiatrist and a psychologist who were called by the State as witnesses testified that Fox was competent, and a forensic psychologist who was called by Fox testified that Fox was marginally competent. The district court reached its determination based on this testimony and reports in evidence.

The State submitted a report by the psychiatrist and the psychologist which stated that Fox had "demonstrated an adequate understanding of the legal system" and "appear[ed] to have the ability to assist his attorney in developing a rational defense." Their report also noted that although Fox had chosen not to assist in his defense, his "behavior and reluctance to discuss his legal circumstances appear[ed] volitional" and that Fox's symptoms did "not appear to be so severe as to prevent him from assisting in his defense, if he [chose] to cooperate with legal counsel." The psychiatrist and the psychologist testified to similar effect.

The forensic psychologist called by Fox gave similar testimony stating that he believed Fox was marginally competent to stand trial. While noting his concern regarding Fox's propensity to "decompensate under stress," the forensic psychologist stated in his report that Fox "appear[ed] to have the requisite capacities associated with marginal competence to proceed with adjudication."

In its order finding that Fox was competent to stand trial, the district court stated that it had reviewed the evidence and considered the factors set forth in Nebraska cases, including a concurring opinion in *State v. Guatney*, 207 Neb. 501, 299

N.W.2d 538 (1980) (Krivosha, C.J., concurring). This concurrence lists 20 factors which it suggests be considered in determining whether a defendant is competent to stand trial. Fox urges us to endorse consideration of these 20 factors. We find it unnecessary in this case to adopt the 20-factor test set forth in the *Guatney* concurrence. Nevertheless, we note that the district court stated that it had reviewed each of them, along with the evidence, and indicated that it was "compelled to conclude that [Fox was] competent to stand trial in this matter."

The record shows that Fox had an understanding of the nature and object of the proceedings against him, could comprehend his own condition in reference to the proceedings, and had the ability to make a rational defense. See, *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *Guatney, supra.* The district court's determination is supported by sufficient evidence. See, *Vo, supra*; *State v. Walker,* 272 Neb. 725, 724 N.W.2d 552 (2006). For completeness, we note that, as we explain below, Fox voluntarily chose not to participate in portions of his defense, although the record showed that he had the capacity to participate. The district court did not err when it found that Fox was competent to stand trial.

Notwithstanding the record made in connection with the pretrial determination that Fox was competent to stand trial, Fox urges us to adopt a requirement of an additional posttrial competency finding as set forth by the U.S. Court of Appeals for the District of Columbia Circuit in *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968). In *Wilson*, the defendant was tried and convicted of five counts of assault with a pistol and robbery. *Id.* In a car accident following the robberies, the defendant suffered a head injury, and the medical evidence showed that he could not, and probably never would, remember anything that happened from the afternoon of the robberies until he regained consciousness 3 weeks later. *Id*. The district court found that the defendant was competent to stand trial, but the District of Columbia Circuit remanded "for more extensive post-trial findings on the question of whether the [defendant's] loss of memory did in fact deprive him of the fair trial and effective assistance of counsel to which the Fifth and Sixth Amendments entitle him." 391 F.3d at 463. For purposes

of remand, the appellate court directed the district court to make additional posttrial findings of fact regarding whether the defendant had demonstrated his competency during trial. Three opinions were filed in *Wilson*, one denominated a "concurrence," "to avoid the impasse of a 3-way split," *id*. at 466 (Leventhal, Circuit Judge, concurring), and one denominated a "dissent," (Fahy, Senior Circuit Judge, dissenting). Fox urges us to adopt the *Wilson* standard.

We decline to adopt the procedure set forth in *Wilson*. Consistent with our decision, we note that other courts have declined to adopt the *Wilson* standard in cases where the defendants claim they are incompetent to stand trial because they have suffered from amnesia for the period of time during which the alleged crime occurred. In these decisions, courts have generally stated that amnesia of the events alone does not render a defendant per se incompetent to stand trial. See, e.g., *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir. 1985); *Morris v. State*, 301 S.W.3d 281 (Tex. Crim. App. 2009) (cases collected); *U.S. v. Douglas*, No. 06-00159-01-CR-W-NKL, 2007 WL 541609 (W.D. Mo. Feb. 16, 2007) (unpublished opinion). Additionally, declining to adopt the *Wilson* standard is in accord with our own jurisprudence. In *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), we determined that the mere fact that the defendant maintained he did not recall committing the crime, but with full faculty entered a plea, did not impose upon the trial court an obligation or duty to require a competency hearing.

In this case, the record shows the district court effectively determined that Fox is not suffering from amnesia or an actual loss of memory. The record shows that Fox has elected not to discuss or remember the events surrounding his mother's death because of their disturbing nature and his risk of decompensating. Fox's case is distinguishable from *Wilson, supra*, and other cases where the defendants did not have the capacity to remember the events surrounding their alleged crimes, and our ruling in this case does not necessarily speak to refining the procedure where a defendant is unable to remember the events during the alleged crime. We decline to adopt the procedure regarding competency set forth in *Wilson*. We conclude that the

district court did not err when it found that Fox was competent to stand trial.

The Court Did Not Err When It Found That Fox Knowingly and Voluntarily Waived His Right to Be Present at Trial and Allowed Fox to Absent Himself From Trial.

Fox next generally claims that the district court erred when it allowed him to absent himself from much of the trial. We read Fox's claim as an assertion that he did not knowingly and voluntarily waive his constitutional and statutory right to be present at his trial. We find no merit to this assignment of error.

[7,8] The U.S. Supreme Court addressed the defendant's right to be present in the courtroom in *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Court stated:

> The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." We have held that the Fourteenth Amendment makes the guarantees of this clause obligatory upon the States. *Pointer v. Texas*, 380 U.S. 400[, 85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965). One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis v. United States*, 146 U.S. 370[, 13 S. Ct. 136, 36 L. Ed. 1011] (1892).

397 U.S. at 338.

The Nebraska Constitution contains a similar provision and we have discussed the right to be present at one's criminal trial under Neb. Const. art. I, § 11, in *State v. Zlomke*, 268 Neb. 891, 689 N.W.2d 181 (2004). Neb. Const. art. I, § 11, states: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . ."

The Nebraska statutory right to be present during trial is found at § 29-2001, which provides:

> No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a

> misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court.

We have previously considered the criminal defendant's constitutional and statutory right to be present at trial, as well as the effective knowing and voluntary waiver of that right. In *Scott v. State*, 113 Neb. 657, 204 N.W. 381 (1925), we referred to the predecessor statute to § 29-2001 in a case where the defendant was released on bail and was voluntarily not present at trial. In *Scott*, we stated:

> It is insisted, and no doubt is the law, that under this statute defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right . . . .

113 Neb. at 659, 204 N.W. at 381.

[9] We discussed the absence of a criminal defendant issue further in *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). After acknowledging that a defendant may waive his right to be present at any proceeding during his trial, we stated that "[i]f a defendant is to effectively waive his presence at trial, that waiver must be knowing and voluntary." *Id.* at 325, 476 N.W.2d at 225. In *Red Kettle*, we noted that the court advised the defendant of his right to be present at trial and read § 29-2001 to the defendant. Additionally, the court advised the jury, without objection from the defendant, that the defendant "'has a right not to be present at the trial. The fact that he has been voluntarily absent from the trial must not be considered by you as an admission of guilt and must not influence your verdict in any way.'" *Red Kettle*, 239 Neb. at 326, 476 N.W.2d at 226. In *Red Kettle*, we determined that the trial court did not err in conducting the trial in the defendant's absence.

In this case, after he had been found competent to stand trial, Fox filed a motion to waive his attendance at trial. He explained that it would be difficult for him to view forensic and other evidence depicting his mother's death. Fox contends that he would have suffered negative mental health consequences if he had viewed certain evidence; and on appeal, he seems to assert that this choice to absent himself from trial to avoid

these consequences was, therefore, not voluntary. We reject this contention.

There is nothing in the record which indicates that Fox was incapable of making the choice to attend or not attend trial. In *Godinez v. Moran*, 509 U.S. 389, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993), the U.S. Supreme Court acknowledged that a defendant must make numerous decisions during a trial which may affect a constitutional right such as whether to waive his privilege against compulsory self-incrimination, waive the right to a jury trial, and other strategic choices. In *Godinez*, the Court stated that "*all* criminal defendants . . . may be required to make important decisions once criminal proceedings have been initiated." 509 U.S. at 398 (emphasis in original). The fact that difficult choices must be made does not make the fact of selection or the selected option involuntary.

The record shows that the district court conducted a hearing on Fox's request to absent himself from portions of the trial and that the issue was discussed with Fox present. Fox's counsel confirmed that Fox had been informed that if Fox decided not to attend the trial, Fox could change his mind at any time and be present at any portion of the trial he wished to attend. The court confirmed that this was an accurate statement of the substance of the hearing.

In its order sustaining Fox's motion to waive attendance at trial, the district court found that Fox understood his right to be present at trial and at all hearings and proceedings, as well as his right to face and confront the witnesses against him. The district court thus found that Fox's choice to waive his right to be present was knowingly and voluntarily made. The court also found that Fox understood that he had the choice to be present or not present at any portion of the trial and that Fox had the right to change his mind at any time.

At various times throughout the trial, the court asked defense counsel if Fox intended to attend upcoming portions of the trial, and defense counsel informed the court that Fox did not wish to be present. The court also advised Fox that he could observe the trial on closed circuit television when he was not present in court. Additionally, the court admonished the jury that Fox had the right to be present or absent for portions of the

trial, but that the jury was "to make nothing of that and make no assumptions or take that in any way as to determining his guilt or innocence in this case."

Based on the facts, we conclude that the district court did not err when it found that Fox knowingly and voluntarily waived his constitutional and statutory right to be present at trial.

CONCLUSION

The district court did not err when it determined that Fox was competent to stand trial. The district court did not err when it concluded that Fox knowingly and voluntarily waived his right to be present at trial. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

MACK DOWNEY AND DEBORAH DOWNEY, HUSBAND AND WIFE, AND FERGUSON SIGNS, INC., APPELLEES AND CROSS-APPELLANTS, V. WESTERN COMMUNITY COLLEGE AREA, WHICH OPERATES WESTERN NEBRASKA COMMUNITY COLLEGE, APPELLANT AND CROSS-APPELLEE.

808 N.W.2d 839

Filed January 6, 2012. No. S-10-867.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **Judgments: Appeal and Error.** When determining the sufficiency of the evidence to sustain the trial court's judgment, a court must consider the evidence in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and the successful party is entitled to the benefit of every inference that can be deduced from the evidence.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Appeal and Error.** An appellate court resolves questions of law independently of the trial court.
5. **Negligence: Liability: Contractors and Subcontractors.** A nondelegable duty rule applies when the issue is whether an owner, who has maintained possession of the property, can be held liable for defects that arise on the premises through the negligence of an independent contractor.
6. **Negligence: Liability: Proximate Cause.** A possessor of land is liable for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant

either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

7. **Negligence.** Several factors relate to whether a possessor has breached a duty to use reasonable care. These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.
8. **Negligence: Invitor-Invitee: Licensee: Contractors and Subcontractors.** After *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), whether a possessor of land has breached a duty to use reasonable care to protect lawful visitors is determined under the same test for both licensees and invitees, which includes independent contractors.
9. **Negligence: Invitor-Invitee.** Even if a possessor of land has reason to believe that a lawful visitor will discover a defect, it can still have a duty to take reasonable measures to protect lawful visitors under circumstances showing that it should expect that visitors will not realize the danger or will fail to protect themselves.
10. **Negligence.** Whether a defendant breaches a duty is a question of fact for the fact finder.
11. **Workers' Compensation: Contribution.** Claims for contribution against employers covered by the workers' compensation statutes are barred.
12. **Workers' Compensation: Contribution: Parties: Liability.** An employer covered by workers' compensation does not have a common liability with a third party, which is necessary for contribution.
13. **Workers' Compensation: Statutes: Liability.** Because an employer covered by workers' compensation has no liability in tort, a release with such an employer is not a release with a "person liable" under Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008).
14. **Liability: Contribution.** Indemnity and contribution are distinct concepts.
15. **Negligence: Employer and Employee: Liability.** A defendant can point to the negligence of the employer and claim that the employer was the sole cause of the accident. But the defendant may not reduce his or her own liability by apportioning some of the fault to the employer.
16. **Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.
17. ____: ____. Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.

18. **Liability: Contribution: Damages.** If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution.
19. **Contribution: Words and Phrases.** Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard A. Douglas and Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Ossian, P.C., for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee Ferguson Signs, Inc.

Kyle J. Long, of The Robert Pahlke Law Group, for appellees Mack Downey and Deborah Downey.

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

CONNOLLY, J.

Like many cases arising from construction site injuries, this appeal raises several interrelated issues. These include premises liability, the nondelegable duty doctrine, indemnification, and the thorny issue of whether our comparative negligence statutes allow a court to apportion liability to an employer who is immune from suits in tort because of our workers' compensation statutes.

Mack Downey and his wife sued Western Community College Area, which operates Western Nebraska Community College (the College), after Downey suffered severe injuries from a fall that occurred while he was replacing a scoreboard at the College. His employer, Ferguson Signs, Inc., was named as a plaintiff in the suit to preserve a subrogation interest for workers' compensation benefits. After a bench trial, the court found that the College was liable for a portion of Downey's injuries. It also apportioned liability to Downey and Ferguson Signs. The College appeals, and the Downeys and Ferguson Signs cross-appeal.

I. BACKGROUND

In 2003, the College requested bids to replace a scoreboard in its gym. The bid included a requirement that the winning bidder help the College remove the old scoreboard. The College left the means and method of removing the existing scoreboard to the contractor and subcontractors. The College awarded the project to NEVCO Scoreboard Company. Ferguson Signs was a subcontractor for the project.

The scoreboard was about 12 feet square at the top, 9½ feet square at the bottom, and 6 feet tall. The scoreboard had a wooden platform installed about 3 feet above the metal floor of the scoreboard. From the top of the scoreboard to the wooden floor was about 3 to 4 feet. This platform sat at an angle within the scoreboard. Looking at it from the top, it looked like a diamond set in a square. This left triangular-shaped gaps at the corners of the scoreboard where the metal floor was exposed. The bottom of the scoreboard was about 30 feet off the gym floor.

Although some employees of the College had previously entered the scoreboard without the use of safety equipment, they knew that the sheet metal floor was not a weight-bearing surface. Still, no one at the College told Downey or any of the other contractors that the scoreboard's floor was not weight bearing.

Downey and Ferguson Signs' original plan to remove the old scoreboard was to simply lower the scoreboard to the floor. But the plan changed because there was no lift system in place that would allow them to lower the scoreboard. Ferguson Signs discussed the need for a new plan with a maintenance worker for the College. They agreed that Ferguson Signs would have to weld a new plate to the gym ceiling to allow an attached chain to lower the scoreboard. Although there was a discussion about hiring another subcontractor, the owner of Ferguson Signs decided that Downey could do the necessary welding. The welding point was to be on the ceiling directly above the middle of the scoreboard, which would mean that Downey would have to enter the scoreboard to do the welding. Despite at least one employee of the College knowing that one of the subcontractors would have to enter the scoreboard to remove

it, the College and its employees failed to warn Downey or Ferguson Signs of the potential danger.

Before Downey's fall, the owner of Ferguson Signs and Downey had climbed the scaffolding and looked into the scoreboard to try to find a way to lower it. Neither of them, however, ever entered the scoreboard. Downey testified that he could not see how the metal floor was attached to the scoreboard. According to Downey, the metal could have been weight bearing depending on how it was attached.

A custodian working for the College saw Downey's fall. He stated that Downey climbed the scaffolding next to the scoreboard. Then he put one leg over, swung the other leg over, and then immediately fell through the bottom of the scoreboard to the floor 30 feet below. He landed headfirst and suffered serious injuries.

Downey received workers' compensation benefits from Ferguson Signs. Then, Downey and his wife sued the College. Ferguson Signs was named as a plaintiff because it had paid workers' compensation benefits to Downey and wished to preserve its subrogation interest. Downey alleged that the College was negligent as follows:

- failing to warn him of the false floor;
- failing to provide safe access;
- failing to provide fall protection;
- failing to provide anchor points for Downey to tie onto; and
- failing to provide reasonably safe premises.

Downey also asserted a premises liability claim against the College.

In its answer, the College alleged that it was not in control of the construction site when the accident occurred. The College also argued that the condition of the scoreboard was open and obvious. Finally, the College argued that the plaintiffs had been contributorily negligent to the extent that it should bar recovery for Downey.

1. Trial on Liability

The court determined that the College had breached a nondelegable duty arising from its control of the worksite. This duty required the College to provide Downey a safe place to work. To determine whether this duty was breached, the court

applied the test for premises liability we laid out in *Herrera v. Fleming Cos.*[1] and subsequent cases. The court ultimately found the College liable.

According to the court, Ferguson Signs and Downey were also negligent. Downey was negligent in entering the scoreboard without first determining whether the metal floor would support his weight and in failing to use safety equipment and proper fall protection equipment.

The court concluded that Ferguson Signs was negligent in several ways:

- failing to comply with Occupational Safety and Health Administration (OSHA) regulations;
- failing to determine whether surfaces on which its employees would be working could support their weight; and
- failing to provide proper fall protection equipment.

In sum, the court ruled that Ferguson Signs had a duty to protect Downey from injury and that it failed to discharge that duty.

The court found that the negligence of the College, Downey, and Ferguson Signs all combined to produce a single injury. The court determined that Downey was 33-percent negligent, Ferguson Signs was 33.5-percent negligent, and the College was 33.5-percent negligent.

2. Trial on Damages

The court found that Downey's economic damages totaled $1,058,950.50, while his noneconomic damages were $500,000. It found that Downey's wife had sustained noneconomic damages of $200,000.

As part of its apportionment of damages, the court then confronted an issue involving the interplay of Nebraska's comparative negligence rule and its workers' compensation statute. The court stated in its order that the issue is whether a "workers' compensation employer's negligence can be considered for purposes of comparative negligence and apportionment of damages against the third party tortfeasor." The court concluded that it could be. It ruled that an employer who has

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[1] *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003).

paid workers' compensation benefits is a "'released person'" under Neb. Rev. Stat. § 25-21,185.11(1) (Reissue 2008) and that Ferguson Signs' share of the liability had to be subtracted from Downey's recovery from the College.

The court rejected the College's claim for indemnification and contribution. The court determined that any claim for contribution would be barred by the exclusivity provision of the workers' compensation laws. And the court also rejected any claims for indemnification. It found that there was no express contractual term providing for such indemnification and that there was no special relationship that would give rise to an implied indemnification.

II. ASSIGNMENTS OF ERROR

The College assigns, restated and consolidated, that the district court erred in

(1) concluding that the College was liable under a premises liability theory;

(2) not finding that Downey's and Ferguson Signs' negligence and failure to comply with OSHA regulations were the proximate cause of the accident;

(3) not combining Downey's and Ferguson Signs' negligence for comparative negligence purposes;

(4) not reducing Downey's economic damages by Ferguson Signs' share of the allocated negligence; and

(5) not concluding that Ferguson Signs owed an independent duty to the College that created a special relationship that would allow for indemnification.

On cross-appeal, the Downeys and Ferguson Signs assign that the district court erred in

(1) concluding that Ferguson Signs was a "released person" under § 25-21,185.11; and

(2) apportioning negligence to Ferguson Signs and reducing the Downeys' recovery as a result.

III. STANDARD OF REVIEW

[1,2] In actions brought under the Political Subdivisions Tort Claims Act,[2] an appellate court will not disturb the factual

[2] Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Cum. Supp. 2002).

findings of the trial court unless they are clearly wrong.[3] When determining the sufficiency of the evidence to sustain the trial court's judgment, a court must consider the evidence in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and the successful party is entitled to the benefit of every inference that can be deduced from the evidence.[4]

[3,4] Statutory interpretation presents a question of law.[5] An appellate court resolves questions of law independently of the trial court.[6]

IV. ANALYSIS

1. Is the College Liable Under a Premises Liability Theory?

The trial court concluded that the College had a nondelegable duty to provide Downey with a safe place to work. It determined that this nondelegable duty arose from the College's "'possession and control of premises.'"[7] To determine whether the College had breached this nondelegable duty, the court applied our test for premises liability to the College. But the nondelegable duty rule does not apply here.

[5] A nondelegable duty rule applies when the issue is whether an owner, who has maintained possession of the property, can be held liable for defects that arise on the premises through the negligence of an independent contractor.[8] This is a type of vicarious liability. In contrast, the alleged defects here existed before the College invited a contractor to the property for repairs. So the College's duty to provide Downey with a safe place to work was the duty that a possessor of property

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

[4] See *id.*

[5] *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

[6] See *id.*

[7] See *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007).

[8] See, e.g., *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972). See, also, Restatement (Second) of Torts § 422 (1965).

owes to a lawful visitor. And thus, as we explain later, whether the College maintained possession of the premises during repairs is irrelevant to whether it breached its direct duty to Downey. In short, the nondelegable duty rule did not apply here. But the court correctly applied premises liability elements to decide the issue.

The district court ultimately concluded that the College was liable to Downey on a theory of premises liability. The College asserts that this was error. It argues (1) that it was not in control of the worksite, (2) that the floor of the scoreboard did not constitute a latent defect, (3) that the condition was open and obvious, and (4) that it did not breach its duty.

[6] A possessor of land is liable for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.[9]

[7] Several factors relate to whether a possessor has breached a duty to use reasonable care.[10] These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or

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[9] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008); *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Herrera, supra* note 1.

[10] *Aguallo, supra* note 9; *Herrera, supra* note 1.

community in terms of inconvenience or cost in providing adequate protection.[11]

[8] The district court reasoned that the test for liability was modified for independent contractors by *Anderson v. Nashua Corp.*[12] The court concluded that a landowner's duty to independent contractors was limited to latent defects of which the independent contractor or his employees had no knowledge. But we decided *Anderson* in 1994. And in 1996, in *Heins v. Webster County*,[13] we abolished the distinction between invitees and licensees. After *Heins*, whether a possessor of land has breached a duty to use reasonable care to protect lawful visitors is determined under the same test for both licensees and invitees, which includes independent contractors.

As noted, one of the factors is the purpose for which the visitor entered the premises. Obviously, because we abolished the distinction between licensees and invitees, the relevant inquiry is not whether the visitor entered for his or her own purpose or for the possessor's purpose.[14] And an independent contractor is a business invitee, to whom a possessor owes a duty to protect against dangers it either knows of or could have discovered with reasonable care.[15]

But a possessor of property is not liable for injury to an independent contractor's employee caused by a dangerous condition that arose out of the contractor's work, as distinguished from a condition of the property or a structure on the property.[16] In *Anderson*, we recognized this rule. But relying on *Plock v. Crossroads Joint Venture*,[17] we also stated that a possessor's

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[11] *Aguallo, supra* note 9, quoting *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[12] *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

[13] See *Heins, supra* note 11.

[14] See, generally, *id.*

[15] Marc M. Schneier, Construction Accident Law 63 (1999).

[16] See, e.g., *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004); *Anderson, supra* note 12. See, also, Schneier, *supra* note 15.

[17] *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

duty to independent contractors was limited to latent defects that the independent contractor or his employees do not have knowledge of. This rule is no longer valid. To the extent that *Plock* and *Anderson* hold that a modified duty applies to independent contractors, we disapprove.

(a) Control of the Premises

The College contends that the court incorrectly concluded that it was in control of the premises. As stated, whether the College maintained control of the premises is irrelevant to its liability on the facts of this case. It is true that premises liability often depends on an owner's possession of the property when the injury occurred.[18] But here, the College's alleged negligence is its breach of a duty to protect Downey from a preexisting danger. So the question is whether it had exercised reasonable care to protect Downey when it turned the premises over to Ferguson Signs.[19] Because the court's determination of possession during repairs was unnecessary here, we do not consider whether it correctly ruled on the issue.

(b) Should the College Have Expected That Downey Would Not Discover the Defect?

The College next argues that the court erred in finding that the non-weight-bearing nature of the scoreboard's floor was a defect that Downey would not discover. It referred to this as a "latent defect." Similarly, the College argues that the court erred in failing to find that the defect was not open and obvious.

This court has adopted the Restatement (Second) of Torts § 343A,[20] which states: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

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[18] See, e.g., *Range, supra* note 9.

[19] See, *Tillman v. Great Lakes Steel Corp.*, 17 F. Supp. 2d 672 (E.D. Mich. 1998); Schneier, *supra* note 15.

[20] Restatement, *supra* note 8, § 343A at 218. See *John v. OO (Infinity) S Development Co.*, 234 Neb. 190, 450 N.W.2d 199 (1990).

[9] Although the court did not explicitly address the open and obvious defense,[21] this rule controls both of the College's arguments. That is, even if a possessor of land has reason to believe that a lawful visitor will discover a defect, it can still have a duty to take reasonable measures to protect lawful visitors under circumstances showing that it should expect that visitors will not realize the danger or will fail to protect themselves.[22] We expressed this rule as a factor a court must consider under *Heins*.

The court found that lawful visitors such as Downey might not recognize the danger, because the scoreboard's floor was not weight bearing. This was a factual finding of the court.[23] But, the College argues that Downey saw the floor of the scoreboard from the scaffolding as he was preparing to enter. Further, it points out Downey's testimony that he could see that the wooden floor did not cover the entirety of the scoreboard—namely, that there were gaps at the corners. It also highlights that Downey admitted he could not know whether the floor was weight bearing. Finally, it cites testimony from Ferguson Signs that most attachments similar to the floor of the scoreboard in this case are not weight bearing. But Downey claims that the College is either misrepresenting Ferguson Signs' testimony regarding this final statement or removing it from context.

Downey concedes that both he and Ferguson Signs inspected the scoreboard before they began work. Downey argues, however, that they were not able to see how the metal floor was fastened to the rest of the scoreboard because they were not able to get close enough. Downey claims that, in his experience, how the metal floors were attached to the scoreboard could determine whether it was weight bearing.

At best, the evidence is in conflict. But we do not resolve such conflicts. The court found that Downey would not realize the danger or would fail to protect himself from it. The court was not clearly erroneous in finding that Downey would not

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[21] See *John, supra* note 20.

[22] See Restatement, *supra* note 8, § 343A.

[23] See *Aguallo, supra* note 9.

realize the danger or that he would fail to protect himself from the danger.

(c) Open and Obvious Condition

As mentioned, the rule we discussed in the previous section controls both of the College's arguments. Indeed, the court's finding that the defect was not open and obvious is implicit in the court's finding that Downey either would not discover or realize the danger or would fail to protect himself or herself against the danger. The court could not have found that Downey would have failed to recognize the danger, while at the same time holding that such a danger is open and obvious. Because we concluded that the court's factual finding that Downey would not recognize the danger was not clearly erroneous, we also conclude that the court's implicit finding that the condition was not open and obvious is also not clearly erroneous.

(d) Did the College Breach Its Duty of Reasonable Care?

Finally, the College argues that it did not breach its duty. It argues that it acted with reasonable care by granting Downey and Ferguson Signs control of the site, allowing Downey to observe the interior of the scoreboard, and restricting access to the scoreboard to only Ferguson Signs and its employees.

As previously stated, the following factors are relevant in determining whether the College breached its duty. These include (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction of giving the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection.[24]

[10] Although the court did not expressly weigh these factors, it is uncontested that the College gave no warning to

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[24] *Aguallo, supra* note 9, quoting *Heins, supra* note 11.

either Downey or Ferguson Signs. It is this failure to warn that was the basis of the College's liability. Ultimately, whether a defendant breaches a duty is a question of fact for the fact finder.[25] And we review it for clear error. We find no clear error in the court's finding.

2. The Court Erred in Apportioning Negligence to Ferguson Signs

We next consider the Downeys' and Ferguson Signs' cross-appeals. We do so at this point because our resolution of this issue ultimately affects our resolution of some of the College's other assignments of error. In their cross-appeals, both the Downeys and Ferguson Signs argue that the court erred in apportioning negligence to Ferguson Signs. They argue that reducing the College's liability by assigning negligence to Ferguson Signs would circumvent the rule that a third-party tort-feasor is not entitled to contribution from the employer.

The question presented is whether Ferguson Signs is a "released person" within the meaning of § 25-21,185.11. If it is, then the court correctly reduced Downey's recovery from the College by Ferguson Signs' share of the obligation.

Section 25-21,185.11 provides in part:

> (1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.

We conclude that Ferguson Signs is not a "released person" under the statute.

[11,12] Section 25-21,185.11 refers to a release entered into by the claimant with a "person liable." But Ferguson Signs is not such a person because it was never liable in tort for the

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[25] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

injury. In *Vangreen v. Interstate Machinery & Supply Co.*[26] and *Harsh International v. Monfort Indus.*,[27] we held that claims for contribution against employers covered by the workers' compensation statutes were barred. We based this result, in part, upon the theory that an employer covered by workers' compensation does not have a common liability with the third party, which is necessary for contribution.[28]

In *Vangreen* and *Harsh International*, we noted that our rule denying contribution was in line with the majority rule. "The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the employee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."[29] And arguments that a state's adoption of comparative negligence altered this rule "have been consistently unsuccessful."[30] "There is nothing in the embracing of comparative negligence that implies any intention to alter the fundamental principle of exclusiveness of compensation liability."[31] Third-party defendants, such as the College, "are usually unable to raise the concurrent negligence of plaintiff-employers as a defense."[32] Because employers are immune from lawsuits by their employees, most courts are unwilling to reduce the liability of third-party tort-feasors by amounts not recoverable by the employees themselves.[33] Our research reveals the same.

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[26] *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976).

[27] *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003).

[28] See *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009).

[29] 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 121.02 at 121-11 to 121-12 (2009).

[30] *Id.* at 121-12.

[31] *Id.*

[32] 2 Mark A. Rothstein et al., Employment Law § 7.38 at 428 (4th ed. 2009).

[33] *Id.*

While there is authority to the contrary,[34] most courts do not allow a third-party tort-feasor to seek contribution from or argue the comparative negligence of the employer.[35]

[13] We agree with the majority rule, which is consistent with our decisions in *Vangreen* and *Harsh International*. To allow a court to apportion tort liability to an employer who, because of workers' compensation, is immune from tort liability is inconsistent with the rationale of these decisions. Thus, because an employer covered by workers' compensation has no liability in tort,[36] a release with such an employer is not a release with a "person liable" under § 25-21,185.11.

Admittedly, federal district courts in Nebraska have decided this question differently. In *Windom v. FM Industries, Inc.*,[37] the court refused to dismiss a cross-claim by a third party against a plaintiff that sought to reduce the plaintiff's recovery by the plaintiff's employer's share of the negligence. In its decision, the court in *Windom* distinguished between actions for

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[34] See, *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993); *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023, 166 Ill. Dec. 1 (1991); *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977); *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

[35] See, *Muller v. Gateway Building Systems, Inc.*, 743 F. Supp. 2d 1096 (D.S.D. 2010); *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979); *Durniak v. August Winter and Sons, Inc.*, 222 Conn. 775, 610 A.2d 1277 (1992); *Hanagami v. China Airlines, Ltd.*, 67 Haw. 357, 688 P.2d 1139 (1984); *Thompson v. Stearns Chemical Corp.*, 345 N.W.2d 131 (Iowa 1984); *C & K Lord v. Carter*, 74 Md. App. 68, 536 A.2d 699 (1988); *Van Hook v Harris Corp*, 136 Mich. App. 310, 356 N.W.2d 18 (1984); *Sweet v. Herman Bros., Inc.*, 688 S.W.2d 31 (Mo. App. 1985); *Cordier v. Stetson-Ross, Inc.*, 184 Mont. 502, 604 P.2d 86 (1979); *Bilodeau v. Oliver Stores, Inc.*, 116 N.H. 83, 352 A.2d 741 (1976); *Schweizer v. Elox Div. of Colt Industries*, 70 N.J. 280, 359 A.2d 857 (1976); *Layman v. Braunshweigische Maschinenbauanstalt*, 343 N.W.2d 334 (N.D. 1983); *Cacchillo v. H. Leach Machinery Co.*, 111 R.I. 593, 305 A.2d 541 (1973); *Hagemann v. NJS Engineering, Inc.*, 632 N.W.2d 840 (S.D. 2001); *Troup v. Fischer Steel Corp.*, 236 S.W.3d 143 (Tenn. 2007); *Varela v. American Petrofina Co. of Texas*, 658 S.W.2d 561 (Tex. 1983).

[36] See 7 Larson & Larson, *supra* note 29.

[37] *Windom v. FM Industries, Inc.*, No. 8:00CV580, 2002 WL 378525 (D. Neb. Mar. 12, 2002) (unpublished opinion).

indemnity or contribution and a claim that sought "'only allocation or, in the alternative, a reduction of Plaintiff's recovery to the extent [the employer] is apportioned fault at trial.'"[38] The court also relied on a comment to the Nebraska jury instructions that predicted that an employer's negligence would be taken into account in an action because it is likely a "released person" within the meaning of § 25-21,185.11.[39] Finally, the court also took into consideration our decisions allowing a claim-based express contractual indemnification to be asserted against the employer[40] and a Nebraska Court of Appeals' decision that a third party can argue the employer was the sole cause of the employee's injury.[41]

[14] We disagree with the federal district court's analysis. We do not view the attempt to apportion liability to an employer immune from tort liability as meaningfully different from seeking contribution from an immune employer. In both cases, the third party seeks to limit its exposure based on the fault of the employer. But our decisions in *Vangreen* and *Harsh International* relied in part on the rationale that an employer has no such fault. To allow negligence to be imputed to an immune employer is inconsistent with our earlier decisions. Further, the district court's reliance on our decision in *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*[42] was misplaced as that case involved an express contract for indemnity. While we have recognized a few situations in which indemnity will be allowed against an immune employer (including when an express contractual provision calls for indemnity),[43] we stress that indemnity and contribution are distinct concepts.[44] Our

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[38] *Id.* at *2.

[39] *Id.*

[40] See *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

[41] See *Steele v. Encore Mfg. Co.*, 7 Neb. App. 1, 579 N.W.2d 563 (1998).

[42] *Union Pacific RR. Co., supra* note 40.

[43] See *Harsh International, supra* note 27.

[44] See *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

decision allowing indemnity based upon an express contractual provision is distinguishable from claims for contribution or to diminish a plaintiff's recovery because of an employer's comparative negligence. As we explain shortly, those entitled to indemnity are generally free from personal fault while those entitled to contribution are not.

Finally, the federal district court also cited *Steele v. Encore Mfg. Co.*[45] in its analysis. We view that case as distinguishable from the present case. In *Steele*, the plaintiff sued the defendant for injuries he suffered while working on an air compressor for the defendant. The plaintiff's employer was joined as a defendant solely for subrogation purposes. The district court instructed the jury that it could not consider the conduct of the plaintiff's employer. After noting that the defendant was not seeking contribution or indemnification from the employer, the Court of Appeals held that the court should have allowed the jury to consider whether the employer's conduct was *the sole proximate cause* of the plaintiff's injuries. If the employer's conduct was the sole proximate cause, then the defendant could not have caused the injury, which would negate the plaintiff's prima facie negligence case against that defendant. In other words, the defendant was not arguing that the employer is jointly liable with it, the defendant was arguing that it is not liable at all.

[15] So, in the light of *Steele* and our decision today, a defendant can point to the negligence of the employer and claim that the employer was the sole cause of the accident. But the defendant may not reduce his or her own liability by apportioning some of the fault to the employer. We note that this approach is consistent with that of other jurisdictions.[46]

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[45] *Steele, supra* note 41.

[46] *Gatlin v. Cooper Tire & Rubber Co.*, 252 Ark. 839, 481 S.W.2d 338 (1972); *Archambault v. Soneco/Northeastern, Inc.*, 287 Conn. 20, 946 A.2d 839 (2008); *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821 (Del. 1995); *Chumbley v. Dreis and Krump Mfg. Co.*, 521 N.W.2d 192 (Iowa App. 1993); *Troup, supra* note 35; *Dresser Industries, Inc. v. Lee*, 880 S.W.2d 750 (Tex. 1993).

Finally, the legislative history of the bills that eventually established comparative negligence in Nebraska unambiguously supports our conclusion. The legislative history indicates that the Legislature sought to leave in place existing law. This history reflects the Legislature's understanding that "unless an employer is the sole . . . cause of the accident, . . . the employer's negligence, if any, is ignored."[47] And this is the result we reach today.

As mentioned, our rationale in *Vangreen* and *Harsh International* is controlling—an employer does not have shared liability with a third party. So, Ferguson Signs was not a released party within the meaning of § 25-21,185.11 and the court erred in apportioning fault to it. Thus, we remand the cause to the court to apportion Ferguson Signs' share of the negligence between the College and Downey.

3. Proximate Cause

The College's next assignments of error relate to proximate cause. The College argues that the failure of Downey and Ferguson Signs to comply with OSHA regulations was the proximate cause of Downey's injuries. This assignment of error is confusing in that the court did apportion a share of liability to both Downey and Ferguson Signs, which necessarily includes a finding that their negligence was *a* proximate cause of the injury.

We do not read the College's brief as arguing that its negligence was not a proximate cause of the accident. Nor do we view the College as raising an argument that the others' negligence was a supervening cause that would have absolved the College of liability. At best, we view this assignment of error as arguing that Downey and Ferguson Signs' share of the negligence either equaled or surpassed that of the College's, which would have prevented Downey from recovering.[48]

We have already decided that the court cannot apportion liability to Ferguson Signs. Based on that decision, remand is

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[47] Summary Analysis, L.B. 88, Judiciary Committee, 92d Leg., 1st Sess. 3 (Jan. 23, 1991).

[48] See Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008).

necessary to apportion that share of the negligence to the other remaining parties. We leave to the court to decide whether Downey's apportioned fault is sufficient to bar recovery.

4. Implied Indemnification

The College next argues that Ferguson Signs owes the College indemnification for any damages it is obligated to pay Downey because Ferguson Signs owes an independent duty to the College. The College does not claim that any contractual provision for indemnification exists. The College argues that because the indemnification is based upon an independent duty and does not arise from the injury per se, such indemnification would not be barred by the exclusivity provision of workers' compensation law. But because the College was liable in its own right, a claim for indemnity is inappropriate in this case.

[16-19] Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.[49] Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.[50] If a party seeking indemnification is independently liable to the plaintiff, that party is limited to a claim for contribution.[51] Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.[52] In sum, "[o]ne who is him[self] or herself at fault is not due indemnity, because liability for indemnity exists only when the party seeking indemnity . . . is free of fault and has discharged a debt that should be paid wholly by the indemnitor."[53]

As we explained earlier, the College was directly liable, not vicariously liable. It was independently liable based on its own

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[49] *Kuhn, supra* note 44.

[50] *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992).

[51] *Id.*

[52] *Kuhn, supra* note 44; *Estate of Powell, supra* note 28; *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[53] 41 Am. Jur. 2d *Indemnity* § 21 at 439 (2005).

acts and omissions, not those of Ferguson Signs or NEVCO Scoreboard Company. The College was not free from any wrongdoing. It thus cannot claim indemnity.

V. CONCLUSION

Because of our decision, other issues that the parties assigned are no longer relevant. We conclude that the court did not err in finding the College liable. Further, it correctly denied the College's claim for indemnity. The court, however, did err in apportioning negligence to Ferguson Signs. On remand, the court should reapportion Ferguson Signs' share of the negligence to the remaining parties—Downey and the College. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

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

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CHAD NORMAN, APPELLANT.
808 N.W.2d 48

Filed January 6, 2012. No. S-10-888.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the court below.
4. **Pretrial Procedure: Appeal and Error.** The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal.
6. **Criminal Law: Convicted Sex Offender: Notice.** Before determining that a defendant convicted of a crime not sexual in nature is subject to sex offender

registration pursuant to Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010), the court must provide notice and a hearing and must make the finding whether sexual penetration or sexual contact occurred in connection with the incident that gave rise to the conviction based on the record and the hearing.

7. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
8. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.
9. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
10. **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.
11. **Due Process.** When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. Second, having found a liberty interest, the court must determine what procedural safeguards are required. Third, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
12. **Criminal Law: Convicted Sex Offender: Presentence Reports: Due Process.** Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010) provides that the court's finding shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report. However, the statute does not limit the court's consideration to such sources and, because a liberty interest is at stake, a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report.
13. **Criminal Law: Convicted Sex Offender: Proof.** The finding required under Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010) should be established by clear and convincing evidence.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Synek for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Chad Norman pled no contest to third degree assault, Neb. Rev. Stat. § 28-310 (Reissue 2008), and was sentenced by the district court for Buffalo County to probation for 2 years and jail for 30 days with credit for time served. After a hearing, the court also ordered Norman to register under Nebraska's Sex Offender Registration Act (SORA) pursuant to Neb. Rev. Stat. § 29-4003(1)(b)(i)(B) (Cum. Supp. 2010). Norman appeals the portion of his sentence which ordered him to register, because he claims he was denied due process. We find merit to this claim and reverse the registration order and remand for resentencing in a manner that comports with procedural due process as outlined in this opinion. We find no merit to Norman's remaining assignments of error.

STATEMENT OF FACTS

On August 20, 2009, the State filed an information charging Norman with one count of third degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 2008). The State alleged that in February 2009, Norman had subjected T.A.W., born in March 1998, to sexual contact. Norman pled not guilty.

On April 22, 2010, Norman filed a motion to take the depositions of certain witnesses and for discovery of certain information. Norman sought, inter alia, to depose three persons who had treated T.A.W. for behavioral disorders and to discover T.A.W.'s juvenile and residential treatment records maintained by the Nebraska Department of Health and Human Services. The court sustained portions of the motion but, on the basis of physician-patient and counselor-client privileges, denied his requests to depose the three counselors and to discover treatment and juvenile records compiled by the Department of Health and Human Services.

Thereafter, Norman and the State reached a plea agreement pursuant to which the State filed an amended information charging Norman with one count of third degree assault in violation of § 28-310. Section 28-310 provides:

> (1) A person commits the offense of assault in the third degree if he:
>
> (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or
>
> (b) Threatens another in a menacing manner.
>
> (2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

The information tracked the language of § 28-310(1)(a) and (b).

Norman offered to plead no contest to this amended charge at a plea hearing held June 16, 2010. When questioning Norman prior to accepting his plea, the court informed Norman that the State had advised the court that if a conviction were entered, the State would request, based upon the factual basis for the plea, that the court require Norman to register pursuant to SORA. Norman replied that he understood.

The State provided the following factual basis:

> [O]n July 9th of 2009, officers were dispatched to [a certain address] to have contact with . . . the mother of the victim identified in the complaint as [T.A.W.], date of birth [March 1998]. During this contact, [T.A.W.'s mother] stated that her son had told her that he had been sexually assaulted by . . . Norman.
>
> An interview was conducted with the minor child. He stated that [Norman] had touched his penis. Then stated that [Norman] told him or threatened him by saying not to tell anyone or he would hurt his family.
>
> Those events occurred in Buffalo County, Nebraska.

After recitation of the factual basis, the court clarified that the third degree assault charge was "based upon the threat," to which the State agreed. The State added that "[t]here was no physical injury to the child . . . ." Finding that an adequate factual basis had been established for conviction of third degree assault based on threats made in a menacing manner, the court accepted Norman's plea and found Norman guilty of third degree assault.

Because of the potential for SORA registration, the court conducted an expansive sentencing hearing. At the sentencing hearing held August 2, 2010, the State offered two exhibits in support of its request to require Norman to register under SORA. Norman did not object to the stipulated redacted version of the police reports. The police reports stated that T.A.W. had told officers that Norman had touched his penis on more than one occasion. Norman objected to the State's offer of a copy of a deposition of T.A.W. taken by Norman's attorney. The court found that the relevant portions of the deposition were cumulative to statements in the police reports and sustained the objection.

Norman later offered a redacted version of the deposition of T.A.W. as a rebuttal to statements in the police reports. The State objected to admission of the redacted version of the deposition. In the redacted version, T.A.W. stated that he had told police Norman "sexually abused" him and that he had heard of sexual abuse because "[a] lot of my friends have been sexually abused"; upon further questioning, T.A.W. stated that only one friend had talked to him about being sexually abused. The court received Norman's redacted version of the deposition but also received the full deposition that had been offered by the State "to the extent that [it] clarifies or places into context the contents of" the redacted version.

Norman offered two additional exhibits pertaining to SORA registration. The court sustained the State's relevance objection to Norman's offer of a copy of the record of T.A.W.'s juvenile proceedings, but the court received a redacted version of a deposition of T.A.W.'s mother in which she stated, inter alia, that T.A.W. had been removed from her home and was a ward of the State and that T.A.W. had behavioral problems. She further stated that Norman had lived with her and that she continued to ask him for money after he moved out. She also described the circumstances under which T.A.W. told her that Norman had sexually abused him.

Norman testified at the sentencing hearing. He stated that he had lived with T.A.W.'s mother and her children, that both T.A.W. and his mother had asked Norman for money to buy things when he lived with them, and that they continued to ask

him for money after he had separated from T.A.W.'s mother. Norman testified that a week or two before he was arrested in this case, he had denied requests from T.A.W. and his mother for money and they became angry and confronted him publicly. During the confrontation, T.A.W. stated that Norman had sexually abused him. Norman testified that this was the first he had heard such claims and that he was later arrested based on T.A.W.'s allegations. Norman denied that he had sexually abused T.A.W. and testified that there had "never been any contact between me and him."

The State requested that as part of his sentence, Norman be required to register under SORA pursuant to § 29-4003. In 2009, the Legislature had amended § 29-4003 such that persons convicted of certain offenses not sexual in nature would be required to register under SORA if the court found evidence of sexual penetration or sexual contact in the record. The relevant portion of § 29-4003(1)(b) provides that SORA applies to, inter alia, "any person who on or after January 1, 2010 . . . has ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of offenses, which list includes "[a]ssault in the third degree pursuant to section 28-310." Section 29-4003(1)(b)(i)(B) provides that in order for SORA to apply to the offenses listed in § 29-4003(1)(b)(i) which are not sexual in nature, including third degree assault under § 28-310, of which Norman stands convicted, "a court shall have found that evidence of sexual penetration or sexual contact, as those terms are defined in section 28-318, was present in the record, which shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report."

After the 2009 amendments to SORA, an individual ordered to register must provide certain information and adhere to certain reporting requirements. Neb. Rev. Stat. § 29-4001 et seq. (Cum. Supp. 2010). Failure to do so subjects the individual to a felony. § 29-4011. The information provided shall not be confidential, § 29-4009, except for certain facts, such as the individual's Social Security number. Further, the information provided will be made publicly available using the Internet, § 29-4013, without regard to classification as to level of dangerousness.

In sum, the individual ordered to register under SORA will be publicly listed in the sex offender registry and be identified as a sex offender.

After hearing argument by both the State and Norman, the court made the following oral ruling with regard to SORA registration under the revised statute:

> You appear to have gone to a rather enlarged hearing because of the language contained in Nebraska statutes that was recently amended which provided that a person who is convicted of an offense that is not a sex offender offense based upon the contents of the Court's record can still be required to register pursuant to [SORA]. As far as that particular statute is concerned, it provides that if there is evidence within the record that the person has committed actions which would lead him to be convicted of a registrable offense, that regardless of whatever the defendant is convicted of, he can be required to register. There's no provision for any facts, findings, or any decisions by the Court or a jury or any trier of fact to resolve the dispute in the evidence in the record. And to the extent that the statute can require registration based upon evidence that rule isn't evidence but statements which are contained in the record, the Court will not find that the law is applicable.
>
> However, the law does provide that one of the things the Court must consider is the factual basis that was established in getting to the conviction. We had a plea, we had a factual basis, we had an agreement by [Norman] that the State would be able to offer that evidence at the time of trial. And by the very nature of his plea, [Norman] was saying that he was not willing to contest those statements at trial. The Court then accepted those statements and . . . accepted [Norman's] plea in part based upon the Court's acceptance of the statements and then found beyond a reasonable doubt [Norman] guilty.
>
> Based upon that portion of the arraignment and solely upon that portion of the arraignment, the Court will find that [Norman] will have to register pursuant to [SORA].

The court then sentenced Norman to probation for 2 years and to jail for 30 days, with credit for time served, on the conviction for third degree assault and ordered Norman to register pursuant to SORA.

Norman appeals.

ASSIGNMENTS OF ERROR

Norman generally claims that the district court erred and imposed an "excessive sentence" when it ordered him to register pursuant to § 29-4003(1)(b)(i)(B) of SORA. He claims that the district court denied him procedural due process and that the court erred when it failed to find § 29-4003(1)(b)(i)(B) unconstitutional. Norman claims that the district court erred when it denied his motion to allow him to take certain depositions and conduct discovery seeking additional information about T.A.W.

STANDARDS 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).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010). On a question of law, an appellate court is obligated to reach a conclusion independent of the court below. *Travelers Indem. Co. v. Gridiron Mgmt. Group, supra*.

[4] The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

Before addressing Norman's arguments, we clarify the issues that are properly before us and that we will address on appeal. The State asserts that Norman failed to argue his "excessive

sentence" assignment of error in his brief. Norman replies that the court imposed an "excessive sentence" to the extent it found him subject to the registration requirements of SORA and that he did not challenge any other part of his sentence. We therefore read Norman's "excessive sentence" assignment of error as being encompassed by and resolved in his claim that the court erred when it ruled that he was subject to SORA.

Norman also claims that the district court erred when it failed to find § 29-4003(1)(b)(i)(B) unconstitutional. The State argues that Norman did not properly raise and preserve a challenge to the constitutionality of the statute before the trial court and that he did not give proper notice of his challenge or comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008). Norman asserts that he had no opportunity to challenge the statute until sentencing, when he was ordered to register under SORA.

[5] A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal. *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006). To the extent that Norman contends that § 29-4003(1)(b)(i)(B) is unconstitutional, he failed to timely make that challenge to the trial court, and therefore the issue is not properly before this court on appeal.

The record shows that prior to accepting the plea, the district court advised Norman that the State intended to invoke § 29-4003(1)(b)(i)(B) and that Norman could be subject to SORA upon the requisite factual finding. Norman had the opportunity to challenge the constitutionality of the statute at the trial level. The fact that Norman's proposed challenge goes to the constitutionality of a statute that affects his sentence, rather than the underlying charge, does not absolve Norman of the need to challenge the statute at the trial level. See *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010). Therefore, we do not consider Norman's arguments on appeal that the statute is unconstitutional.

In contrast, Norman generally challenges the district court's application of the statute to him and asserts in particular that the court did not use procedures required by the statute and by procedural due process. Our analysis of whether the court complied with the statute requires interpretation of the statute, and,

as we discuss below, our interpretation of the statute entails consideration of the constitutional requirements of procedural due process. Whether Norman received procedural due process is properly before us.

Norman Was Entitled to Procedural Due Process With Regard to the Court's Finding Under § 29-4003(1)(b)(i)(B); Although the Court Gave Norman Notice and a Hearing, the Court Erred When It Failed to Consider Evidence From the Hearing When It Determined He Was Subject to SORA.

[6] Norman generally claims he was denied procedural due process in connection with the court's order directing him to register under SORA. He specifically asserts that the district court erred because the court did not provide the process due under § 29-4003 and under constitutional principles of procedural due process. We find merit to Norman's claim that he was denied procedural due process. For reasons explained below, we conclude that before determining that a defendant convicted of a crime not sexual in nature is subject to SORA registration pursuant to § 29-4003(1)(b)(i)(B), the court must provide notice and a hearing and must make the finding whether sexual penetration or sexual contact occurred in connection with the incident that gave rise to the conviction based on the record and the hearing. In this case, although Norman was given notice and a hearing, the court stated that it did not consider the evidence adduced at the hearing and instead found Norman had committed an act of sexual contact subjecting him to SORA registration based solely on statements in the State's factual basis for the plea. Under our reading of § 29-4003(1)(b)(i)(B), Norman did not receive the process he was due. We therefore reverse the portion of the sentencing order which found Norman subject to SORA, and we remand the cause to the district court with instructions to make the § 29-4003(1)(b)(i)(B) finding, based on all the evidence in the record, including evidence from the hearing, and to determine, based on such finding, whether Norman is subject to SORA.

Broadly speaking, the issue in this case is to determine the procedures required before a defendant convicted of a

crime not sexual in nature can be ordered to register as a sex offender. The primary statute at issue in this case is § 29-4003, which specifies persons to whom SORA is applicable. Section 29-4003(1)(a) provides that SORA "applies to any person who on or after January 1, 1997 . . . [h]as ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of specific criminal offenses. The offenses listed under subsection (1)(a) are generally offenses of an obviously sexual nature or offenses committed against minors. However, subsection (1)(b) provides that "[i]n addition to the registrable offenses under subdivision (1)(a) of this section, [SORA] applies to any person who on or after January 1, 2010 . . . has ever pled guilty to, pled nolo contendere to, or been found guilty of any of" a list of offenses. The offenses listed in subsection (1)(b) include offenses that are not of a sexual nature, including "(VI) Assault in the third degree pursuant to section 28-310." Norman was found guilty of third degree assault.

Section 29-4003(1)(b)(i)(B), upon which we focus, provides as follows:

> In order for [SORA] to apply to the offenses listed in subdivisions (1)(b)(i)(A)(I) [murder in the first degree], (II) [murder in the second degree], (III) [manslaughter], (IV) [assault in the first degree], (V) [assault in the second degree], (VI) [assault in the third degree], (VII) [stalking], (IX) [kidnapping], and (X) [false imprisonment] of this section, a court shall have found that evidence of sexual penetration or sexual contact, as those terms are defined in section 28-318, was present in the record, which shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report.

In sum, Norman was convicted of third degree assault pursuant to § 28-310, which is an offense listed in both § 29-4003(1)(b)(i)(A) and § 29-4003(1)(b)(i)(B). Therefore, for a person such as Norman convicted of third degree assault to be subject to SORA, the court must make the required finding of either "sexual penetration or sexual contact." § 29-4003(1)(b)(i)(B). Norman claims that the district court did not make a proper finding under § 29-4003(1)(b)(i)(B) and that

he was denied procedural due process in the manner by which the district court reached its finding. We look to the statute and our procedural due process jurisprudence in order to determine whether the court made a proper finding and what procedures are required in reaching the finding which subjects Norman to registration under SORA and its consequences.

[7-10] With regard to reading the statute at issue, we note certain standards of statutory construction. In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent. *Id*. In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Id*. It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

The purpose of SORA is indicated by the legislative findings set forth in Neb. Rev. Stat. § 29-4002 (Reissue 2008), which provides in part:

> The Legislature finds that sex offenders present a high risk to commit repeat offenses. The Legislature further finds that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction.

From these findings, it is apparent that the purpose of registration under SORA is to identify persons who are "guilty of sex offenses" and to gather and publish information regarding

these individuals which is necessary for the protection of the public. The Nebraska State Patrol Sex Offender Registry similarly indicates that it contains "information about individuals who have pleaded guilty to or have been found guilty of sex offenses." The persons referred to in § 29-4002 and listed in the registry are deemed "sex offenders."

Unlike other state sex offender registry statutes, "sex offender" is not explicitly defined in SORA. Compare *Rainer v. State*, 286 Ga. 675, 678, 690 S.E.2d 827, 830 (2010) (noting that "sexual offender" is defined in Ga. Code Ann. § 42-1-12(a)(20)(A) (Supp. 2009) and that there "is no requirement that sexual activity be involved"). In the absence of a statutory definition, we look to SORA overall to determine who is a sex offender for registration purposes. Section 29-4003(1)(b) states that SORA applies to persons who stand convicted of the listed offenses and, as to certain crimes, where the requisite finding of sexual penetration or sexual contact has been made. Persons so convicted are deemed to have committed "sex offenses" and are "sex offenders" for purposes of SORA and the Nebraska State Patrol Sex Offender Registry.

We read § 29-4003(1)(b)(i)(B) in light of the purpose of SORA. As to persons convicted of crimes not sexual in nature, we read § 29-4003(1)(b)(i)(B) to require the court to make a factual finding that the defendant committed an act of "sexual penetration" or "sexual contact" which is related to the incident that gave rise to the conviction before the defendant can be ordered to register under SORA as a sex offender. That is, before an individual convicted of a crime not sexual in nature listed in § 29-4003(1)(b)(i)(B) can be publicly identified as a "sex offender" under SORA and the registry, this requisite finding must be made.

Having identified the finding that the court must make under § 29-4003(1)(b)(i)(B), we next consider the procedures the court must follow under the statute and constitutional principles in making such finding. The statute does not clearly specify the procedure the court must follow in making its finding. Because, as we explain below, registering and failing to register under SORA as amended in 2009 implicate a liberty interest, we construe § 29-4003(1)(b)(i)(B) as requiring those procedures

that comply with constitutional mandates for procedural due process. In doing so, we give the statute an interpretation that meets constitutional requirements. See, *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

We had occasion in *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004), a case involving a reputational claim under a previous version of SORA, to consider the procedural due process required by U.S. Const. amend. XIV, § 1, and Neb. Const. art. I, § 3. As we noted in *Slansky* by reference to our prior due process jurisprudence, procedural due process limits the government's ability to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause. In this regard, the U.S. Supreme Court has stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." *Id*. Procedural due process reduces the risk of a finding which both is erroneous and places an individual in a false light.

Due process requires that parties at risk of the deprivation of liberty interests be provided adequate notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which may be affected by it. *Slansky v. Nebraska State Patrol, supra*. The U.S. Supreme Court has stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Consideration should be given to "the risk of an erroneous deprivation of such [liberty] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Id*. at 335.

[11] When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there

is a liberty interest at stake. Second, having found a liberty interest, the court must determine what procedural safeguards are required. Third, the facts of the case are examined to ascertain whether there was a denial of that process which was due. See, *id.*; *Slansky v. Nebraska State Patrol, supra*.

In *Slansky*, the Nebraska State Patrol determined that the defendant was a Level 3 sex offender and, under SORA then in effect, such determination required public disclosure of information concerning his status as a sex offender. The defendant asserted that public disclosure impacted his reputational liberty interest and that the manner by which the assigned level was ascertained violated his right to procedural due process. We determined in *Slansky* that we did not need to reach the issue whether a liberty interest was at stake, because even if we assumed there was a liberty interest in not having his Level 3 sex offender status and associated information released, the process afforded before public dissemination of the information was surely adequate. In *Slansky*, we noted that the defendant had notification and the ability to contest his classification prior to public disclosure. We concluded that the defendant "was afforded notice and a meaningful opportunity to contest the [State Patrol's] decision." 268 Neb. at 385, 685 N.W.2d at 355. The instant case differs from *Slansky* because SORA has been revised and to analyze Norman's claim, we are required to determine whether Norman had a liberty interest and, if so, whether he received procedural due process.

For completeness, we also note that the instant case differs from *State v. Worm*, 268 Neb. 74, 89, 680 N.W.2d 151, 164 (2004), where we noted under an earlier version of SORA that the "only issue currently before this court is the registration requirements, which do not involve public notice." *Worm* involved a defendant already found guilty of a sexual crime, attempted first degree sexual assault on a child, and at issue was whether he had committed an aggravated offense. Unlike *Worm*, Norman's underlying conviction for third degree assault is not a crime necessarily sexual in nature, but under the current version of SORA, if the finding under § 29-4003(1)(b)(i)(B) is made, then public notice of Norman's status as a sex offender is required.

The current version of SORA, applicable to this case, is more expansive than those previously considered by this court. It has been described as follows: "What the [current version of SORA] actually did . . . was to replace a system that required individualized risk assessments of sex offenders" to determine if the fact of their registration should be made public with a law which requires that "certain information regarding *all* registrants is disclosed to the public." *Doe v. Nebraska*, 734 F. Supp. 2d 882, 917, 919 (D. Neb. 2010) (emphasis supplied). See § 29-4009(1) ("[i]nformation obtained under [SORA] shall not be confidential . . ."). See, also, § 29-4013. Upon registration, information is published on the Sex Offender Registry Web site, which tracks the statutory language at § 29-4002 and identifies the individuals listed as sex offenders who "have pleaded guilty to or have been found guilty of sex offenses."

Norman identifies several liberty interests which he asserts are at stake. We focus on the reputational claim to the effect that he was denied procedural due process when he was required to register under SORA, thus identifying him as a sex offender and placing his information on the public Web site, because such order deprived him of a liberty interest—his reputation combined with the alteration of his status under state law—without a meaningful hearing. We have previously noted that such a reputational claim is subject to the "'stigma plus'" test. *State v. Worm*, 268 Neb. at 88, 680 N.W.2d at 164. In *Worm*, we stated:

> Reputational damage caused by state action which results in a person's stigmatization can implicate a protected liberty interest, but only if it is coupled with some more tangible interest . . . . See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001), quoting *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

268 Neb. at 88, 680 N.W.2d at 163. The stigma-plus analysis is applicable to procedural due process claims. *Doe v. Nebraska, supra*.

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), referred to in *Worm*, is a case brought under 42 U.S.C. § 1983 (1970). The U.S. Supreme Court observed in *Paul* that to establish a violation of due process, a plaintiff who

complains of governmental defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatization. The stigma-plus test applies to cases such as the present one which show indications of material government involvement in its public role such that the claim of a violation of a liberty interest in one's reputation is distinguishable from a common state law defamation suit.

A "stigma" is "'[a] mark or token of infamy, disgrace, or reproach . . . .'" *Doe v. Dept. of Public Safety ex rel. Lee*, 271 F.3d 38, 48 (2d Cir. 2001), *overruled on other grounds* 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) (quoting The American Heritage Dictionary of the English Language 1702 (4th ed. 2000)). Being publicly deemed a sex offender is sufficiently derogatory to injure a person's reputation. The Nebraska State Patrol Sex Offender Registry, following the language of § 29-4002, "stigmatizes" the people listed on it insofar as it asserts that the persons listed are sex offenders, that is, "individuals who have pleaded guilty to or have been found guilty of sex offenses." Although this stigmatizing statement would be true as to persons convicted of a sex offense, it may be a false statement as to persons such as Norman who are convicted of an offense not sexual in nature. That is, if the requisite finding of sexual penetration or sexual contact under § 29-4003(1)(b)(i)(B) is not established, it would be inaccurate to identify Norman as a sex offender. Through his procedural due process claim, Norman seeks to show that he has been inaccurately deemed a "sex offender."

To summarize our stigma analysis under § 29-4003(1)(b)(i)(B), persons convicted of offenses not sexual in nature, such as murder in the first degree, manslaughter, and various degrees of assault, can be ordered to register under SORA. Such order is based upon a finding of an act of sexual penetration or sexual contact. This finding will require the defendant to register under SORA, and hence, he or she will publicly be deemed by the State as a "sex offender" and his or her information will be

publicly disclosed. Norman was found guilty of third degree assault, and by application of § 29-4003(1)(b)(i)(B), he was ordered to register under SORA, identified publicly as guilty of a sex offense, and deemed a sexual offender on the public registry. We believe the stigma component of Norman's claim has been satisfied by the making of a reputation-tarnishing statement, i.e. he is a sex offender, which may be proved false.

Having isolated the "stigma" that the Nebraska sexual offender registry visited on Norman, we must next inquire whether there is a "plus" factor that gives rise to a liberty interest triggering procedural due process. A plus factor includes an alteration or impairment by the State of "a right or status previously recognized by state law." *Paul v. Davis*, 424 U.S. 693, 711, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). *Paul* clarified that stigmatization by the State alone does not give rise to a liberty interest or necessitate procedural due process. Under *Paul*, common-law defamation is available for ordinary insults visited by nonstate actors. Only where there is a stigma imposed by state action and where that stigma causes a nontrivial injury which could not have been initiated by a private citizen will the plus factor be recognized. Although the stigma factor may be comparable to private defamation, the plus factor directly implicates state action.

Applying the stigma-plus test to the case before us, we agree with Norman's assertion that the statutory registration duties imposed on him constitute the plus factor. These obligations alter his legal status and are governmental in nature. The registration duties imposed on Norman by SORA are extensive and onerous. Under Nebraska's SORA statutes, a person subject to SORA is required within specified time limits to register in person at a location designated by the State Patrol, to notify the sheriff if he or she moves within the county or outside the state, and, if he or she moves to a new county, to notify the sheriff of the new county. § 29-4004. The person must provide DNA samples, §§ 29-4004(10) and 29-4006(1)(r). The person must provide certain information, such as his or her remote communication device identifiers, domain names registered by the person, and blogs and Internet sites maintained by the person, and verify such information annually for the duration of the

registration period. § 29-4006. If a person required to register under SORA violates the act, he or she is guilty of a Class IV felony for such failure and, for a subsequent failure, is guilty of a Class III felony and shall be sentenced to a minimum term of 1 year in prison. § 29-4011.

We believe these and other statutory obligations taken together constitute the plus factor. "The imposition on a person of a new set of legal duties that, if disregarded, subject him or her to felony prosecution, constitutes a 'change of [that person's] status' under state law" under *Paul* and constitutes the plus factor. *Doe v. Dept. of Public Safety ex rel. Lee*, 271 F.3d 38, 57 (2d Cir. 2001) (quoting *Paul v. Davis, supra*). Although the issues raised differ from Norman's claim, we note that the plus factor has been found by several other courts considering sex offender registration requirements. *Gwinn v. Awmiller*, 354 F.3d 1211 (10th Cir. 2004); *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999); *State v. Germane*, 971 A.2d 555 (R.I. 2009); *State v. Briggs*, 199 P.3d 935 (Utah 2008); *Schuyler v. Roberts*, 285 Kan. 677, 175 P.3d 259 (2008); *State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004); *Noble v. Board of Parole*, 327 Or. 485, 964 P.2d 990 (1998).

Having found stigma and the plus factor, we conclude that Norman had a reputational liberty interest at stake when the court made a finding under § 29-4003(1)(b)(i)(B) and ordered him to register under SORA. Because a liberty interest is at stake, due process requires notice and a meaningful opportunity to be heard. We therefore must consider what procedural safeguards are required.

The U.S. Supreme Court considered the requirements of procedural due process in connection with a sex offender registration scheme in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003). In that case, the U.S. Court of Appeals for the Second Circuit determined that being listed on the Connecticut state registry implied that such individual was currently dangerous. The Second Circuit concluded that public disclosure of sex offender status deprived offenders of a liberty interest and that the Connecticut scheme violated procedural due process because offenders were not afforded a predeprivation hearing

to determine whether they were likely to be "currently dangerous." See *Doe v. Dept. of Public Safety ex rel. Lee, supra*. The U.S. Supreme Court assumed without deciding that a liberty interest was at stake in connection with registering as a sex offender. The Court reversed the Second Circuit's decision. The Court found that under Connecticut's law, registration was required based only on the fact that a person had been convicted of a sex offense and no other finding; that is, no finding of current dangerousness was required as a predicate to registration. The Court concluded that "due process does not entitle [the defendant] to a hearing to establish a fact that is not material under the [State] statute." *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. at 7.

[12] Unlike the statute in *Doe*, Nebraska's SORA requires a finding of fact in addition to the fact of conviction as a predicate to registration for persons like Norman who were convicted of an offense not sexual in nature. Given the liberty interest at stake, we conclude here that in order to make the finding initially requiring a person who is guilty of an offense not sexual in nature to be subject to SORA, pursuant to § 29-4003(1)(b)(i)(B), the court is required to give notice to the defendant that such order is being sought and that a hearing will be held. The court must then hold a hearing at which the defendant is given the opportunity to dispute evidence in the record regarding sexual penetration or sexual contact. For the hearing to be meaningful, the court must make its finding based on the evidence in the record, including evidence adduced at the hearing. We note that § 29-4003(1)(b)(i)(B) provides that the court's finding "shall include consideration of the factual basis for a plea-based conviction and information contained in the presentence report." However, the statute does not limit the court's consideration to such sources and, because a liberty interest is at stake, a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report. A registration decision is not punitive, and the fact necessitating registration can be decided by the court as opposed to a jury. See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[13] In regard to the burden of proof, we look initially to the statute at issue. Section 29-4003(1)(b)(i)(B) under consideration does not specify a standard of proof required for the finding which subjects the defendant to SORA. We note, however, that Nebraska's Sex Offender Commitment Act provides statutorily in Neb. Rev. Stat. § 71-1209(1) (Reissue 2009) that the State must prove certain facts "by clear and convincing evidence" before the defendant can be committed. See *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009). Having examined the burden of proof issue in other jurisdictions, we agree with the observation of the Supreme Court of Wyoming, where it stated: "It is difficult to identify a general rule as to the 'correct' burden of proof under a sexual offender registration statute, both because statutes differ so much from jurisdiction to jurisdiction, and because the questions raised in the reported cases vary so much one from the other." *JJF v. State*, 132 P.3d 170, 177 (Wyo. 2006). Returning to Nebraska law, we note that although being subject to SORA does not implicate liberty interests to the same degree as commitment under the Sex Offender Commitment Act, we nevertheless conclude that the finding required under § 29-4003(1)(b)(i)(B) which converts a defendant convicted of a crime not sexual in nature into a "sex offender" should also be established by clear and convincing evidence. We add that because the SORA registration requirement is not considered punitive, see *Slansky v. Nebraska State Patrol, supra*, and *State v. Worm, supra*, due process does not require evidence beyond a reasonable doubt, see *Com. v. Maldonado*, 576 Pa. 101, 838 A.2d 710 (2003). However, because of the liberty interests at stake in a registration decision under the current statute, we conclude that the fact of sexual penetration or sexual contact should be based on more than a mere preponderance of the evidence. We are aware of state statutes that require clear and convincing evidence for registration and notification decisions. E.g., N.Y. Correct. Law § 168-n(3) (McKinney 2003 & Cum. Supp. 2012); 42 Pa. Cons. Stat. Ann. § 9795.4(e)(3) (West 2007 & Cum. Supp. 2011). See, also, *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998). But

see, *JJF v. State, supra*; *State v. Guidry*, 105 Haw. 222, 96 P.3d 242 (2004); *In re W.M.*, 851 A.2d 431 (D.C. 2004); *Sweet v. State*, 371 Md. 1, 806 A.2d 265 (2002) (all holding that appropriate burden was preponderance of evidence). We conclude that the appropriate burden of proof for a finding under § 29-4003(1)(b)(i)(B) is clear and convincing evidence.

To summarize, in order to fulfill our duty to construe statutes in a manner that meets constitutional requirements, including requirements of procedural due process, we construe § 29-4003(1)(b)(i)(B) to require the following: When considering requiring a defendant convicted of an offense not sexual in nature to register under SORA pursuant to § 29-4003(1)(b)(i)(B), the court must give the defendant notice that such order is being considered and that a hearing will be held to determine whether the fact required under § 29-4003(1)(b)(i)(B) exists. The State must establish the fact of sexual penetration or sexual contact by clear and convincing evidence. The defendant may present evidence at the hearing to dispute evidence regarding sexual penetration or sexual contact. After considering the evidence in the record, including the factual basis for a plea, the presentence report, and evidence adduced at the hearing, the court must make a finding, based on clear and convincing evidence, whether the defendant committed an act of sexual penetration or sexual contact related to the incident that gave rise to the defendant's conviction. If the court so finds, then it must order that the defendant is subject to SORA.

We now consider whether the court followed these requirements in this case to ensure that Norman received procedural due process before his reputational liberty interest was impacted by ordering him to register under SORA and being publicly deemed a sex offender. In this case, the court gave Norman notice that the State sought an order requiring him to register under SORA. The court also held an evidentiary hearing and took evidence. However, the court erred when it ignored the evidentiary record and instead based its decision that Norman was subject to SORA solely on the State's assertion of sexual contact in the factual basis for the plea. Because the court did not consider the evidence adduced at the hearing, Norman was

not given a meaningful opportunity to be heard. We conclude that the court erred and Norman was denied procedural due process when it found sexual contact and ordered Norman to be subject to SORA based solely on statements from the factual basis.

Later in this opinion, we reject Norman's discovery-related assignment of error and affirm his conviction. Hence, the trial record made at the hearing is complete. Accordingly, we must now consider the remedy resulting from the improper sentencing order directing Norman to register under SORA. The improper SORA portion of the sentence is divisible from the remainder of the sentence pertaining to incarceration and probation. See *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). We therefore reverse that portion of the sentencing order requiring Norman to register under SORA. We remand the cause to the district court to make a proper finding under § 29-4003(1)(b)(i)(B) as set forth in this opinion. We note that because the court already conducted an evidentiary hearing regarding facts relevant to the finding required under § 29-4003(1)(b)(i)(B), on remand, the court need not hold a new hearing. Instead, the court should make a finding whether sexual penetration or sexual contact occurred in connection with the incident giving rise to his conviction for third degree assault based on the record before it, including evidence adduced at the hearing. Based on such finding, the court must then determine whether Norman is required to register under SORA.

The District Court Did Not Err When It Denied Norman's Motions for Depositions and Discovery.

Norman finally asserts that the district court erred when it denied his motion to take depositions and to allow discovery of additional information about T.A.W. A plea of guilty or nolo contendere waives certain claims on appeal. See *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000). See, also, *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). However, we consider it prudent to comment on this assignment of error as further support of our determination that the

hearing on the § 29-4003(1)(b)(i)(B) finding is complete for purposes of consideration on remand. We find no merit to this assignment of error.

The trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). We conclude that the district court did not abuse its discretion with respect to these discovery rulings, and this assignment of error does not provide a basis for reversing Norman's conviction or necessitate additional evidence at the § 29-4003(1)(b)(i)(B) hearing.

After the State initially charged Norman with third degree sexual assault of a child, Norman sought to depose three counselors who had treated T.A.W. for behavioral disorders and to discover T.A.W.'s juvenile and residential treatment records compiled by the Department of Health and Human Services. The court denied the requests on the basis of the physician-patient privilege set forth in Neb. Rev. Stat. § 27-504 (Reissue 2008). Norman and the State thereafter reached a plea agreement whereby the State amended the information and charged Norman with third degree assault. Norman pled no contest to that charge.

Norman argues that the district court should have allowed the discovery under an exception to the physician-patient privilege set forth in § 27-504(d), which provides that "[t]here is no privilege under this rule . . . in any criminal prosecution involving injury to [children]." Norman refers us to the original information, which charged him with third degree sexual assault of a child and alleged that he "did not cause serious personal injury to [T.A.W.]." He argues that the charge impliedly involves an injury, albeit not a *serious* injury and that therefore, under § 27-504(d), there is no privilege.

Regardless of whether the district court's discovery ruling was correct at the time it was made, the ruling was not made in the context of the charge to which Norman pled no contest. The State amended the information and charged Norman with third degree assault. At the plea hearing, it was made clear by the State that the third degree assault to which Norman plead nolo contendere was based on a threat to T.A.W. made in a

menacing manner, not based on a physical injury. We further note that the exception to the physician-patient privilege would not apply to the SORA hearing, because the purpose of the hearing is to determine whether Norman had "sexual contact" with T.A.W., which finding does not necessarily involve a physical injury to T.A.W.

Norman makes no convincing argument that the district court abused its discretion when it denied his discovery requests. We reject this assignment of error.

CONCLUSION

We find merit to Norman's claim that he was denied procedural due process in connection with the ruling ordering him to register under SORA. We conclude that before a court orders a defendant to be subject to SORA pursuant to § 29-4003(1)(b)(i), subsection (B) requires that the court make a finding, based on clear and convincing evidence, whether the defendant committed an act of sexual penetration or sexual contact as part of the incident that gave rise to the defendant's conviction for one of the offenses not sexual in nature listed in § 29-4003(1)(b)(i)(B). We conclude that a liberty interest is implicated in the making of this finding and that the court must provide procedural due process when it makes this finding. The court must make the finding after providing the defendant proper notice and a meaningful opportunity to be heard. We determine that although the court in this case provided Norman notice and a hearing, the court erred when it based its finding solely on statements in the State's factual basis for Norman's plea and explicitly ignored the evidence at the hearing. We therefore reverse that portion of the sentencing order requiring Norman to be subject to SORA, and we remand the cause with directions to make a finding under § 29-4003(1)(b)(i)(B) based on all the evidence in the record, including evidence adduced at the hearing, and to determine based on such finding whether Norman is subject to SORA.

We reject Norman's remaining discovery-related assignment of error. We therefore affirm his conviction, and we affirm his sentence, except we vacate the portion of the sentence in which the court ordered that Norman was subject to SORA,

and remand the cause for a finding whether Norman is subject to SORA consistent with this opinion.

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

HEAVICAN, C.J., participating on briefs.

WRIGHT, J., not participating in the decision.

IN RE INTEREST OF ELIZABETH S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES, V. VICTORIA G., APPELLANT.

809 N.W.2d 495

Filed January 6, 2012. No. S-11-153.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. ____: ____. An appellate court reviews questions of law independently of the juvenile court's conclusions.
3. **Minors: Juvenile Courts.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
4. **Juvenile Courts: Parental Rights: Adoption.** Where a juvenile has been adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and a permanency objective of adoption has been established, a juvenile court has authority under the juvenile code to order the Nebraska Department of Health and Human Services to accept a tendered relinquishment of parental rights.
5. **Juvenile Courts: Parental Rights: Evidence.** A parent's prior relinquishment of parental rights may be considered as evidence supporting adjudication or termination of parental rights in a future proceeding involving another child.
6. **Juvenile Courts: Parental Rights.** A juvenile court should exercise its authority to order the Nebraska Department of Health and Human Services to accept a valid relinquishment with respect to an adjudicated child when it would be in the best interests of that child to do so.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Sanford J. Pollack, of Pollack & Ball, L.L.C., for appellant.

Shellie D. Sabata, Deputy Lancaster County Attorney, for appellee State of Nebraska.

James L. Hatheway for appellee Department of Health and Human Services.

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

GERRARD, J.

Victoria G., the biological mother of Elizabeth S., appeals from the judgment of the separate juvenile court of Lancaster County overruling Victoria's motion to require the Department of Health and Human Services (Department) to accept her relinquishment of parental rights and instead terminating her parental rights. We find that the court should have ordered the Department to accept Victoria's relinquishment of her parental rights, but we conclude that the issue is moot because we find clear and convincing evidence supporting the court's termination of Victoria's parental rights. We affirm.

I. BACKGROUND

Elizabeth was born 2 months prematurely in Lincoln, Nebraska, in May 2009. On June 2, Crystal Lentell, a child and family services specialist with the Department, was assigned to complete a safety assessment, because Victoria had not been to see Elizabeth in the hospital since May 26. When Lentell met with Victoria on June 9, Victoria said she was living under a bridge on West O Street. She said she had not been to see Elizabeth because she was "stranded" at a nearby recreation area and did not have transportation back to Lincoln. Hospital staff reported that Victoria was not bonding with or caring for Elizabeth. Lentell concluded that Victoria lacked parenting knowledge and the skills and motivation necessary to ensure Elizabeth's safety. Elizabeth was released from the hospital when she was 8 weeks old and immediately placed in foster care.

On July 7, 2009, the State filed a petition alleging that Elizabeth was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition alleged that Victoria had not demonstrated an ability to provide for Elizabeth's basic needs or a safe and stable home environment. Victoria did not contest the allegations. On September 8, the court entered an order

adjudicating Elizabeth as a child as defined by § 43-247(3)(a). The court ordered that Elizabeth remain in the temporary legal and physical custody of the Department for placement, treatment, and care; that Victoria have reasonable rights of supervised visitation; and that Victoria cooperate with a full psychological evaluation.

Although Victoria was granted visitation with Elizabeth, there were concerns about her ability to parent because she did not understand the basics of childcare, such as how to check the temperature of a bottle. Victoria also seemed to believe that Elizabeth should be walking and talking at 4 months old. Victoria was inconsistent in her visitations, despite being provided with transportation. She would fail to come for visits, fall asleep during them, arrive late, or want to leave early. Victoria's last visit with Elizabeth occurred on September 4, 2009; she stopped visiting after that. At some time around then, Victoria tried to commit suicide by drinking a bottle of peroxide.

After a dispositional hearing on October 29, 2009, the court found that reasonable efforts had been made to return legal custody to Victoria through visitation time, referrals for a pretreatment assessment, psychological and psychiatric evaluations, parenting education, and family support. However, the court determined that returning legal custody to Victoria would be contrary to Elizabeth's welfare due to Victoria's lack of contact and her history of mental health problems and instability. The court ordered Elizabeth's legal custody to remain with the Department and continued her placement in foster care. It directed Victoria to maintain a safe and stable living environment for herself and Elizabeth; to obtain or maintain employment; to have a minimum of two supervised visits per week; to complete a psychological evaluation; and to participate in family support services, a parenting/bonding assessment, a psychiatric evaluation, parenting education, and individual therapy.

Following review hearings on February 1, June 7, and July 12, 2010, the court continued to find that returning legal custody to Victoria would be contrary to Elizabeth's welfare. Victoria did not appear at any of those hearings. The court continued legal custody with the Department and placement

in the same foster home. The same restrictions were placed on Victoria as had been outlined in the earlier order. The court found that services had been provided in compliance with the case plan and that no progress had been made to alleviate the causes of the out-of-home placement. At some point during the proceedings, Victoria had moved to Illinois, but a Department caseworker and a service coordinator each tried to help Victoria access services in Illinois, and there is no evidence that Victoria complied with the court's orders. Nor did Victoria provide any financial support, food, clothing, or gifts for Elizabeth.

On July 30, 2010, Victoria filed a motion to require the Department to accept her relinquishment of Elizabeth. Victoria said she wished to voluntarily relinquish her parental rights, but the Department had advised her that it was not willing to accept a voluntary relinquishment. On September 1, the court conducted a review hearing and considered Victoria's motion. Victoria did not appear at that hearing either. Robin Gibreal, the Department caseworker, testified that the agency was not willing to accept Victoria's relinquishment based on concerns about her ability to parent. Gibreal had learned that while living in Illinois, Victoria had had another child, who was going to live with Victoria's sister in Nebraska. If Victoria continued to have children, Gibreal was concerned about their well-being. Gibreal said it was in Elizabeth's best interests for termination to occur.

In an order entered on September 9, 2010, the court approved a permanency plan of adoption by the current foster parents and continued the hearing on Victoria's motion seeking relinquishment. When the hearing resumed on September 30, Gibreal stated that the Department did not want to accept the relinquishment, because Victoria had not completed a mental health or psychological evaluation and the agency was concerned about whether she had the mental state to agree to relinquishment. Gibreal also said Victoria had never submitted paperwork to the Department to request its approval of relinquishment.

The court overruled Victoria's motion because she was not present at the hearing, the relinquishment had not been tendered to the Department, and it could not be determined

whether Victoria understood the meaning of relinquishment and whether she was willing to enter into it. On October 6, 2010, the court entered an order overruling Victoria's motion and scheduling a review hearing for December 6.

On October 12, 2010, the State filed a motion to terminate Victoria's parental rights to Elizabeth. On December 6, Victoria filed a second motion asking the court to require the Department to accept her relinquishment. At a hearing on December 8, Victoria testified that she was currently living in Illinois. She said that she wanted to relinquish her parental rights to Elizabeth. Victoria stated that she was under the care of a psychologist and was taking medication for clinical depression, "Bipolar Type 2." Victoria admitted that she had given birth to another child who had been voluntarily placed with Victoria's sister through a guardianship entered in the county court for York County, Nebraska. Victoria said she understood that if she relinquished her parental rights to the Department, she could not change her mind or undo the adoption. She also said she was willing to participate in a mental health assessment to determine her competency.

Elizabeth's foster mother testified that she and her husband were willing to adopt Elizabeth as quickly as possible. But Gibreal testified that the Department was not willing to accept the relinquishment because it believed Victoria had abandoned Elizabeth. Victoria said she planned to move back to Nebraska, and the Department did not have a guarantee that she would not take back custody of her subsequently born child. And the Department continued to have concerns about Victoria's ability to parent. The court took Victoria's motion under advisement. Victoria was arrested on outstanding warrants after the hearing and spent 8 days in jail.

On January 4, 2011, Victoria filed a motion asking the court to rule on her relinquishment motion. A formal hearing on the motion to terminate parental rights was held on January 11. Finally, on February 2, the court entered an order terminating Victoria's parental rights to Elizabeth. The court noted that Victoria's contact with Elizabeth had been inconsistent even before Victoria left Nebraska. Victoria had shown minimal interest in Elizabeth and had provided virtually no care,

support, or protection, whether of a physical, financial, or emotional nature. Nor did it appear that she was capable of doing so: Evidence at the termination hearing established that she was living at a city mission. Victoria presented no evidence of compliance with any aspect of her case plan. The court found that the Department had proved the allegations of the termination motion by clear and convincing evidence and that it was in Elizabeth's best interests that Victoria's parental rights be terminated.

On the same date, the court also entered an order overruling Victoria's motion to require the Department to accept her relinquishment. Because the court had terminated Victoria's parental rights, the court found the relinquishment motion was moot.

II. ASSIGNMENTS OF ERROR

Victoria assigns, as consolidated and restated, that the juvenile court erred in (1) failing to require the Department to accept her relinquishment, (2) finding that Victoria had substantially and repeatedly or continuously neglected Elizabeth, (3) finding that reasonable efforts had failed to correct the conditions leading to the adjudication, and (4) finding that the termination of Victoria's parental rights was in Elizabeth's best interests.

III. STANDARD OF REVIEW

[1,2] We review juvenile cases de novo on the record and reach our conclusions independently of the juvenile court's findings.[1] And we also review questions of law independently of the juvenile court's conclusions.[2]

IV. ANALYSIS

1. Victoria's Relinquishment of Parental Rights

The parties to this appeal agree that Victoria has forfeited her parental rights to Elizabeth and that Elizabeth should be

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[1] *In re Interest of Lakota Z. & Jacob H., ante* p. 584, 804 N.W.2d 174 (2011).

[2] See *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

adopted by her foster parents. They disagree about the means by which Victoria should have been deprived of her parental rights. And the Department argues that the issue is moot. With that much, we agree.[3] But the record in this case reflects some disagreement among the parties, both on appeal and in the lower court, about the appropriate analysis to be performed when a parent tenders relinquishment of his or her parental rights. And that issue, while capable of repetition, will evade review absent the unlikely circumstances of both the refusal to accept relinquishment *and* the overruling of a motion to terminate parental rights. It is, therefore, in the public interest for us to address Victoria's argument.[4]

The basis for the parties' dispute is the collateral effect that involuntary termination of parental rights can have on that parent's rights to other children. One of the statutory conditions supporting termination of parental rights is that the parents "have substantially and continuously or repeatedly neglected and refused to give the juvenile *or a sibling of the juvenile* necessary parental care and protection."[5] And reasonable efforts to reunify a family prior to termination are not required if "[t]he parental rights of the parent to a sibling of the juvenile have been terminated involuntarily."[6] In sum, once the State has successfully terminated a parent's rights to one child, it becomes easier for the State to terminate the same parent's rights to other children. That collateral advantage is what the Department sought to obtain here and what Victoria apparently sought to avoid.

[3] But while the Department's decision makes sense from a strategic point of view, the foremost purpose and objective of the Nebraska Juvenile Code[7] is to promote and protect the

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[3] See, generally, *In re Interest of Thomas M., ante* p. 316, 803 N.W.2d 46 (2011).

[4] See *id.*

[5] Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2010) (emphasis supplied).

[6] Neb. Rev. Stat. § 43-283.01(4)(c) (Cum. Supp. 2010).

[7] See Neb. Rev. Stat. §§ 43-246 through 43-2,129 (Reissue 2008 & Cum. Supp. 2010).

juvenile's best interests.[8] And we relied upon that principle in *In re Interest of Gabriela H.*,[9] in which we explained the juvenile court's authority to compel the Department to accept a parent's relinquishment of parental rights. In that case, the Department refused to accept a relinquishment because, among other things, the parent was paying a "'substantial amount'" of child support.[10] The juvenile court, however, ordered the Department to accept the relinquishment. We affirmed that order.[11]

[4] We reasoned that although the juvenile code gives the Department a "certain degree of discretion" with respect to children in its custody, "that discretion is subject to the superior right of the juvenile court to determine what is in the child's best interests."[12] Juvenile courts, we noted, are accorded broad discretion in their determination of the placement of adjudicated children and to serve the best interests of the children involved.[13] Because the juvenile in that case had been adjudicated under § 43-247(3)(a), the court was guided by the juvenile code.[14] And, we noted, it would have been inconsistent with other statutory provisions to conclude that the Department "is required to recommend termination of parental rights in the case of an abandoned child but, at the same time, has the authority to prevent such termination by refusing to accept a tendered relinquishment of parental rights."[15] So, we held that where a juvenile has been adjudicated pursuant to § 43-247(3)(a) and a permanency objective of adoption has been established, a juvenile court has authority under the

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[8] See *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990).

[9] *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

[10] *Id.* at 286, 785 N.W.2d at 845.

[11] See *id.*

[12] *Id.* at 288, 785 N.W.2d at 847.

[13] *Id.*

[14] See *id.*

[15] *Id.* at 290, 785 N.W.2d at 848.

juvenile code to order the Department to accept a tendered relinquishment of parental rights.[16]

The guiding principle that is apparent from *In re Interest of Gabriela H.* is that the court's authority to order the Department to accept relinquishment is based in, and guided by, the court's responsibility to act in the best interests of the child. And that means that the court's responsibility is to the juvenile who has been adjudicated *in that case*—not some other child over whom the court has no established jurisdiction and whose circumstances are unknown.

[5] We reasoned in *In re Interest of Gabriela H.* that a parent's payment of child support could not "justify the legal perpetuation of a parental relationship which no longer exists in fact, thereby permitting an abandoned child to linger indefinitely in foster care."[17] The same is true when a child is suspended in foster care for the sake of simplifying the State's burden of proof in some other proceeding, for some other child. It was not in Elizabeth's best interests, in this case, to delay permanency for her solely for the sake of its collateral effect on another proceeding. We also note that while a relinquishment of parental rights may not have the same automatic collateral effect as involuntary termination, a prior relinquishment may nonetheless be considered as evidence supporting adjudication or termination in a future proceeding involving another child.[18]

We recognize that in this case, at least initially, the Department also expressed concerns about Victoria's capacity to consent to relinquishment. That, of course, is a different matter, and it is well within the discretion of the Department and the juvenile court to inquire into the capacity of a parent to relinquish his or her parental rights. But those concerns were evidently addressed here when Victoria appeared in court and testified

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[16] *In re Interest of Gabriela H., supra* note 9.

[17] *Id.* at 291, 785 N.W.2d at 848.

[18] See, *In re Interest of Sir Messiah T.*, 279 Neb. 900, 782 N.W.2d 320 (2010); *In re Interest of Andrew S.*, 14 Neb. App. 739, 714 N.W.2d 762 (2006).

to her mental state and her understanding of the consequences of relinquishment. And, at that point, the juvenile court could have (and should have) avoided weeks of further delay and the burden of a termination hearing by directing the Department to accept Victoria's relinquishment.

[6] We cannot see—and the Department does not explain—how it was in Elizabeth's best interests to do otherwise. It is, in fact, difficult to imagine circumstances in which the best interests of a child with a permanency objective of adoption would not be best served by accepting a valid relinquishment of parental rights. So, to be clear: We hold that a juvenile court should exercise its authority to order the Department to accept a valid relinquishment with respect to an adjudicated child, pursuant to *In re Interest of Gabriela H.*, when it would be in the best interests *of that child* to do so.

That having been said, we agree with the Department that in this case, the issue of relinquishment is moot. As we will explain shortly, we find no merit to Victoria's argument that the juvenile court erred in finding sufficient evidence to support termination of her parental rights. The court's failure to order the Department to accept Victoria's relinquishment does not affect the merits of the court's decision to terminate her parental rights, and Victoria cannot relinquish what she no longer has. The prejudice resulting from the court's decision—the delay and burden of the termination hearing—cannot be remedied after the fact.[19] So, while we agree with Victoria that the court should have ordered the Department to accept her relinquishment, we find no basis in that argument for reversing any aspect of the court's judgment.

2. Termination of Parental Rights

Victoria also argues that the court erred in terminating her parental rights. The bases for termination of parental rights are codified in § 43-292, which provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination

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[19] See *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

is in the best interests of the child.[20] Such findings must be proved by clear and convincing evidence.[21] Victoria questions the court's conclusions with respect to § 43-292(2) and (6), and its ultimate conclusion that termination was in Elizabeth's best interests. We find no merit to any of Victoria's arguments.

(a) § 43-292(2)

First, Victoria argues that the court erred in finding that she had "substantially and continuously or repeatedly neglected and refused to give the juvenile . . . necessary parental care and protection."[22] This argument is directed at the court's finding that termination was appropriate under § 43-292(2). We note, however, that this was only one of the statutory grounds for termination alleged by the State and found by the juvenile court to have been proved by clear and convincing evidence. Most pertinently, it is undisputed that at the time of the termination hearing, Elizabeth had been in an out-of-home placement for 15 or more of the most recent 22 months.[23] That fact alone would provide a statutory basis for termination,[24] if clear and convincing evidence also showed that termination was in Elizabeth's best interests.

But in any event, the record also supports the court's determination that Victoria substantially and continuously or repeatedly neglected and refused to give Elizabeth necessary parental care and protection. The record, in fact, does not show that Victoria *ever* provided Elizabeth with *any* parental care or protection. Victoria's argument is simply that she never had the opportunity to parent her child because she moved out of state. Her voluntary decision to move, however, does not weigh in her favor. "'A parent may as surely neglect a child of whom [he or] she does not have possession by failing to put [himself or] herself in a position to acquire possession as by

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[20] See *In re Interest of Sir Messiah T., supra* note 18.

[21] § 43-279.01(3).

[22] See § 43-292(2).

[23] See § 43-292(7).

[24] See *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

not properly caring for a child of whom [he or] she does have possession.'"[25]

(b) § 43-292(6)

Similarly, we find no merit to Victoria's second argument that the court erred in finding that reasonable efforts had been made to correct the conditions leading to the adjudication. Victoria argues that once she moved to Illinois, the Department stopped supporting her and did not arrange or pay for any of the court-ordered services in Illinois. It was, again, Victoria's choice to move away from where the Department could readily provide her with services—most pertinently, proximity to Elizabeth, which would seem to be a necessary aspect of any reasonable efforts at reunification.

And even then, Victoria's argument is unsupported by the record. Victoria did not take significant advantage of her opportunities when she lived in Nebraska and maintained only sporadic communication with the Department; communication became even more difficult after Victoria moved to Illinois. Nonetheless, the Department attempted to locate service providers for Victoria in Illinois that would accept the Illinois Medicaid payments for which Victoria was eligible after she moved. And a provider was located for Victoria that she apparently utilized to some degree, but no evidence was presented at the termination hearing about the extent to which Victoria took advantage of those services. In short, the record clearly establishes that even after Victoria moved to Illinois, the Department made reasonable efforts to preserve and reunify Victoria and Elizabeth. Those efforts failed because of Victoria, not the Department.

(c) Best Interests

Finally, Victoria argues that the court erred in finding that termination was in Elizabeth's best interests. Victoria's argument in this regard is limited to her observation that no witness at the termination hearing literally opined that termination was in Elizabeth's best interests. But such "magic words" are not

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[25] *In re Interest of Kalie W.*, 258 Neb. 46, 50, 601 N.W.2d 753, 756 (1999).

necessary for the record to establish, by clear and convincing evidence, that termination is in a child's best interests. In this case, the record establishes both Victoria's failure as a parent, along with the foster parents' willingness to provide Elizabeth with stability and permanency.

In fact, in arguing for relinquishment, Victoria seems to agree that adoption by the foster parents is in Elizabeth's best interests. And while Gibreal did not specifically opine that termination was in Elizabeth's best interests, she did opine that Elizabeth's needs were being met by her foster parents, that placement with the foster parents was in Elizabeth's best interests, that Elizabeth needed permanency as soon as possible, and that reunification with Victoria was not a realistic goal. In short, the record contains clear and convincing evidence that terminating Victoria's parental rights was in Elizabeth's best interests.

V. CONCLUSION

While we agree with Victoria that the juvenile court should have ordered the Department to accept relinquishment of her parental rights, we also agree with the Department that the relinquishment is moot. And we find no merit to Victoria's claim that the court erred in terminating her parental rights. The juvenile court's judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

JAN GINAPP, APPELLEE, V. CITY OF BELLEVUE, NEBRASKA, APPELLANT, AND ALEGENT HEALTH MIDLANDS HOSPITAL, APPELLEE.

809 N.W.2d 487

Filed January 6, 2012. No. S-11-193.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every

controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.

2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Negligence: Proof.** In order to recover in a negligence case, 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. ____. An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
6. ____. The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.
7. ____. An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless an affirmative duty created by another circumstance is applicable.
8. ____. An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.
9. ____. To the extent that a custodian has some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions.

Robert S. Lannin, of Shively & Lannin, P.C., L.L.O., and, on brief, Richard C. Grabow for appellant.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellee Alegent Health Midlands Hospital.

Steven M. Lathrop and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee Jan Ginapp.

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

GERRARD, J.

Jan Ginapp, a registered nurse, was injured on the job in a violent assault committed by a patient who had been admitted to the hospital after he was taken into emergency protective custody by the City of Bellevue, Nebraska, police department.

The questions presented in this appeal are whether Bellevue's duty to control the assailant's behavior ended when he was admitted to the hospital and whether Bellevue breached that duty by taking him to the hospital in the first place.

BACKGROUND

On July 4, 2007, at 4:14 p.m., Bellevue police were dispatched to an apartment in Bellevue based on a report that 18-year-old Ray Gilpin was "out of control." When they arrived, they learned that Gilpin had used a hammer to destroy walls, a door, and a window in his mother's apartment. Gilpin had also possessed a notebook containing statements indicating a desire to kill people and a drawing of a cube with the word "help" in the center. The notebook had been torn and stabbed with a pen. Gilpin's mother explained that while Gilpin was destroying the apartment, he had been laughing and mumbling. She hid in the bathroom and got dressed, but Gilpin pounded on the bathroom door and told her to get out. She took her car keys and left, but Gilpin followed her and got into the car. Gilpin's mother drove him to his aunt's house in Omaha, Nebraska.

One of the officers contacted Omaha police and had them pick up Gilpin and return him to his mother's apartment. Gilpin was cooperative until he saw his mother, but then he became agitated, spit on her and police, and yelled obscenities. Bellevue police then took Gilpin to Midlands Hospital (Midlands), where he remained cooperative. Gilpin arrived at Midlands' emergency room at 5:33 p.m. The "Emergency Admittance" form completed by Bellevue police at 5:45 p.m. provided a description of Gilpin's behavior that day and indicated that Gilpin was mentally ill and dangerous toward others.

When a person is taken into emergency protective custody by Bellevue police, the protectee is handcuffed and is not free to leave police custody. But emergency protective custody is a medical issue, and the protectee is neither under arrest nor charged with a crime. Any final determination as to whether the protectee is a threat is made by a mental health board. It was the Bellevue Police Department's policy, when leaving a protectee in an emergency room, not to leave until the officers believed the protectee was under control. But if the protectee

later became disruptive and law enforcement support was required, Midlands was to call police in Papillion, Nebraska, not Bellevue, because Midlands is in Papillion.

The Bellevue Police Department's written policy concerning emergency protective custody also provided that protectees were to be placed in appropriate psychiatric care through the Spring Center, at that time, a local mental health treatment center. Midlands does not provide psychiatric care, so Midlands was the preferred destination only if medical care was needed before transportation to a psychiatric facility. But other evidence in the record suggests that despite that written policy, Bellevue police routinely transported protectees to Midlands. The record in this case does not indicate whether Gilpin was transported to Midlands because of any medical issue, although he later tested positive for use of illegal drugs. The detaining officer testified in his deposition that he did not remember contacting the Spring Center and did not remember why Gilpin was transported to Midlands as opposed to some other destination.

Gilpin was triaged at 6:06 p.m. by a triage nurse, and Midlands admitted him for medical screening. He continued to cooperate with hospital personnel. A Midlands' emergency room admission record describes him as a patient in emergency protective custody who was "being medically screened prior to transfer to psych hospital." Bellevue police remained with Gilpin throughout this process, at times displaying a stun gun to ensure that they kept physical control of him, and removing his handcuffs only when necessary. The Bellevue officers did not depart until 7:10 p.m., and Midlands security was present when the police left. According to the Midlands security officer, Gilpin "got a little restless a couple of times but not so out of control" and complied with voice direction.

Although the record does not reflect whether Bellevue police contacted the Spring Center, Midlands' medical records indicate that Midlands was in contact with the Spring Center that evening, a few minutes after the police left, and was eventually informed that no psychiatric placement would be available that evening. Gilpin tested positive for marijuana and barbiturates. He was examined by a Midlands doctor who again

recommended admission, pending bed availability. Gilpin was placed in one of Midlands' intensive care units.

At the time of the incident, Ginapp was a registered nurse employed at Midlands. She worked in the intensive care unit (ICU) and intensive immediate care unit (IMCU), which is a post-intensive-care unit. The ICU and IMCU are on different sides of the same floor: 9 beds are in the ICU and 16 beds are in the IMCU. Because Midlands does not provide psychiatric services, emergency protective custody patients at Midlands, such as Gilpin, are usually in the ICU, unless no beds are available.

On the next day—July 5, 2007—Ginapp was the charge nurse, responsible for managing both the ICU and IMCU. Gilpin was in the IMCU because it had the only available bed. Ginapp had Gilpin moved closer to the nurses' station so that she would have a better view of him and to get him away from an exit door. Later that day, Gilpin became agitated about having to use the commode and was cursing and making a commotion. Ginapp went to his room and successfully calmed him. Hospital security was not present in the ICU or IMCU, nor was Gilpin restrained. Ginapp explained that she did not have the authority to order that a patient be restrained and did not believe that Gilpin's behavior warranted calling for a doctor's order to restrain him.

But later in the evening of July 5, 2007, Gilpin had another outburst. Ginapp had security called and then went to Gilpin's room to try to calm him again. She convinced Gilpin to return to bed, but after about a minute, he lunged at her. He hit her on the left side of her face and she fell to the floor, where he continued beating her as she lay on the floor. Ginapp was seriously injured, incurred substantial medical expenses and lost wages, and still suffers from headaches and debilitating double vision. After the assault, Gilpin was restrained, and later that day, he was transferred by ambulance to an available psychiatric care placement.

Ginapp sued Bellevue in district court pursuant to the Political Subdivisions Tort Claims Act,[1] alleging that her

[1] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007).

injuries resulted from the Bellevue Police Department's negligence. Midlands is part of the Alegent Health System (Alegent), and Bellevue moved to join Alegent as a necessary party, for purposes of both apportionment of negligence and workers' compensation subrogation. The court denied Bellevue's motion as it related to apportionment, but added Alegent as a party to protect its workers' compensation subrogation interest.

After a bench trial, the court found that Gilpin was still in Bellevue police custody while at Midlands, so Bellevue had a duty to prevent Gilpin from injuring third persons. The court also found that Bellevue knew or should have known that Gilpin was a substantial risk to cause serious harm. The court found that the Bellevue Police Department was negligent in transporting Gilpin to Midlands, which had no psychiatric ward. The court refused to allocate negligence to Alegent, and entered judgment for Ginapp against Bellevue in the amount of $350,000. Bellevue appeals.

ASSIGNMENTS OF ERROR

Bellevue assigns, as consolidated and restated, that the court erred in (1) finding that Bellevue police had custody of Gilpin; (2) not finding that Bellevue's officers exercised due care; (3) finding that Bellevue police owed a duty to Ginapp; (4) failing to allocate the negligence of Midlands and proportionally reducing Bellevue's liability; (5) failing to allocate negligence between Bellevue, Midlands, and Ginapp; and (6) awarding excessive damages.

STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong.[2] When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be

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

resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[3] But when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[4]

ANALYSIS

[3-6] In order to recover in a negligence case, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[5] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[6] An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[7] And the conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.[8]

[7,8] When discussing a defendant's duty to control the behavior of a third party, we have previously relied on the Restatement (Second) of Torts,[9] which provides that there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct," and explains that "[o]ne who takes charge of a third person whom he knows or should know [is] likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such

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[3] *Id.*

[4] *Id.*

[5] *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[6] *Id.*

[7] *Id.*

[8] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 19 (2010).

[9] Restatement (Second) of Torts § 315(a) at 122 (1965).

harm."[10] The Restatement (Third) of Torts[11] similarly explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless an affirmative duty created by another circumstance is applicable, but that "[a]n actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship."[12]

There is little question in this case that when Bellevue police took Gilpin into emergency protective custody, they assumed a duty to exercise reasonable care to prevent him from causing harm to others.[13] The questions presented in this appeal are when that duty ended and whether it was discharged sufficiently before it did.

[9] Specifically, Bellevue argues that the district court erred in finding that its legal custody of Gilpin continued even after he was admitted to Midlands. We agree. As we have explained, the duty of a custodian to prevent a person in custody from causing harm to others is premised on the degree of control afforded to one who "'takes charge'" of another.[14] The Restatement (Third) of Torts explains that the custodial relationship need not be "24/7 physical custody giving the custodian complete control over the other person," but that to the extent that "there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control."[15] The extent of Bellevue's control here is not at issue, because the record is clear that by the time the assault occurred (and well before it), Bellevue police had no custody or control of Gilpin.

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[10] *Id.*, § 319 at 129.

[11] See Restatement (Third), *supra* note 8, § 37 (Proposed Final Draft No. 1, 2005).

[12] *Id.*, § 41(a) at 778.

[13] See *id.*, comment *f*.

[14] See *Bartunek v. State*, 266 Neb. 454, 462, 666 N.W.2d 435, 441 (2003).

[15] Restatement (Third), *supra* note 8, § 41, comment *f.* at 783.

Under the Nebraska Mental Health Commitment Act,[16] a law enforcement officer who has probable cause to believe that a person is mentally ill and dangerous may take such person into emergency protective custody.[17] The person taken into emergency protective custody "shall be admitted to an appropriate and available medical facility,"[18] and the officer executes a written certificate alleging the officer's belief that the person in custody is mentally ill and dangerous and summarizing the behavior supporting such allegations.[19] A copy of that certificate is immediately forwarded to the county attorney.[20] The administrator of the medical facility then has the person evaluated by a mental health professional as soon as reasonably possible but not later than 36 hours after admission, and the person is released from emergency protective custody after the evaluation unless the mental health professional determines, in his or her clinical opinion, that the person is mentally ill and dangerous.[21] A mental health professional reaching that conclusion also completes a written certificate that is immediately forwarded to the county attorney.[22] And if the county attorney elects to petition for involuntary commitment, the subject of the petition is held in the "nearest appropriate and available medical facility."[23]

That procedure was properly initiated by law enforcement here. The district court seems to have reasoned that because a person taken into "emergency protective custody" remains in custody, and is not free to leave, Bellevue police still had a custodial relationship with Gilpin at the time of the assault. But as explained above, that is not how the Nebraska Mental Health Commitment Act works. Just because Gilpin remained

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[16] Neb. Rev. Stat. §§ 71-901 to 71-963 (Cum. Supp. 2006).

[17] § 71-919(1).

[18] § 71-919(2)(a).

[19] § 71-919(3).

[20] *Id.*

[21] § 71-919(4).

[22] § 71-920.

[23] § 71-922(2).

in "emergency protective custody," pending decisions by a mental health professional and the county attorney, did not mean that he remained in the custody of Bellevue police. And even if Bellevue police had retained some lingering legal connection to Gilpin, it is equally clear that for purposes of evaluating Bellevue's tort liability, it is *actual custody and control* that gives rise to a duty to prevent harm to third persons. Bellevue had no such control here.

But that is not dispositive of Bellevue's liability, because it is not disputed that Gilpin was in Bellevue's custody for at least some time, and a failure to exercise reasonable care during that time could support liability. For instance, had Bellevue police simply released Gilpin or negligently permitted him to escape, which then would have given him the opportunity to assault someone, Bellevue might have been liable. But that liability would not arise out of custody of Gilpin at the time of the assault—indeed, the loss of custody would be the basis for the tort claim. Instead, that liability would arise out of Bellevue's failure to exercise reasonable care *while Gilpin was in custody*.

So, the issue here is whether Bellevue, while Gilpin was actually in its custody, exercised reasonable care. The district court found that Bellevue failed to transport Gilpin to an "appropriate" medical facility for emergency protective care purposes. The court concluded that because Midlands does not have a psychiatric ward, it was not an "appropriate" facility to hold individuals in emergency protective custody.

The record, however, establishes that Midlands was a common destination for persons being held in emergency protective custody, from Bellevue and other law enforcement agencies. It was Midlands' practice to transfer such patients to other facilities, when they were medically stable, but that does not mean that law enforcement had a duty, in tort or under the Nebraska Mental Health Commitment Act, to transport detainees to another facility initially.

The record also establishes, beyond reasonable dispute, that when Gilpin was contacted by Omaha police, he was cooperative. Only in the presence of his mother was he disruptive, and once transported from her apartment, he was again cooperative

with police and hospital personnel during admission. Hospital personnel were notified of Gilpin's behavior leading to his detention. Bellevue police remained with Gilpin at Midlands for nearly 2 hours, and the detaining officer explained that Bellevue police only left the hospital under such circumstances "with the understanding that we left with the person being calm and it was safe — we felt it was safe at the time and that the medical staff were aware of the situation and that they were comfortable with us leaving." And in this case, when the officers left, they did so after Midlands agreed to admit Gilpin and with Midlands security personnel in control of him.

Taken as a whole, the record establishes no basis upon which to conclude that Bellevue police did not exercise reasonable care in detaining Gilpin and transporting him to Midlands. The question whether Midlands was the best medical facility to detain Gilpin for mental health evaluation is not one on which a law enforcement officer should be expected to act as the final authority, and there is no evidence in this record to prove that the Bellevue officers in this case acted unreasonably in transporting Gilpin to Midlands or relying upon Midlands' willingness to accept Gilpin and admit him.

It is true that Bellevue's official law enforcement policy on emergency protective custody provided that placement was to be conducted by contacting the Spring Center and that transportation to Midlands was only preferred if medical care was required. The record does not establish, one way or the other, whether the Spring Center was contacted regarding Gilpin before he was taken to Midlands. Nor does the record establish whether police suspected the medical issue presented by Gilpin's drug use. The question, however, is not solely whether Bellevue's written procedure was followed, but whether the measures that were taken in this case were reasonable. We conclude, as a matter of law, that they were. The district court was clearly wrong in concluding otherwise.

Given that conclusion, there is no basis in the record for finding that Bellevue was liable for Ginapp's injuries. While Ginapp's injuries are clearly substantial, her remedy is from her employer for workers' compensation or from Gilpin himself. Bellevue was not responsible for Gilpin's actions on

July 5, 2007, and the district court erred in concluding otherwise. Having reached that conclusion, we need not consider Bellevue's remaining arguments.

CONCLUSION

The district court erred in concluding that Gilpin was in Bellevue's custody at the time of the assault and that Bellevue law enforcement acted unreasonably in transporting Gilpin to Midlands and permitting him to be admitted. The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in favor of Bellevue.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

HEADNOTES
Contained in this Volume